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Partnerships in Employment Brief: Influencing Changes in State Policy and Practice with Data on Subminimum Wages

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Subminimum wage is a pervasive and controversial issue. In many states there are individuals with disabilities who earn as little as seven cents an hour and workers who do not earn any wages because they do not produce enough products to be paid wages for their work according to the 14(c) Certificate holder.

There are many ways that data on wages earned under Section 14(c) of the Fair Labor Standards Act, i.e., 14(c) Certificates can be used to influence changes in state policy and practice. This brief describes examples from Partnerships in Employment grantee states.

Review the data to establish a list of entities to monitor.

State-level Protection and Advocacy (P&A) agencies can use their access authority to monitor facility or service provider compliance with federal and state laws to ensure the rights and safety of individuals with disabilities. In addition to monitoring, the P&A may also provide information and referrals to individuals employed under the 14(c) Certificates about the P&A or other services, such as how to obtain vocational rehabilitation (VR) or assistive technology services to assist them in obtaining competitive employment.

Another strategy for using information obtained through a Freedom of Information Act request (FOIA), or a similar state request regarding wages, types of disabilities, and the region where the work site is located, is to look for employment outcome trends and ways to support implementation of the Workforce Innovation and Opportunity Act (WIOA). WIOA requires that state VR agencies provide career counseling and information and referral services to individuals with disabilities seeking or continuing employment at subminimum wages at specific intervals (<https://doleta.gov/wioa/Docs/WIOA-Final-Rules-and-Performance-FAQs.pdf>).

Another useful action is gathering data on the age of the individual with the disability (relating to WIOA and requirements for transition-age youth), and the length of time the individual has been working for subminimum wage. These types of data can be used to make follow-up inquiries as to whether individuals are receiving adequate opportunities to make real choices based in experiential opportunities, such as job shadowing and situational work assessments.

States with subminimum wage laws should look into having their state subminimum wage applications request more information that would shed additional light on the pathway to subminimum wage work, as well as the duration of this employment type.

Alaska: Using additional information

In Alaska, employers must identify the work category of the subminimum wage worker. As a result, it is possible to analyze some primary occupational categories. Janitorial, clerical, maintenance, and food-related jobs are the most prevalent subminimum wage work categories. Sharing data on the concentration of work in a limited number of categories can encourage discussion about low expectations and stereotypes of individuals with disabilities in the workforce.

Submit data to the state VR agency regarding what they need to know for WIOA compliance.

On July 22, 2016, certain requirements of WIOA relating to the payment of subminimum wages to individuals with disabilities went into effect. Sharing of data on 14(c) Certificates obtained through FOIA or state agency requests with state VR agencies can support implementation of these new rules.

Under the rules, state VR agencies:

- » have an obligation to provide career counseling and information and referral services to individuals that it knows to be employed at subminimum wages by employers holding 14(c) Certificates (34 CRF §397.40(a)). This includes individuals who become known to VR through another entity, such as a client assistance program (34 C.F.R. §397.40(a)(2)).
- » have an obligation for individuals under 24 years of age not presently working at a subminimum wage job to document that the individual has received pre-employment transition services, has applied for VR services, and
 - (i) the VR case has been closed due to ineligibility or
 - (ii) the individual received services and the VR case was closed and the individual received counseling, information, and referrals related to obtaining competitive employment.

Under WIOA, entities with 14(C) Certificates must ensure that within 6 months of the first year of earning subminimum wages and annually thereafter individuals (and if applicable, their parents or guardians) are provided career counseling, information, and referral by the state VR agency. Additionally the employer must inform the individual about self-advocacy, self-determination, and peer mentoring opportunities in the area. This is a condition of continued employment of individuals of any age at subminimum wages. The DOL sent letters dated July 27, 2016, to 14(c) Certificate holders informing them of these WIOA requirements and of the DOL's authority to enforce compliance.

Submit data to the state IDD agency regarding Center for Medicare and Medicaid Services Community Settings Rules

Sharing data from the FOIA request and state wage agencies with the state's Medicaid Authority and intellectual and developmental disabilities (IDD) agency are ways to support implementation of the state's Home and Community-Based Services Plans to ensure community integration and legal compliance. Identifying organizations that have permission to employ individuals at subminimum wages to these agencies is important, because

wages that are noncompetitive/subminimum often occur in segregated environments.

Iowa: Linking subminimum wage to community inclusive outcomes

Iowa's Protection and Advocacy Organization issued a December 2014 report, "Stalled on the Road to Olmstead Compliance." Throughout the report, payment of subminimum wages is linked to placement in segregated workplaces and economic insecurity. One recommendation from the report is to develop a multi-year Olmstead compliance plan to reduce the number of Iowans with disabilities earning subminimum wages.

Use data for a statewide public service announcement (PSA) campaign about the wages individuals with disabilities are making.

Data such as the number of individuals with disabilities paid subminimum wages, their rates of pay, and the entities holding 14(c) Certificates may be useful in creating a PSA to educate the community about subminimum wages in their state. Examples of individuals who had previously earned subminimum wages but are now employed at prevailing wages in the community, testimonials from individuals with disabilities about the impact of community employment on their life, disability civil rights, and Employment First are all topics that can be highlighted in a PSA.

Supporting better employment services

Information about 14(c) Certificate holders and subminimum wage earners may be a topic of discussion between disability advocates and entities paying subminimum wages. The information provides a factual point from which to discuss the impact of subminimum wages on their workers, people they serve, and ways in which the entities could be assisted in transitioning to competitive and integrated employment opportunities for their workers.

Alaska: Promoting better employment practices

In Alaska, the wider adoption of customized employment practices was a result of sharing information about the impact of subminimum wages. The outcome of employment has been reframed to focus on individuals obtaining a job that allows them to earn the minimum or prevailing wage or above.

California: “Shame on you” approach

California has been differentiating between the use of 14(c) in schools and the adult system, and has been working on identifying schools and helping them come into compliance. This has involved bringing in outside experts to say “Shame on you” to schools that are not compliant with expectations for transitioning youth to community employment, and enlisting families to say “Shame on you for devaluing my child.”

Because of the possible coverage gap under federal law, advocates could consider examining their state wage laws to determine if they provide adequate protection to workers with disabilities. If state coverage is inadequate, one strategy is to advocate for legislation to address the coverage gap under federal law, or to eliminate subminimum wages within the state for workers with disabilities.

Mississippi: Building strength, applying pressure

Mississippi has been using the strengths of its P&A network, as well as pressure brought by the federal Department of Labor judgment against an Ohio employer regarding improper payments of subminimum wages to individuals with disabilities. Now MS is using data on the individual level to challenge people’s placement in sheltered work.

Examination of State Wage Legislation

Many states have laws that govern payment of subminimum wages (Appendix A). However, some of those state laws simply defer to Section 14(c) of the Fair Labor Standards Act (14(c)), and do not provide protection or coverage to individuals in their state receiving subminimum wages beyond that provided by the federal statute. In those “deferral” states and in states with no subminimum wage laws¹, the only regulation of the payment of subminimum wages occurs through operation of 14(c).

However, that federal law does not apply in all instances. For example, an individual employed in a non-retail segment of a not-for-profit work center may not be covered under 14(c), regardless of that entity’s dollar volume of business, because such entities are generally not considered to have a “business purpose,” which is the usual requirement for an entity to be covered under the Fair Labor Standards Act.²

¹ States that appear to have no subminimum wage laws are AL, KY, LA, MS, SC, TN, and WY.

² Generally an individual is covered under the Fair Labor Standards Act, including 14(c), under one of the following circumstances: (i) the person handles goods moving in interstate commerce; (ii) the enterprise employing the individual is operated for a business purpose and has an annual volume of sales or

State Use Legislation and Subminimum Wages

The federal Javits-Wagner O’Day Act (JWOD) is a statute requiring that all federal agencies purchase specified services and goods from non-profit agencies employing people who are blind or have other severe disabilities with the intent of increasing their employment opportunities. Approximately 37 states (Appendix B) have legislation that is similar to the federal JWOD. The parallel state legislation, commonly referred to as “state use law,” provides employment opportunities for workers with disabilities through state and local government contracts (state use contracts) with their employers for approved products and services.

JWOD and state use contracts are not subject to a competitive bidding process, and must meet the applicable federal or state-approved price for the goods or services. Agencies that hold 14(c) Certificates are better able to meet these price requirements through the payment of subminimum wages to their workers. As a result, JWOD and state use contracts may foster the payment of subminimum wages.

business done of \$500,000; or (iii) the individual is employed by a public agency, hospital, or agency primarily engaged “in the care of the sick, the mentally ill or defective” who reside on the premises, or a school. See DOL Fact Sheet #39: The Employment of Workers with Disabilities at Subminimum Wages and DOL’s Wage & Hour Division Field Operations Handbook, Chapter 64b.

The 2014 annual report of AbilityOne, which oversees the JWOD program, lists the entities by state that participate in that program (http://www.abilityone.gov/media_room/documents/Commission_AnnualReport_Final_040815_nocropmarks_508v2_FINAL.pdf). States may also maintain a list of entities that participate in their state use contracts. Stakeholders can compare AbilityOne and state use contract participant lists with lists of 14(c) Certificate holders in their state to identify those entities that may be paying subminimum wages to workers with disabilities who are working on federal, state, or local contracts. Using this information, advocates can spark public discussion about how state use laws and contracts may be in conflict with other federal and state initiatives, in particular states' Employment First efforts.³

New York: Finding balance

New York is addressing the issue of preferred source products through the Federal Government (Ability One and State Use). The state has created materials about balancing incentive funds, as well as tools for assessing the capacity to change.

Conclusion

Use of data on 14(c) Certificates and similar state subminimum wage authorizations is an important strategy to reduce the use of subminimum wages for individuals with disabilities. Strategies described in this report provide a set of tools stakeholders can use to create a comprehensive picture for state agency officials and the public at large of the impact that subminimum wages have on citizens with disabilities.

For information about how to access and analyze data on 14(c) Certificates, please see the companion document to this publication, Partnerships in Employment Brief: Guidance on how to obtain data on the use of subminimum wages within a state to inform systems change activities.

Staff from the Alaska and Tennessee Partnerships in Employment Projects and Partnerships in Employment Technical Assistance Center collaborated in the development of this project.

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³ The JWOD process, which is overseen by Ability One and administered in part by Source America, has been the target of recent federal investigations reportedly involving alleged bid-rigging, corruption, and failure to use the requisite percentage of employees with disabilities to produce goods and provide services on federal contracts.

<http://www.cnn.com/2016/05/27/politics/abilityone-sourceamerica/>

<http://www.cnn.com/2016/01/21/us/disabled-work-program-investigation-update/index.html?sr=nfCNN012116disabled-work-program-investigation-update1244AMStory>

Appendix A

State statutes addressing sub-minimum wages for people with disabilities (as of July 2016)

STATE	STATUTE
AL	None identified
AS	AS §23.10.070
AZ	A.R.S. §23-326
AR	A.C.A. §11-4-214
CA	West's Ann. Cal. Labor Code §§1191-1191.5
CO	C.R.S.A. §8-6-108.5
CT	C.G.S.A. §31-67
DE	19 Del.C. §905
FL	West's FSA §448.110
GA	GA Code Ann. §34-4-4
HI	HRS §387-9
ID	I.C. §44-1505
IL	820 ILCS 105/5
IN	IC 22-2-2-3(j)
IA	I.C.A. §91D.1(2)(a)
KS	K.S.A. 44-1207(b)(1)
KY	None identified
LA	None identified
ME	26 M.R.S.A. §666
MD	MD Code, Labor and Employment, §3-414
MA	M.G.L.A. 151§9
MI	M.C.L.A. 408.414c
MN	M.S.A. §177.28 Subd.5
MS	None identified
MO	V.A.M.S. 290.515

STATE	STATUTE
MT	MCA 39-3-406(f)
NE	Neb. Rev. St. §§48-1202 & 48-1502
NV	N.R.S. 608.250(2)(f)
NH	N.H. Rev. Stat. §279:22
NJ	N.J.S.A. 34:11-56a17(b)
NM	N.M.S.A.1978 §50-4-23
NY	McKinney's Labor Law §651(5)(j)
NC	N.C.G.S.A. §95-25.3(c)
ND	NDCC 34-06-15
OH	R.C. §4111.06
OK	40 Okl. St. Ann. §197.11(b)
OR	O.R.S. §653.030
PA	43 P.S. §333.104(d)
RI	Gen. Laws 1956, §28-12-9
SC	None Identified
SD	SDCL §60-11-5
TN	None identified
TX	V.T.C.A., Labor Code §62.161
UT	U.C.A. §34-40-104(2)
VT	21 V.S.A. §385(5)
VA	VA Code Ann. §40.1-28.9(B)(13)
WA	RCWA 49.46.060
WV	W.Va. Code, §21-5C-1(f)(8)
WI	W.S.A. 104.07(2)
WY	None identified

Appendix B

States with State Use Laws (as of July 2016)

STATE	STATUTE
AL	None identified
AS	None identified
AZ	A.R.S. §41-2636
AR	A.C.A. §§19-11-901 to -902
CA	None identified
CO	C.R.S.A. §§24-30-1203, 26-8.2-103
CT	C.G.S.A. §17b-656
DE	16 Del.C. §§9601-9605
FL	West's F.S.A. §§413.035 to -.07
GA	Ga. Code Ann., §§50-5-135 to -138
HI	HRS §103D-1010
ID	None identified
IL	30 ILCS 500/45-35
IN	IC 5-22-13-1 to -5
IA	I.C.A. §8A.311
KS	K.S.A. §75-3317 to -3322
KY	KRS §45A.465, .470
LA	LSA-R.S. 38:2261
ME	5 M.R.S.A. §1826-A to -C
MD	MD Code, State Finance & Procurement, §14-103
MA	None identified
MI	M.C.L.A. 18.1293 to .1297
MN	None identified
MS	Miss. Code Ann. §31-7-13
MO	V.A.M.S. 34.165

STATE	STATUTE
MT	MCA 18-5-101 to -103
NE	None identified
NV	N.R.S. 334.025
NH	None Identified
NJ	N.J.S.A. 30:6-23 to -33
NM	N.M.S.A. 1978 §§13-1C-1 to -7
NY	McKinney's State Finance Law §162
NC	N.C.G.S.A. §§143-48, -48.2
ND	NCCC 25-16.2-01 to -04
OH	R.C. §§4115.31 to .36
OK	74 Okl. St. Ann. §§3001, 3003-3010
OR	O.R.S. §§279.835 to .855
PA	62 Pa.C.S.A. §520
RI	None identified
SC	None identified
SD	None identified
TN	T.C.A. §§71-4-701 to -705
TX	V.T.C.A., Human Resources Code §§122.001 to .030
UT	U.C.A. 1953 §63G-6a-805
VT	None identified
VA	VA Code Ann. §2.2-4344
WA	West's RCWA 39.23.005 to .020, 39.26.230
WV	W.VA. Code §5A-3-10
WI	W.S.A. 16.752
WY	None identified

ThinkWork!



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