



June 21, 2021

Secretary of Labor Martin J. Walsh  
Office of the Secretary  
200 Constitution Ave NW  
Washington, DC 20210

Dear Secretary Walsh:

We write to encourage you to place an immediate moratorium on the issuance of new certificates under Section 14(c) of the Fair Labor Standards Act (FLSA) to sheltered workshops that employ people with disabilities for subminimum wages.

The National Federation of the Blind (NFB) is the premier organization of blind Americans. We believe Section 14(c) of the FLSA is a discriminatory practice and we have long been fighting to end it. We are also aware that Section 14(c) certificates have been a source of systemic abuse and corruption. Finally, Section 14(c) certificates can no longer be justified, even under the FLSA's own terms, considering the modernized employment services systems, technologies, and legal protections available under current laws and government programs.

Section 14(c) is discriminatory on its face in that it presumes people with disabilities are incapable of work and, therefore, are undeserving of the minimum wage available to all other adults. This presumption is incorrect and has always been incorrect. The National Federation of the Blind, its members, and its employees, the majority of whom are blind, are a living embodiment of the fallacy of that presumption. In fact, many of our members previously worked in sheltered workshops for the blind for subminimum wages and, when given the opportunity to leave, left for successful jobs at prevailing wages. Research has shown that virtually all people with virtually all disabilities can work in an appropriate job with appropriate supports.

Evidence-based systems, such as supported employment, designed to find people appropriate jobs in their communities are required to be in place at state and federally funded Vocational Rehabilitation agencies in every state in the country. Such services are also available in many communities through private nonprofit providers. In addition, appropriate accommodations are required to be provided by employers under the Americans with Disabilities Act, as well as under Section 504 of the Rehabilitation Act (for recipients of federal financial assistance), Section 503 of the Rehabilitation Act (for federal contractors), and Section 501 of the Rehabilitation Act (for federal government agencies). And for supports that do not fall within the definition of accommodations under those laws, state and federally funded Vocational Rehabilitation agencies and nonprofit agencies provide them without cost to employers.

Section 14(c) has been a source of abuse and mistreatment. In litigation in which the NFB is involved, alone, we have worked with people who were forced to do subminimum jobs at sheltered workshops when the same job was available at minimum wage or above, but only for people without disabilities. We have worked with people

who were forced to do subminimum wage jobs without appropriate accommodations to suppress their ability to perform at minimum wage levels. We have worked with people who were being paid subminimum wages when the evidence showed they were not disabled for the work they were performing. We have worked with people who were kept in subminimum wage jobs when they were capable of management positions. We have encountered sheltered workshops that brought in people with disabilities as employees only for short terms when they were subject to inspection and then laid them off when inspections were over. Finally, we have encountered workshops who brought in former inmates to replace workers with disabilities when contract deadlines approached. We also note that federal law not only allows workers with disabilities in sheltered workshops to be denied minimum wages, but also to be denied unemployment compensation when they are laid off.

The National Council on Disability has confirmed that even employers in the federally-overseen AbilityOne program who use Section 14(c) certificates do not appear to be complying with the requirement to ensure that sub-prevailing wage jobs are reserved for those with severe disabilities who would not be able to work otherwise.<sup>1</sup> As the NCD concluded, these employers “have a vested interest in finding the person significantly disabled in order to fulfill program requirements.”<sup>2</sup> Section 14(c) employers not subject to AbilityOne oversight have an even greater incentive, and even less risk of being caught abusing the Section 14(c) privilege. In addition, in Missouri, where, unlike in the federal system, audits are conducted of whether the individuals, not just entities, subject to Section 14(c), are appropriate for subminimum wages, 53 audits over 11 years found violations leading to nearly \$800,000 in back wages.<sup>3</sup>

Independent governmental agencies like the National Council on Disability (NCD) and the United States Commission on Civil Rights (USCCR) have both weighed in on this issue over the past year. In an October 2020 report titled *Policies from the Past in a Modern Era: The Unintended Consequences of the AbilityOne Program & Section 14(c)*, NCD wrote “Since the passage of the Rehabilitation Act, disability-related statutes and policies

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<sup>1</sup> National Council on Disability (NCD), *Policies from the Past in a Modern Era: The Unintended Consequences of the AbilityOne Program & Section 14(c)*, (Washington, DC: 2020) at 43-44 (“NCD spoke with a number of people with disabilities during visits of SourceAmerica NPAs job sites who did not present as having a significant disability. ... If the goal of the AbilityOne Program is to employ people with severe disabilities who have difficulty finding public or private employment, it was difficult to see how the people NCD spoke with had such difficulties. Many people NCD observed during site visits were actively participating in meaningful work without any direct supervision, and some with almost no supervision. In fact, some of the employees, who were determined to have a significant disability, were working on a different floor than their supervisor. If they needed any assistance, the person with a significant disability had to call the supervisor for assistance, although NPA supervisors indicated that most often the workers did not require assistance. NCD noted one instance in which a person considered to have a significant disability drives a truck, requiring a commercial license, with another person considered to have a significant disability. Their job involved navigating through a major city to deliver paper twice a week. Also, during these visits, a number of workers fully engaged with NCD in conversation. One employee spoke about his upcoming solo trip to Asia to visit family. Another employee oversaw the scheduling of and setting up for meetings for a conference space in a federal building. When asked if he sometimes provided meeting attendees with technical assistance with the technology, he answered affirmatively. NCD observations highlight the subjective nature of the [Individualized Employment Evaluation] and that the program does not appear on the surface to be employing persons with significant disabilities. ... [I]f an AbilityOne employee can work unsupervised, travel, and drive independently, the question that should be asked is this: why is the person not working in [competitive integrated employment]? Members of an advisory group of disability advocates, former AbilityOne employees, and a former manager of an NPA also discussed how the NPAs only hire employees who marginally fall under the definition of significantly disabled. This practice is not unlike that of public/private employers.”

[https://ncd.gov/sites/default/files/NCD\\_AbilityOne\\_508.pdf](https://ncd.gov/sites/default/files/NCD_AbilityOne_508.pdf).

<sup>2</sup> Id. at 45

<sup>3</sup> U.S. Commission on Civil Rights, *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*, (Washington, DC: 2020), 171. <https://www.usccr.gov/files/2020-09-17-Subminimum-Wages-Report.pdf>.

have all sought to remedy inaccessibility, inequity, and segregation,” and that Section 14(c) is now a “significant exception to the norms of modern disability policy.”<sup>4</sup>

Just one month before that, in September 2020, the USCCR, in a report titled Subminimum Wages: Impacts on the Civil Rights of People with Disabilities published a list of recommendations regarding subminimum wages for people with disabilities. The first of these recommendations is that “Congress should repeal Section 14(c) with a planned phase-out period to allow transition among service providers and people with disabilities to alternative service models prioritizing competitive integrated employment.”<sup>5</sup>

Finally, considering 80 years of legal, policy, and program developments, Section 14(c) certificates cannot even meet the prejudiced assumptions in place at its enactment in 1938. Because of improvements in legal protections, accommodations, technology, and employment services and supports offered by federal and state governments over the past 80 years, Section 14(c) certificates are no longer justified, even by the terms of the FLSA.

**FLSA authorizes issuance of Section 14(c) certificates ONLY “to the extent necessary to prevent curtailment of opportunities for employment” of people with disabilities.** Given the requirements of the ADA and other federal and state disability rights laws that require virtually all employers to provide reasonable accommodations to employees with disabilities, as well as the robust supports available through state and federal Vocational Rehabilitation and nonprofit agencies to cover the costs of services and supports not covered by employers, not to mention the plethora of affirmative action programs now available (in federal and state government, as well as private employers) designed explicitly to increase hiring of people with disabilities at prevailing wages, there is no evidence that Section 14(c) certificates are necessary to prevent curtailment of opportunities for employment of people with disabilities.<sup>6</sup>

In fact, as explained by the U.S. Commission on Civil Rights, the evidence is to the contrary: “While data show the number of people employed in 14(c) workshops decreasing over time, the number of people with disabilities working in competitive employment as reported by state intellectual and developmental disabilities agencies has increased dramatically over the past few decades, from approximately 33,092 in 1988 to approximately 130,402 in 2017.”<sup>7</sup> In addition, in states that eliminated subminimum wages in state law, employment of people with disabilities actually increased.<sup>8</sup>

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<sup>4</sup> National Council on Disability, *Supra* note 1, at 26. See also National Council on Disability, [National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future](https://ncd.gov/publications/2018/new-deal-real-deal), (Washington, DC: 2018), <https://ncd.gov/publications/2018/new-deal-real-deal>.

<sup>5</sup> U.S. Commission on Civil Rights, *supra* note 3, at 223. <https://www.usccr.gov/files/2020-09-17-Subminimum-Wages-Report.pdf>.

<sup>6</sup> As the National Council on Disability noted, “The increased prevalence and availability of the customized employment approach allow people who were previously considered “unemployable” to successfully maintain employment in a competitive, integrated environment. The key to this approach is the use of flexible strategies. Rather than relying on open job postings, a job developer will work to determine the specific skills, assets, and interests of a person with a significant disability and how these skills can address an unmet need of an employer.” *Supra* note 1, at 62.

<sup>7</sup> U.S. Commission on Civil Rights, *supra* note 4, at 72.

<sup>8</sup> *Id.* at 84. See also *id.* at 180-81 (In Vermont, the first state to eliminate subminimum wage, disability employment rate rose from 35.8% to 42% since closing its sheltered workshops and it exceeds national averages for weekly wages and hours worked).

However, the Section 14(c) application seeks no information on employment opportunities or employment demand for people with disabilities. Therefore, the Department currently makes no effort to determine whether a Section 14(c) certificate is necessary or whether there are competitive integrated jobs available in the geographic area of the applicant for people with disabilities. Nor does the application ask whether vocational rehabilitation, supported employment, and other services are available to assist people with disabilities in the geographic area to secure and sustain those competitive integrated jobs. Rather, the application relies on the outdated and discriminatory assumption that people with disabilities can only work in subminimum wage work.

Finally, the current process for issuing Section 14(c) certificates does not appear to comply with the Department's mandate to issue such certificates "to provide for the employment ... of *individuals*," rather than for employers to impose subminimum wages on whoever they choose. The application does not even request the identity(ies) of any individual(s) to whom the certificate would apply (other than those under the age of 24 subject to new requirements of the Workforce Innovation and Opportunity Act). Nor does it impose or even request description of any process by which the applicant will determine that its subminimum wage employees meet the requirements of Section 14(c) (e.g., that unavailability of a subminimum wage job will curtail their employment opportunities or that their disability actually "curtail[s]" their "earning or productive capacity."

Given the evidence that Section 14(c) certificates are no longer necessary as a general matter to prevent curtailment of employment opportunities for people with disabilities, and that they, themselves, act as a discriminatory and abuse-prone curtailment of competitive integrated employment opportunities we ask that you impose a moratorium on further issuances of Section 14(c) certificates - until the Department establishes a mechanism for requiring applicants and renewal applicants to establish that the certificates they seek are actually necessary to prevent curtailment of employment opportunities for people with disabilities in their geographic area.

The moratorium should continue until the Department forecloses the opportunities for abuse in the Section 14(c) program by establishing a mechanism for applicants and renewal applicants to establish that everyone for whom a certificate is sought is a person for whom a Section 14(c) certificate is necessary and appropriate. A process along the lines of the Workforce Innovation and Opportunity Act requirements for youth would be one mechanism for meeting this requirement.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark A. Riccobono". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mark A. Riccobono, President  
National Federation of the Blind