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BELOW THE MINIMUM: A CRITICAL REVIEW OF THE 14(C) WAGE PROGRAM FOR EMPLOYEES WITH DISABILITIES

I. INTRODUCTION

The opportunity to work in a safe and healthy environment and to be treated equitably in the workplace is a basic human right. Unscrupulous employers who take advantage of workers with disabilities should be held accountable to the fullest extent of the law. Where the law fails to protect workers, it needs to be changed. Where government agencies fail to enforce the law, they should be held accountable.¹

It is a little known fact that under current law in the United States, workers with a disability may be paid less than the minimum wage. The payment of subminimum wages to individuals with disabilities commensurate with their production rates is authorized by special certificates issued by the Department of Labor (“DOL”).² This creates a grave and very real danger of wage and worker exploitation. Although created by Congress for benevolent purposes, the subminimum wage program, codified in Section 14(c) of the Fair Labor Standards Act (“14(c)”)³ has come to have many inherent and systemic problems, which this Note explains and analyzes. This subminimum wage program also raises many dubious legal and constitutional issues. In 2001, it was reported that the wages of 14(c) workers employed nationwide by work centers that exclusively employ and accommodate individuals with disabilities were extremely low.⁴ Specifically, more

1. *Preventing Worker Exploitation: Protecting Individuals with Disabilities and Other Vulnerable Populations: Hearing Before the S. Comm. on Health, Educ., Labor, and Pensions*, 111th Cong. 47 (2009) (statement of Sen. Patty Murray, Member, S. Comm. on Health, Educ., Labor, and Pensions) [hereinafter *Preventing Worker Exploitation Senate Hearing*], available at <http://www.help.senate.gov/hearings/hearing/?id=03555b88-0eb3-b4db-724b-c7e6fc6c05d8>.

2. See 29 U.S.C. § 214(c)(1)(A)-(C) (2006).

3. *Id.* at § 214.

4. U.S. GENERAL ACCOUNTING OFFICE, SPECIAL MINIMUM WAGE PROGRAM: CENTERS OFFER EMPLOYMENT AND SUPPORT SERVICES TO WORKERS WITH DISABILITIES, BUT LABOR SHOULD IMPROVE OVERSIGHT 21 (2001) [hereinafter 2001 GAO REPORT], available at

than half of the 14(c) workers (fifty-four percent) earned less than \$2.50 an hour, primarily because the alleged productivity levels of those workers, *as reported by the work centers (themselves)*, were so low.⁵

An influential 2011 position paper by the National Disability Rights Network, titled “Segregated & Exploited: The Failure of the Disability Service System to Provide Quality Work,” argues for the end of segregated work, sheltered employment, and the subminimum wage system that is currently in place for individuals with disabilities in the United States.⁶ The segregated nature of the overwhelming majority of employment opportunities for those with disabilities provides the constitutional and legal rationale for enacting the complete repeal of the 14(c) program currently in place.⁷ However, it is the ever-present danger of wage exploitation, inherent in the 14(c) subminimum wage system, which justifies the implementation of immediate changes and greater enforcement. This danger of wage exploitation has become a reality, as evidenced by employers in Wisconsin and Iowa who recently took advantage of 14(c) workers, paying them as little as two to eleven cents per hour and subjecting them to abusive policies and working conditions.⁸

The recent calls for reform and greater enforcement of the 14(c) program have been sparked, in large part, by shocking human rights violations uncovered in Atalissa, Iowa at Henry’s Turkey Service, a meat processing plant.⁹ Henry’s “provided” cockroach infested housing

<http://www.gao.gov/new.items/d01886.pdf>.

5. *Id.* If allowing a cynical view of the 14(c) subminimum wage program, employers have an incentive to report artificially low productivity rates. Reporting of low rates would permit them to pay individual workers less than they would otherwise be paid, since subminimum wages are calculated commensurate with an employee’s productivity on the job. See Ellen R. Anderson, *Invisible Laborers: Sheltered Workers Under the National Labor Relations Act*, 3 LAW & INEQ. 265, 267 (1985).

6. See NAT’L DISABILITY RIGHTS NETWORK, SEGREGATED & EXPLOITED: THE FAILURE OF THE DISABILITY SERVICE SYSTEM TO PROVIDE QUALITY WORK 8 (2011) [hereinafter SEGREGATED & EXPLOITED], available at <http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf>.

7. See *infra* Part VI.

8. Alex Morrell, *Pay Rate for Disabled Wisconsin Workers Stirs Debate*, GREEN BAY PRESS-GAZETTE (Aug. 14, 2011), <http://www.greenbaypressgazette.com/article/20110814/GPG0101/110200006/Pay-rate-disabled-Wisconsin-workers-stirs-debate>; Clark Kauffman, *Disabled Workers Paid Cents Per Hour at State-Run Homes*, DES MOINES REG. (Dec. 28, 2009), <http://www.desmoinesregister.com/article/20091228/NEWS10/912280319/Disabled-workers-paid-cents-per-hour-state-run-homes>.

9. See SEGREGATED & EXPLOITED, at 11.

to workers with intellectual disabilities—housing for which money was deducted from the workers’ paychecks—and the workers were paid well below the minimum wage.¹⁰ Henry’s was accused of labor law violations in 1997, 1998, and 2003, but the DOL failed to levy any fines or punishments against the company.¹¹ Cases of willful or repeated misconduct are the only instances in which federal fines for labor law violations may be imposed.¹² Between 2003 and 2008, 797 reported cases resulted in almost \$5 million in unpaid wages owed to more than 18,500 workers.¹³ However, only three of these cases led to combined fines, totaling a mere \$8,360.¹⁴

This Note will examine the history of 14(c), inherent and systemic problems of the program, the process that employees must go through to obtain special wage certificates, government shortcomings and significant failures in the enforcement and oversight of the 14(c) program, as well as some proposals and potential solutions. In Part I, we will review the history behind the 14(c) subminimum wage program including its legislative beginnings and how it has developed and changed over the years. Part II sets forth an overview of the process of how an employer obtains a 14(c) certificate, classifies workers as having a disability, and determines their individual subminimum wage rate by evaluating their productivity. Also addressed in Part II are some inherent and systemic problems common and unique to the subminimum wage program that can be addressed by a few simple alterations and reforms to the certification process itself. Part III gives an in-depth look at the actual employers, the challenges they face, and the work environments they set up for their workers. Part IV provides an overview of the regulations, oversight, and enforcement mechanisms prescribed and carried out by the DOL, and exposes several shortcomings in this crucial area. Part V examines the ultimate goal of integrating workers with disabilities into a competitive employment environment, as established by the Supreme Court in *Olmstead v. L.C.* Part VI discusses proposals for reform, including the possible repeal of the entire 14(c) program. The proposals include a gradual phasing out of the program, a supported employment model, and a state and federal

10. *Id.* Workers were verbally and physically abused and ultimately received only \$65 per month. *Id.* Henry’s was also designated as the “caretaker” for the workers, so Henry’s received the workers’ Social Security checks and took out deductions. *Id.*

11. Clark Kauffman, *Few Labor Violators are Fined*, DES MOINES REG., Jan. 5, 2010, at A1.

12. *Id.*

13. *Id.*

14. *Id.*

policy based on an “employment first” philosophy, which emphasizes competitive employment opportunities and integration before resorting to subminimum wages, work centers, and sheltered workshops where competitive employment is not available or not practical for a particular disabled individual.

II. HISTORY

In the 1930s, President Franklin Delano Roosevelt pushed through sweeping economic reforms known as the New Deal in reaction to the Great Depression.¹⁵ These reforms called for increased government involvement in many sectors of industry in an attempt to stimulate the economy.¹⁶ After much congressional debate,¹⁷ one of the last pieces of New Deal legislation was the Fair Labor Standards Act (FLSA), which was signed into law on June 25, 1938.¹⁸ Among other important provisions, the FLSA established a federal minimum wage¹⁹ designed to increase the standard of living of workers and to promote commercial efficiency.²⁰

Section 14(c) of the FLSA included an important exception to the innovative minimum wage for people with disabilities²¹ that, at the time, did not alarm the legislature.²² It was based on definitions and classifications set forth in the National Industrial Recovery Act (NIRA) of 1933.²³ Under NIRA, President Roosevelt defined a person with a disability as one “whose earning capacity is limited because of age, physical or mental handicap, or other infirmity.”²⁴ Section 14(c) stated:

The Administrator, to the extent necessary in order to prevent

15. See THE NEW DEAL 3-4 (Carl N. Degler ed., Quadrangle Books, 1970).

16. See THE NEW ENCYCLOPEDIA BRITANNICA, VOL. 8 MICROPEDIA 633 (15th ed. 1994).

17. See Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T OF LAB., <http://www.dol.gov/oasam/programs/history/flsa1938.htm> (last visited Mar. 8, 2013).

18. Fair Labor Standards Act of 1938, Pub. L. No. 718, ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C. § 8 (2006)).

19. Fair Labor Standards Act § 6.

20. *Id.* § 2(a).

21. See *id.* § 14.

22. See WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., RL 30674, TREATMENT OF WORKERS WITH DISABILITIES UNDER SECTION 14(C) OF THE FAIR LABOR STANDARDS ACT 7-8 (2005) [hereinafter TREATMENT OF WORKERS WITH DISABILITIES], available at http://digitalcommons.ilr.cornell.edu/key_workplace/209/.

23. See *id.* at 6.

24. *Id.* (internal quotation marks omitted).

curtailment of opportunities for employment, shall by regulations or by orders provide for. . . (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage²⁵

Essentially, 14(c) provided the foundation of a system that permitted employers of workers with disabilities to file for special certificates that allowed them to pay such employees less than the federally mandated minimum wage.²⁶ Many of these employers set up “sheltered workshops” where employees with disabilities would work separate and segregated from the rest of the workforce.²⁷

In this section, we will explore notable hearings, proposals and amendments to the 14(c) program over the past seventy-three years and arrive at the current state of the law. There were no major initiatives or proposals brought forth on the issue of subminimum wage employment until approximately thirty years after its inception. On June 28, 1965 Senator Wayne Morse made two proposals to modify the FLSA based on his stated belief that “minimum wage laws [should] appl[y] just as much to the handicapped person who is gainfully employed as it does to anyone else.”²⁸ First, he proposed that over a three-year transitional period, most employees with disabilities would be paid no less than minimum wage.²⁹ Second, he proposed the installation of a minimum wage floor, whereby severely disabled employees would be paid no less than fifty percent of the prevailing minimum wage.³⁰ Public law 89-601 enacted the second proposal, which stated that a disabled worker could not be paid less than fifty percent of the federal minimum wage.³¹

One result was that divisions began to appear within the disability community, with blind workers arguing against the subminimum wage option.³² In June of 1977, building off of the fractured disability community, Representative Phillip Burton urged the legislature to adopt an amendment providing that individuals who are blind or visually impaired be exempt from the subminimum wage exception.³³ One year later, the House Subcommittee on Labor Standards held hearings on the

25. Fair Labor Standards Act § 8.

26. *See id.*

27. *See* TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 2, 7.

28. 111 CONG. REC. 14,956 (1965).

29. *Id.*

30. *See id.*

31. Pub. L. 89-601, § 501, 80 Stat. 830, 842-45 (1966).

32. TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 9.

33. *Id.* at 11.

matter.³⁴ Its proponents argued that visually impaired workers should not be treated like individuals with more severe disabilities.³⁵ Opponents to the proposal believed it would be unethical and illogical to treat someone visually impaired differently from a person with a different disability.³⁶ While the Burton proposal did not pass, it highlighted some of the overarching problems with the existence and enforcement of subminimum wage exceptions.³⁷

A few years later, in May 1980, the House Subcommittee on Labor Standards once again held hearings on 14(c).³⁸ Donald Elisburg, Assistant Secretary for Employment Standards, represented the DOL at the hearings.³⁹ He admitted that the subminimum wage certificate program had been ineffectively regulated.⁴⁰ He also emphasized the need for well-trained compliance officers, better training for workshop managers, re-drafting of procedural guidelines, increased awareness on the part of workers, and increased automation to help with the monitoring process.⁴¹

Jerry Daugherty of the National Industries for the Severely Handicapped articulated that paying individuals with disabilities minimum wage would not be economically feasible.⁴² However, he portrayed what he believed the value of working was to a person with disabilities:

To the handicapped individual, work means much more than therapy or wages. It means that there is a place to go where people are friendly, understanding and accepting . . . where the person has the chance to make a real contribution, to be appreciated as a valuable member of a team effort.⁴³

Kenneth Jernigan, President of the National Federation of the Blind, conveyed the perspective of the employees and contended that

34. *Id.*

35. *See id.*

36. *Id.*

37. *See id.* at 11-13.

38. *Id.* at 14.

39. *Id.*

40. *See id.* at 15.

41. *Oversight Hearings on Section 14(c) of the Fair Labor Standards Act: Hearing Before the H. Subcomm. on Educ. and Labor*, 96th Cong. 23-25 (1980) [hereinafter *1980 House Oversight Hearings*] (statement of Donald Elisburg, Assistant Secretary of Labor, Employment Standards Division).

42. *Id.* at 226 (statement of Jerry Daugherty, National Industries for the Severely Handicapped).

43. *Id.* at 229.

14(c) was discriminatory.⁴⁴ He stated that it tolerated a “class of workers who are blind or handicapped and then forcing the members of this class to justify every penny of their paychecks by means of productivity ratings while working under conditions and with equipment over which they have no control.”⁴⁵ He attacked further by asserting that 14(c) employers “have covered their business activities with a veil of ‘social services.’”⁴⁶ Ultimately, these hearings did not produce any new legislation. However, they highlighted the need for better regulation of a complex issue and set the stage for a significant amendment to 14(c).

A year after these hearings, the United States General Accounting Office (“GAO”) released a report addressing the realities of the administration and enforcement of the subminimum wage program for individuals with disabilities in order to allow Congress to assess proposals moving forward.⁴⁷ The report indicated that the 1966 amendments, which required that workers with disabilities be paid no less than fifty percent of the minimum wage, were not actually affecting the wage structure of these workers since “about half of the handicapped workers were covered under one of the special exemption certificates . . . and the other half were earning at least 50 percent of the statutory minimum before the 1966 amendments.”⁴⁸ Specifically, less than seventeen percent of workers with a disability were guaranteed the subminimum wage floor.⁴⁹

The GAO report found that enforcement and compliance with the requirements were difficult for a number of reasons. Workers in sheltered workshops and work activity centers often had little awareness of their rights.⁵⁰ Also, many employers unintentionally breached their duties because they did not understand what they needed to do in order to satisfy compliance.⁵¹ In addition, DOL lacked the requisite resources to effectively administer the 14(c) program.⁵² Therefore, compliance with the standards was largely left to the employers to self-regulate.⁵³

44. TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 17-18.

45. 1980 House Oversight Hearings, *supra* note 41, at 47.

46. *Id.* at 55.

47. See U.S. GOV'T ACCOUNTABILITY OFFICE, HRD-81-99, STRONGER FEDERAL EFFORTS NEEDED FOR PROVIDING EMPLOYMENT OPPORTUNITIES AND ENFORCING LABOR STANDARDS IN SHELTERED WORKSHOPS (1981) [hereinafter 1981 GAO REPORT], available at <http://www.gao.gov/assets/140/135187.pdf>.

48. *Id.* at 16.

49. *Id.*

50. *Id.* at 29.

51. *Id.*

52. *Id.* at 39.

53. *Id.*

As a result of these numerous difficulties, the GAO report ultimately concluded that Congress should eliminate the provision that required a subminimum wage floor of fifty percent for workers with disabilities.⁵⁴

In 1986, twenty years after the previous adjustment to 14(c), Congress virtually reversed course.⁵⁵ Instead of tying wages to a statutory minimum, the new legislation proposed that the minimum wage floor would be replaced with a system of paying individuals with disabilities a commensurate wage.⁵⁶ Identical bills, H.R. 5614 and S. 2884, were passed in the House and the Senate, respectively,⁵⁷ and signed into law by President Ronald Reagan on October 16, 1986.⁵⁸ The language adopted that day is still in force, and allows employers who obtain special certificates to pay a commensurate wage to the following workers:

[I]ndividuals . . . whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are[:] (A) lower than the minimum wage applicable under section 206 of this title, (B) commensurate with those paid to non-handicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work, and (C) related to the individual's productivity.⁵⁹

The 1986 amendments, which led directly to new DOL rules as codified in the Code of Federal Regulations,⁶⁰ implemented two other major components regarding better regulation mechanisms and an appeal process for the subminimum wage certificate program.⁶¹ Specifically, an employer must provide "written assurances" that wages will be reviewed every six months or every year, depending on the type of pay structure.⁶² Additionally, it set forth a review system where "an employee may petition the Secretary to obtain a review of such special minimum wage rate."⁶³ The statute gives further details regarding the appeal process, including placing the burden of illustrating that the wage is fair on the

54. *Id.* at 149.

55. TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 25.

56. *Id.* at 27.

57. 132 CONG. REC. 19, 27,495-98 (1986).

58. TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 28.

59. Fair Labor Standards Act of 1938, Pub. L. No. 99-486, § 214, 100 Stat. 1229 (1986) (codified as amended at 29 U.S.C. § 214(c)(1)(A)-(C) (2006)).

60. See 29 C.F.R. § 525.1 (2011).

61. See 29 U.S.C. § 214(c)(2), (5) (2006).

62. *Id.* § 214(c)(2)(A)-(B).

63. *Id.* § 214(c)(5)(A).

employer and requiring that, after a hearing, an administrative law judge make a decision within thirty days.⁶⁴

While there have not been any changes since the 1986 amendments, the topic has not gone silent in Congress. Various proposals have been introduced and numerous hearings have been conducted on the issue, but there has been no action.⁶⁵ Most of these discussions have focused on removing blindness as a disability that falls under the category of people who are eligible for subminimum wage consideration,⁶⁶ as well as repealing 14(c) with the exception of individuals with multiple disabilities.⁶⁷

Most recently, Representative Cliff Stearns proposed a bill called the Fair Wages for Workers with Disabilities Act of 2011.⁶⁸ If enacted, this bill would gradually repeal 14(c).⁶⁹ The bill explains that as a result of “advancements in vocational rehabilitation, technology, and training” there are “greater opportunities than in the past” for disabled workers to participate in the workforce.⁷⁰ Additionally, employees with disabilities, including those with the most severe disabilities “can be as productive as nondisabled employees.”⁷¹ The bill further expresses that employers have an incentive to exploit subminimum wage workers rather than help them move on to integrated employment.⁷² Importantly, Representative Stearns contended that employer complaints that they will not be financially viable in the event of repeal are overstated.⁷³ Finally, the bill sets forth a policy to discontinue the issuance by the DOL of any new special wage certificates and a gradual transition over a three-year period of revoking certificates already in existence.⁷⁴ The proposed legislation has since died in the House of Representatives and has been referred to committees, but not yet acted upon.⁷⁵

64. *See id.* § 214(c)(5)(B)-(E).

65. *See, e.g.*, H.R. 3966, 103d Cong. (2d Sess. 1994); H.R. 3540, 106th Cong. (2d Sess. 2000); H.R. 881, 107th Cong. (1st Sess. 2001).

66. *See* H.R. 3966, 103d Cong. (2d Sess. 1994).

67. *See* H.R. 881, 107th Cong. (1st Session 2001).

68. *See* H.R. 3086, 112th Cong. (1st Sess. 2011).

69. *Id.*

70. *Id.* § 2(3).

71. *Id.* § 2(4).

72. *Id.* § 2(5).

73. *See id.* § 2(6)-(7).

74. *See id.* § 3 (“(A) . . . private for profit entities shall be revoked 1 year after such date of enactment; (B) . . . public or governmental entities shall be revoked 2 years after such date of enactment; and (C) . . . non-profit entities shall be revoked 3 years after such date of enactment.”).

75. *See H.R. 3086 (112th): Fair Wages for Workers with Disabilities Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr3086> (last visited Jan. 10, 2013).

Aside from the historical development of 14(c) itself, there are other historical considerations relating to individuals with disabilities. The Fourteenth Amendment to the U.S. Constitution, as adopted in 1868, guarantees all citizens “equal protection of the laws.”⁷⁶ The amendment was designed with the express purpose of ensuring that all U.S. citizens are treated equally.⁷⁷ Like all other forms of non-majority characteristics based on race, gender, age, religion, sexual orientation, etc., individuals with disabilities should be protected by this amendment.⁷⁸ Therefore, the federally approved subminimum wage certificate program for workers with disabilities may run afoul of the Fourteenth Amendment’s Equal Protection Clause.

The amendments to 14(c) should not be evaluated in a bubble. Other parallel legislation affecting individuals with disabilities stressed the importance of integration. The Developmental Disabilities Assistance and Bill of Rights Act of 1963 (amended in 2000) focuses on the need to provide support and opportunities to people with disabilities.⁷⁹ Specifically, the purpose was to give individuals with disabilities and their families “access to needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life, through culturally competent programs.”⁸⁰

The Rehabilitation Act of 1973 provides a clear emphasis on the importance of competitive wages, even for those individuals with the most significant disabilities.⁸¹ The federal government intended to “empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.”⁸²

In July 1990, President George H.W. Bush signed the Americans with Disabilities Act (ADA) into law.⁸³ For the purposes of the ADA, “disability” is defined broadly as “a physical or mental impairment that

76. U.S. CONST. amend. XIV, § 1.

77. Lawrence Friedman, *An Idea Whose Time Has Come – The Curious History, Uncertain Effect, and Need for Amendment of the “Natural Born Citizen” Requirement for the Presidency*, 52 ST. LOUIS U. L.J. 137, 147 (2007).

78. U.S. CONSTITUTION amend. XIV, § 1.

79. 42 U.S.C. § 15001(b) (2006).

80. *Id.*

81. See Rehabilitation Act of 1973, 29 U.S.C. § 701 (2006).

82. *Id.* § 701(b)(1).

83. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (2006)).

substantially limits one or more of the major life activities” of an individual.⁸⁴ The Act is designed “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁸⁵ Moreover, the ADA intended “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”⁸⁶ These objectives offer a framework to analyze the goals, legality, and policy options of the 14(c) program.⁸⁷ At the time of enactment, one may have inferred that the ADA would have drastic consequences for individuals being paid less than minimum wage under 14(c) because it shifted attention to the provision of meaningful integrative opportunities through “reasonable accommodation.”⁸⁸

Two additional pieces of legislation that Congress passed seek to further protect individuals with disabilities with regard to employment. The Workforce Investment Act of 1998 prohibits discrimination against qualified individuals with disabilities who are applicants, employees, and participants in financially assisted programs and activities.⁸⁹ The Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIA) recognizes that individuals with disabilities fear losing health care coverage by working and earning too much.⁹⁰ TWWIA creates “incentives to work . . . by providing individuals with disabilities real choice in obtaining the services and technology they need to find, enter, and maintain employment.”⁹¹ As a result of these findings, TWWIA intends to create a “program that will allow individuals with disabilities to seek the services necessary to obtain and retain employment and reduce their dependency on cash benefit programs.”⁹² Collectively, this large body of legislation evinces an effort to equalize the playing field for individuals with disabilities, and, perhaps, foreshadowed an eventual revocation of 14(c).

84. 42 U.S.C. § 12102(2)(A).

85. *Id.* § 12101(b)(1).

86. *Id.* § 12101(a)(8).

87. See MICHAEL MORRIS ET AL., LAW, HEALTH POLICY & DISABILITY CTR., UNIV. OF IOWA COLL. OF LAW, SECTION 14C OF THE FAIR LABOR STANDARDS ACT: FRAMING POLICY ISSUES 3 (Apr. 2002) [hereinafter FRAMING POLICY ISSUES], available at bbi.syr.edu/publications/morris/Policy_Report_042002.doc.

88. 29 C.F.R. § 1630.9(a) (1999); see also 28 C.F.R. § 35.130(b)(7) (1999).

89. See Workforce Investment Act of 1998, § 188(2), (4), 29 U.S.C. § 2938 (2006).

90. See Ticket to Work and Work Incentives Improvement Act of 1999, § 2(a)(9), 42 U.S.C. § 1320b-19 (2006).

91. *Id.* § 2 (a)(10).

92. *Id.* § 2 (b)(4).

III. THE PROCESS OF OBTAINING 14(c) SPECIAL WAGE CERTIFICATES

The Wage and Hour Division (WHD) of the DOL is authorized to issue special minimum wage certificates to employers who have applied for them.⁹³ Certificates must specify the terms and conditions that the employer needs to meet.⁹⁴ They are valid for either a specified time period or while the employees are in fact disabled for the work they are to perform, whichever is first.⁹⁵ Under the Act, an employer must provide written assurances to the DOL that any special wages paid to workers with disabilities will be reviewed at least once every six months.⁹⁶ Additionally, any special wages must be adjusted by the employer at least once each year to reflect changes in the prevailing wage paid to experienced workers with disabilities employed in the same general locality for similar work.⁹⁷ State and federal statutes require that certain records be maintained⁹⁸ and be kept available for inspection for set periods of time.⁹⁹ Additionally, notices that explain the requirements and procedures regarding the payment of special minimum wages must be posted in a conspicuous place in the work environment, or if that is impractical, be provided directly to each employee being paid a subminimum wage.¹⁰⁰

93. Fair Labor Standards Act, 29 U.S.C. § 214(c) (2006).

94. 2 LES A. SCHNEIDER & J. LARRY STINE, WAGE AND HOUR LAW: COMPLIANCE AND PRACTICE § 17:9 (2012) [hereinafter WAGE AND HOUR LAW], available at Westlaw WHLCP.

95. *Id.*

96. 29 U.S.C. § 214(c)(2)(A).

97. *Id.* § 214(c)(2)(B).

98. See WAGE AND HOUR LAW, *supra* note 94. In general, every employer that holds special minimum wage certificates allowing them to pay certain workers a subminimum wage must maintain and have available for inspection records indicating the following: “(1) Verification of disabilities; (2) Evidence of the productivity of each worker, gathered periodically; (3) Prevailing wages paid to nondisabled workers for comparable work; (4) Production standards for nondisabled workers for the jobs performed by disabled workers under special certificates; (5) Records required pursuant to the regulations and maintained and preserved according to the regulations, except for homeworker handbooks for disabled employees in a nonprofit rehabilitation facility and working in a home, apartment, tenement or room in a residential establishment.” *Id.* (internal citation omitted); 29 C.F.R. § 525.16 (2011).

99. DANIEL B. ABRAHAMS ET AL., EMPLOYER’S GUIDE TO THE FAIR LABOR STANDARDS ACT ¶¶ 430, 434 (2010) [hereinafter EMPLOYER’S GUIDE TO THE FLSA], available at 2004 WL 5037739; 29 C.F.R. § 516.7(b).

100. EMPLOYER’S GUIDE TO THE FLSA, *supra* note 99, at 434; 29 C.F.R. § 516.4 (“Every employer employing any employees subject to the Act’s minimum wage provisions shall post and keep posted a notice explaining the Act, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy. Any employer of employees to whom section 7 of the Act does not

A. Classification of Workers Eligible to be Paid a 14(c) Subminimum Wage

As stated above, workers must have an earning or productive capacity that is impaired by some physical or mental disability for the work to be performed in order to be paid a subminimum wage.¹⁰¹ Importantly, a disability that affects an individual's productive capacity for one specific type of job may not affect their capacity if given a different job.¹⁰² Disabilities that may affect an individual's productive capacity for purposes of this Act include mental retardation, mental illness, blindness, cerebral palsy, alcoholism, and drug addiction.¹⁰³ Under some circumstances, learning disabilities (LD) may also be a qualifying disability under 14(c).¹⁰⁴ Importantly, however, as DOL notes, "individuals with LD as their primary disability do not normally require long-term placement in work centers," and "after acquiring proper training and/or experience, successfully overcome disabilities in the workplace and should no longer be paid less than the minimum wage."¹⁰⁵ Interestingly, age may also be considered an impairment to earning or productive capacity, but only when the employee is at least seventy years old and age impairs his/her productivity for the work they are to perform.¹⁰⁶ Vocational, social, cultural or educational disabilities taken alone are not considered disabilities for purposes of the FLSA.¹⁰⁷ In 2001, the GAO estimated that 74% of the 424,000 workers paid a special minimum wage had an intellectual disability or a different developmental disability.¹⁰⁸ Approximately 12% had some mental

apply because of an exemption of broad application to an establishment may alter or modify the poster with a legible notation to show that the overtime provisions do not apply.").

101. 29 U.S.C. § 214(c)(1).

102. 29 C.F.R. § 525.3(d).

103. *Id.*

104. *Learning Disabilities as a Qualifying Disability Under FLSA Section 14(c)*, U.S. DEP'T OF LAB., <http://www.dol.gov/elaws/esa/flsa/14c/11a.htm> (last visited Mar. 16, 2013). The DOL noted difficulties indicative of a learning disability that may affect the productivity of an individual employee: "needing to work longer hours to produce the same amount as coworkers; needing to choose between being careless or being slow; making more frequent errors than coworkers; misunderstanding instructions from supervisors or comments from coworkers; and failing vocational training." *Id.*

105. *Id.*

106. *Age as a Qualifying Disability Under FLSA Section 14(c)* U.S. DEP'T OF LAB., <http://www.dol.gov/elaws/esa/flsa/14c/11b.htm> (last visited Mar. 16, 2013).

107. 29 C.F.R. § 525.3(d). In addition to vocational, social, cultural and educational "disabilities," chronic unemployment, receipt of welfare benefits, nonattendance at school, juvenile delinquency, and correctional parole or probation are also not considered disabilities. *Id.*

108. 2001 GAO REPORT, *supra* note 4, at 1, 3.

illness, 5% had a visual impairment, and 9% had some other impairment.¹⁰⁹ Forty-six percent had multiple disabilities.¹¹⁰ Some work centers focus on exclusively employing workers who have similar impairments.¹¹¹ For example, fifty work centers exclusively employed workers who were blind or visually impaired.¹¹²

An employment relationship exists independent of the worker's level of performance or whether the work has some therapeutic benefit.¹¹³ Workers with a disability are often referred to as clients or participants but not as employees, especially when working at a work activities center that provides therapeutic benefits, training, or rehabilitation.¹¹⁴ Work activity centers often provide services aimed at improving the functionality of workers with a disability both on and off the job.¹¹⁵ These services vary for each work center, but may include psychological counseling or speech therapy.¹¹⁶

The 14(c) subminimum wage program also applies, in some circumstances, to the employment of temporarily disabled individuals¹¹⁷ or patient workers.¹¹⁸ A patient worker is an individual with a disability who is employed by a hospital or institution providing care or treatment to that individual who is not necessarily, but may be, residing at the establishment while receiving care.¹¹⁹ Patient workers may only be classified as employees if their work is of a tangible economic benefit to the institution.¹²⁰ Temporary workers, on the other hand, include veterans with service-incurred disabilities participating in a vocational rehabilitation program of the Veterans Administration or in a state-

109. *Id.* at 19.

110. *Id.*

111. *See id.* at 10.

112. *Id.*

113. 29 C.F.R. § 525.3(g) (2012) ("However, an individual does not become an employee if engaged in such activities as making craft products where the individual voluntarily participates in such activities and the products become the property of the individual making them, or all of the funds resulting from the sale of the products are divided among the participants in the activity or are used in purchasing additional materials to make craft products.").

114. *See, e.g.,* Carl R. Ochsner, *Productivity – Based Client Pay Systems and Sub-Minimum Wage Certification: Why They Won't Go Away – And Why They Probably Shouldn't*, WORK TRAINING CENTER, <http://wtcinc.org/news/general/2009/12/sub-minimum-wage-certification.html> (last modified Oct. 2010).

115. 2001 GAO REPORT, *supra* note 4, at 13.

116. *Id.*

117. 29 C.F.R. § 525.8.

118. *See* EMPLOYER'S GUIDE TO THE FLSA, *supra* note 99, at ¶ 434.

119. 29 C.F.R. § 525.3(e).

120. *Id.* § 525.4.

administered rehabilitation program.¹²¹ These programs have provisional authority to pay their workers a subminimum wage for ninety days for which a signed application must be sent to the regional Wage and Hour office.¹²² Upon review, a certificate will be issued.¹²³

B. Determining Individual Subminimum Wage Rates

[C]alculating special minimum wage rates for workers with disabilities is a complicated process that is prone to error. As a result, Labor's oversight of the special minimum wage program is important in ensuring that 14(c) workers are not underpaid. Labor is not doing all it can, however, to provide this oversight¹²⁴

Commensurate wage rates for workers with disabilities were authorized by the 1986 Amendments to the FLSA.¹²⁵ This rate must be determined by evaluating the employee's productivity in the first month of employment.¹²⁶ The commensurate wage is determined by a basic formula—the productivity rate of a specific worker with a disability as compared to that of an employee without a disability is multiplied by the prevailing hourly rate for the same or similar type of work.¹²⁷ Therefore, if the prevailing hourly rate is \$8.00 for an employee without a disability, and a specific employee with a disability is half as productive for the same type of work, then that employee's commensurate hourly wage is \$4.00. As discussed above, there is no longer a subminimum wage floor, meaning that wages vary with the worker's productivity from as low as a few cents per hour up to the full federally-mandated minimum wage.¹²⁸ Once a worker's increased productivity merits a wage in excess of the regular minimum wage, the special minimum wage requirements of 14(c) become moot.¹²⁹ Furthermore, if a worker with disability accumulates overtime hours in excess of the maximum workweek, they must be paid at least one and one-half times the regular minimum wage rate.¹³⁰

121. *Id.* § 525.8(a).

122. *Id.* §§ 525.7, 525.8(b).

123. *Id.* § 525.8(c).

124. 2001 GAO REPORT *supra* note 4, at 35.

125. See Pub. L. No. 99-486, § 14(c), 100 Stat. 1229 (codified as amended at 29 U.S.C. § 214(c) (2006)).

126. WAGE AND HOUR LAW, *supra* note 94.

127. *Id.*

128. TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 4.

129. *Id.*

130. WAGE AND HOUR LAW, *supra* note 94.

Employees may also be paid by a piece rate for each part or product they produce.¹³¹ The employer must establish the piece rate by standard industrial practice for non-disabled workers—dividing the prevailing hourly wage rate by the normal number of units produced per hour.¹³² An employee with a disability is paid the full piece rate that an employee without a disability is paid for the same piece.¹³³ Of course, it follows that if their productive capacity is impaired, a worker with disabilities will ultimately be paid less than a worker without a disability. This is often, for practical reasons, a fairer and more objective method of calculating a disabled worker's wages, if appropriate for the type of job being performed (i.e., where specific parts or components are made or where the whole of a product is pieced together by the worker with a disability). However, the use of piece rates derived from competitive industry standards are rarely used in work settings solely employing individuals with disabilities since their operations are usually modified to adapt to the capabilities of blind (and otherwise disabled) workers.¹³⁴ Where piece rates are utilized, certain criteria and methods should be used to make such wage rate determinations such as stopwatch time studies, predetermined time systems, and standard "measurement methods establishing standard production rates of nondisabled workers."¹³⁵ Piece rates should be based on the production rates and wage rates of experienced nondisabled workers performing comparable work of similar quality.¹³⁶

Since workers in sheltered workshops and other work centers often operate as teams, wages are often pooled and then divided.¹³⁷ Employers are allowed to pool earnings only where individual piece rates cannot be established for each worker in the production team.¹³⁸ When dividing pooled earnings, the employer "should make every effort to objectively divide the earnings according to the productivity level of each individual worker."¹³⁹ However, separating these earnings accurately may often be impossible.¹⁴⁰

131. See 29 C.F.R. § 525.12(h) (2012).

132. *Id.* § 525.12(h)(1).

133. See *id.*

134. TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 20.

135. WAGE AND HOUR LAW, *supra* note 94.

136. 29 C.F.R. § 525.12(h)(1)(i). For more guidance on the "work measurement method used to establish piece rates," see *id.* § 525.12(h)(2).

137. TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 5.

138. 29 C.F.R. § 525.12(i).

139. *Id.*

140. TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 5.

Several problems exist regarding the low wages paid to workers with disabilities. For example, issues arise where an employer is not required to obtain a 14(c) certificate.¹⁴¹ If the prevailing wage for a type of job is high enough, a disabled worker's commensurate wage, which is based on productivity, may still be above the minimum wage.¹⁴² Although this situation might not raise 14(c) concerns, it may result in other FLSA violations or issues regarding discrimination against individuals with disabilities under the ADA.¹⁴³

C. Inherent Problems and the Need for Changes to the 14(c) Certification Program

Arguably the most pervasive problem affecting 14(c) workers is their lack of a voice to effectively represent their interests. This problem is caused by a confluence of two sets of circumstances: 1) in many cases, those with the most severe disabilities are unable, as a result of a disability, to communicate on their own behalf;¹⁴⁴ and 2) the concerns and goals of the parent or guardian are often different from the interests of the worker with the disability.¹⁴⁵ A parent's desire for his or her child to participate in a useful activity, even if primarily custodial, may often take precedence over a desire for the activity or job to be economically productive or rewarding.¹⁴⁶

Another inherent and systemic problem is the power imbalance between the employer and the employee resulting from the limited number of jobs for individuals with a disability.¹⁴⁷ Additionally, critics have noted that the subminimum wage requirement imposes an additional burden on workers with disabilities. Whereas a worker with a disability must prove his productivity in order to merit the national minimum wage, a worker without a disability is presumed to be worth at least the national minimum wage and does not have to prove sufficient productivity.¹⁴⁸

To highlight some of these issues, for example, a case study of the

141. See *Preventing Worker Exploitation Senate Hearing*, *supra* note 1, at 28 (statement of James B. Leonard, Former Att'y, U.S. Dep't of Labor).

142. *Id.*

143. *Id.*

144. See David T. Hutt, *Ensuring Fair Wages? Subminimum Wages for Individuals with Disabilities Under the Fair Labor Standards Act*, 45 CLEARINGHOUSE REV. 12, 14 (2011).

145. See TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 35 n.127.

146. See *id.* at 5.

147. See *id.*

148. *Id.* at 36

Pioneer Center, a former New York sheltered workshop, reported that many workers did not know exactly how much money they were making each week, and most, if not all, complained that their pay was too low.¹⁴⁹ In one example, a young worker asked the case study interviewers to help him get higher pay as he was finding it very difficult to afford food and rent.¹⁵⁰ Issues like this are common and are faced by many individuals with disabilities in the employment context.

An additional inherent problem with the 14(c) application process is caused by the fact that no specific information is required to be submitted by the petitioning employer about the specific disability of an individual who they are seeking to employ. A very telling reality, which is quite troubling, is how exceedingly rare it is for an employer's first 14(c) application to be denied.¹⁵¹ In fact, John L. McKeon, Deputy Administrator for Enforcement at the Wage and Hour Division (WHD) of the DOL could not recall any initial application that had ever been denied.¹⁵²

It is only for renewal applications that an employer is required to include information about individual workers, including the employer's determinations regarding each worker's productivity.¹⁵³ The renewal must also show each worker's earning rate and how it was calculated, specifying, of course, the precise disability impacting the worker's production.¹⁵⁴ Individual "team members" from the WHD examine how the wage determinations were made and attempt to ensure that they comply with paying an appropriate wage rate to that worker, commensurate to the prevailing wage rate.¹⁵⁵

One method of ensuring that disabled individuals who are paid a subminimum wage are not taken advantage of is for the DOL to stop granting certificates to potential 14(c) employers.¹⁵⁶ There are several options the DOL could consider to reduce utilization of 14(c)

149. STEPHEN T. MURPHY & PATRICIA M. ROGAN, CLOSING THE SHOP: CONVERSION FROM SHELTERED TO INTEGRATED WORK 84 (1995).

150. *Id.*

151. *Preventing Worker Exploitation Senate Hearing*, *supra* note 1, at 10 (statement of John L. McKeon, Deputy Adm'r for Enforcement, Wage and Hour Div., U.S. Dep't of Labor).

152. *Id.* McKeon responded to Senator Harkin's question: "First application, I don't know whether any have ever been denied." McKeon had previously stated that other applications, particularly renewals, may be denied "because the employer hasn't properly filled out the document . . . [o]r . . . they are not paying the correct prevailing rate or they are not paying the proportionate rate." *Id.*

153. *Id.*

154. *See id.*

155. *Id.*

156. *See* FRAMING POLICY ISSUES, *supra* note 87, at 20.

subminimum wage certificates. The DOL could simply put a cap on the number of certificates that are issued and it could implement more nuanced limitations to reduce utilization of these certificates.

First, the DOL could set time limits for individuals with disabilities receiving subminimum wages.¹⁵⁷ This could be done by setting a maximum of consecutive months that an individual could receive subminimum wages as well as by setting a lifetime maximum number of years.¹⁵⁸ Second, 14(c) employers would be required to submit an “individual transition plan” for each employer.¹⁵⁹ The plan would be submitted as part of an initial application and an updated plan would be required for a renewal application.¹⁶⁰ The plan would be jointly developed by the employer and the employee and would identify particular skills to develop, a timeline to achieve that skill, career aspirations, and specific actions the agency will take to move toward a permanent job placement.¹⁶¹

Third, the DOL could demand a “rebuttable presumption” that all 14(c) employers provide integrated employment.¹⁶² The burden of proof would fall on the employer to demonstrate a reason why the employee was segregated, if that were the case.¹⁶³ Fourth, the DOL would require 14(c) employers to provide updates on each employee receiving subminimum wages.¹⁶⁴ If the employee was not progressing according to the stated “individual transition plan,” the DOL could revoke the special certification and the employer would be required to pay the normal minimum wage. Fifth, the DOL could re-evaluate the employer’s current approach to determine an individual worker’s productivity for essential job functions.¹⁶⁵ Essentially, this re-evaluation relying on technology and better job matching could lead to a calculation of the worker’s productivity in a favorable way to the employee that could increase the pay to minimum wage or beyond.¹⁶⁶

157. *Id.*

158. *Id.*

159. *Id.*

160. See *Building a Better Economic Future for Americans with Disabilities*, WASH. INSIDER (Nat’l Disability Inst.), July 2009, at 10, available at http://www.realeconomicimpact.org/data/files/other%20publications/washington_insider_1.6.pdf.

161. *Framing Policy Issues*, *supra* note 87, at 20.

162. *Id.* at 21.

163. *Id.*

164. See *id.*

165. *Id.*

166. See *id.*

IV. 14(c) EMPLOYERS AND WORK ENVIRONMENTS

Historically, segregating persons with disabilities was considered a protective mechanism that allowed them to safely experience the benefits of a work environment. Today's sheltered workshops reflect these origins, but have not evolved to fit in a culture that has come to appreciate the ability and the legal right of individuals with disabilities to work successfully in an integrated environment, even if employers must make reasonable accommodations to enable them to do so.¹⁶⁷

The 1986 FLSA Amendments permitted the establishment of work activity centers.¹⁶⁸ Work activity centers are facilities that provide therapeutic activities for workers with the most severe disabilities affecting their earning capacity.¹⁶⁹ For these centers, the minimum wage rate granted by the DOL in a special certificate may be less than 50% of the minimum wage.¹⁷⁰ The concept of a work activity center is different from what is commonly called a sheltered workshop, where "productive business activity typically predominates."¹⁷¹

DOL regulations have required work activity centers to provide "therapeutic activities" with "inconsequential" production.¹⁷² However, in 1981, it was reported that work activity centers "did not appear to exclusively provide therapeutic activities, and it did not appear that the production of most handicapped workers was inconsequential."¹⁷³ Work activity centers offer support services of varying effectiveness designed to enable workers with disabilities to secure and perform jobs.¹⁷⁴ This may include, for example, setting up or providing transportation for their workers.¹⁷⁵

Most 14(c) employers are nonprofit work centers.¹⁷⁶ In 2001, out of the 5,600 employers and businesses paying workers subminimum wages under 14(c) certificates, 84% were work activity centers.¹⁷⁷

167. Susan Stefan, *Beyond Residential Segregation: The Application of Olmstead to Segregated Employment Settings*, 26 GA. ST. U. L. REV. 875, 897 (2010) (internal citation omitted).

168. Pub. L. No. 99-486, § 14(c), 100 Stat. 1229 (codified as amended at 29 U.S.C. § 214(c) (2006)).

169. WAGE AND HOUR LAW, *supra* note 94.

170. *See id.*

171. TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 19.

172. *Id.* at 21; 29 C.F.R. § 525.23 (2012).

173. 1981 GAO REPORT, *supra* note 47, at 18.

174. 2001 GAO REPORT, *supra* note 4, at 13.

175. *Id.* 97% of the work centers reviewed by GAO in 2001 provided or helped obtain transportation for workers. *Id.*

176. *Id.* at 9.

177. *Id.*

These work centers employed approximately 95% of all workers paid subminimum wages under a 14(c) certificate.¹⁷⁸ Private nonprofit entities accounted for more than 80% of the approximately 4,700 work centers.¹⁷⁹ State or local government organizations made up 13% of the total work centers.¹⁸⁰ For-profit businesses accounted for 9% of all employers and employ an even smaller percentage of all total 14(c) employees.¹⁸¹

But one must not be fooled by the nonprofit designation or by the seemingly beneficent nature of work activity centers or other employment programs. Although technically nonprofit, such organizations and work centers do make money.¹⁸² Furthermore, the production contracts obtained by work centers are often supplying products to for-profit businesses.¹⁸³ James Leonard, a former DOL attorney, testified the following to Congress:

[T]here is a certain incentive for [work centers] to reduce their costs because of what they are trying to sell to others. . . . [M]erely because they are not for profit and really because they are running a sheltered workshop does not mean that they wouldn't try to cut corners in a way that would harm workers.¹⁸⁴

As Susan Stefan notes in her article "Beyond Residential Segregation: The Application of *Olmstead* to Segregated Employment Settings," the ongoing existence of segregated sheltered workshops results from a government framework which creates incentives for such services, as well as the preferences of parents and agency staff and the profits that many workshops receive.¹⁸⁵ She asserts:

[It is a] fundamental fact that segregated sheltered work settings are maintained, not for the benefit of people with disabilities, but because they are part of a long-existing and well-funded system of congregating and segregating people with disabilities. . . . [S]heltered workshops are also cash cows for a number of very large and

178. *Id.*

179. *Id.*

180. *Id.*

181. *See id.* Hospitals, schools, and other work settings employed approximately 7% of all 14(c) workers. *See id.*

182. *See Preventing Worker Exploitation Senate Hearing, supra* note 1, at 42 (statement of Sen. Tom Harkin, Member, S. Comm. on Health, Educ.. Labor, and Pensions).

183. *Id.* at 37 (statement of James B. Leonard, Former Att'y, U.S. Dep't of Labor).

184. *Id.*

185. Stefan, *supra* note 167, at 879.

profitable industries.”¹⁸⁶

She goes on to make the accusation that the government is not serious about integration and only supports the notion through policy statements, but not through action or enforcement.¹⁸⁷

A. Production Contracts as Primary Source of Work

Many of the jobs at work activity centers come from production contracts to make a specific product or to perform certain tasks for an outside company.¹⁸⁸ Businesses typically contract with workshops to do jobs that are “not major parts of their businesses.”¹⁸⁹ A business is often motivated to outsource certain production and tasks to a workshop employing workers with disabilities since it saves money as a result of the low wages paid – it is more profitable to have the work be performed by workshop “participants” rather than by the company’s own workers who receive much higher pay.¹⁹⁰

A prevalent problem with this dependency on outside contracts is that the acquisition of such contract work is inconsistent and comes in cycles.¹⁹¹ In a case study of the Pioneer Center, a former sheltered workshop in New York, it was found that given the inconsistency of contract work, there were times when there was little work and the employees subsequently received less pay.¹⁹² During these slow phases, although some workers participated in counseling groups or found other tasks at the Pioneer workshop, some refused to work because they did not think they were earning enough.¹⁹³

This dependency on contract work is one of the several reasons why workers often fail to integrate into competitive employment.¹⁹⁴ Contract work involving specialized production tasks is typically not common or similar to the employment opportunities available in the

186. *Id.* at 880.

187. *See id.* at 886 (“[S]heltered workshops have stubbornly hung on, largely because they are hugely underwritten by federal dollars and a federal system that structurally subsidizes segregation, even as it rhetorically supports integration and provides limited funding to integrated programs.”).

188. *See id.* at 877, 879 n.22.

189. STEPHEN T. MURPHY & PATRICIA M. ROGAN, CLOSING THE SHOP: CONVERSION FROM SHELTERED TO INTEGRATED WORK 44 (1995).

190. *See id.*

191. *See id.* at 43.

192. *See id.*

193. *Id.*

194. *See id.* at 43-44.

community's competitive job market.¹⁹⁵ The Pioneer case study found that workshop tasks, since they are not necessarily matched to each worker's abilities and preferences, do not foster some of the stated goals of sheltered workshops, "vocational self-confidence, motivation, and proficiency."¹⁹⁶

Furthermore, the piecework provided by production contracts is often repetitive.¹⁹⁷ When contracted work is not available, some sheltered workshops provide "make work" for their "clients."¹⁹⁸ This type of fake, inconsequential work does little to assist with the process of moving from segregated employment settings to those that are integrated and competitive.¹⁹⁹ Thus, such a work setting also lacks the "hallmarks of therapy or treatment" since such piecework is rarely individualized to the capabilities of the worker.²⁰⁰

B. Funding for Employers

The existence of disabilities in the workplace places a large financial burden on employers. Required assessments and satisfactory accommodations for workers with disabilities, some of whom have multiple and severe disabilities, often require significantly sophisticated equipment and a higher level of staff and managerial training.²⁰¹ Work centers commonly have two sources of funding: grants from federal and state agencies and contracts for the goods that they produce.²⁰² According to a 2001 GAO Report, production contracts for goods and services accounted for 35% of work center funding.²⁰³ Thus, the limited, albeit significant, production output of work centers is typically unable to pay for itself. In the same study, one New York work center reported obtaining \$275,000 in production contracts.²⁰⁴ The same center, *in addition* to its wages for 14(c) workers, had direct expenses of \$690,000

195. *See id.* at 44.

196. *Id.*

197. Stefan, *supra* note 167, at 895.

198. *Id.*

199. *See id.* at 896.

200. *Id.*

201. *See* TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 4.

202. 2001 GAO REPORT, *supra* note 4, at 14-15.

203. *Id.* at 15. Workshops receive only 35% of their funding from production contracts and 9% from retail sales. *Id.* The bulk of funding comes from state and county agencies (46%). *Id.* The remainder of workshop funding comes from donations (2%), investment income (1%), and other sources (7%). *Id.*

204. *Id.* at 17.

for the salaries of its support staff and the cost of materials.²⁰⁵

Work activity centers must comply with the ADA, which requires numerous accommodations for a high volume of individuals with varying types and severities of disabilities.²⁰⁶ In 2001, the GAO reported that 95% of the work centers provided work schedule modifications, 85% provided job restructuring, and 72% provided specialized equipment.²⁰⁷ Often, this specialized equipment comes at a high price.²⁰⁸ Thus, a common problem is funding for such a high level of required accommodations, including those necessary to achieve an acceptable level of production from workers with severe disabilities.²⁰⁹ The availability of state grants and the employer's ability to meet state eligibility criteria determines the type and level of support services the center can provide.²¹⁰

V. WAGE AND HOUR REGULATIONS, OVERSIGHT, AND ENFORCEMENT

The WHD employs investigators who are authorized to verify whether the wages being paid to workers with disabilities are actually commensurate and accurate determinations of a worker's productivity.²¹¹ An investigator is authorized to review employer records for accuracy.²¹² Investigators may also seek to confirm employment data by contacting other employers who provided employment statistics to assist in making the wage determination.²¹³ Investigators also will review the time measurements and productivity ratings of the individual workers.²¹⁴ Once their review is complete, an investigator will issue his findings to the employer.²¹⁵

205. *Id.*

206. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2006).

207. 2001 GAO REPORT, *supra* note 4, at 14.

208. *See id.*

209. *See id.*

210. *See id.* For example, a work center in California was required by the state to have each worker working at least twenty hours per week, have an 85% attendance rate, and have a productivity level of 10%. *Id.* At the same work center, a program aimed to prepare workers for integrated jobs in the community was limited to thirty slots because of funding restrictions. *Id.*

211. *Investigation Procedures Under FLSA Section 14(c)*, U.S. DEP'T OF LAB., <http://www.dol.gov/elaws/esa/flsa/14c/20a.htm> (last visited May 7, 2013).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

Although legal challenges to wage rate determinations are rare,²¹⁶ the Act provides that an employee, or their parent or guardian, may petition the DOL to review the special minimum wage rate that their employer has been paying them.²¹⁷ The petition requesting a review of a special minimum wage determination may also be filed on behalf of other employees “similarly situated.”²¹⁸ Once filed, the DOL must assign the petition to an administrative law judge (ALJ) within ten days who will then conduct a hearing based on the record within thirty days after the assignment of the petition.²¹⁹ In this administrative proceeding, the employer bears the burden of proof and thus must demonstrate “that the special minimum wage rate is justified as necessary in order to prevent curtailment of opportunities for employment.”²²⁰ As discussed above, determining special minimum wage rates and proving that the rates are justified is a complex process that is prone to some inaccuracy.²²¹ The statute does, however, provide some guidance to the ALJ in coming to a determination and, by implication, provides guidance to employers when making their initial determination of the special minimum wage rate when setting it for individual workers.²²²

The factors that must be considered by the ALJ are the employee’s productivity, the conditions under which the productivity was measured, and the productivity of other employees performing similar work in the same vicinity.²²³ This presents an inherent problem. A company’s ability to obtain comparable wage and productivity data from competing companies in the same locality with similar production processes is particularly difficult.²²⁴ In fact, the mere finding of sufficiently similar processes, product lines, equipment, worker organization, and managerial oversight is a difficult and time-consuming process.²²⁵ In the instances of a work activity center, which focuses on individuals with disabilities, the work bears little resemblance to tasks that are commonly found in regular industry, and even where similarities exist, there are

216. See *infra* text accompanying notes 263–65.

217. Fair Labor Standards Act, 29 U.S.C. § 214(c)(5)(A) (2006).

218. *Id.* All employees (or their parent or guardian) must give written consent to the DOL in order to become a party to the action. *Id.*

219. *Id.* § 214(c)(5)(B).

220. *Id.* § 214(c)(5)(C).

221. See *supra* Part III.B.

222. § 214(c)(5)(D).

223. *Id.* § 214(c)(5)(D)(i)–(ii).

224. See TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 4.

225. *Id.*

noticeable differences in production methods.²²⁶ The Secretary of the DOL may review the record of the proceedings and may either adopt the decision reached by the ALJ or issues exceptions.²²⁷ The Secretary's decision becomes the final action by the DOL.²²⁸

A. Shortcomings of Wage and Hour Oversight, Regulations, and Enforcement

"[T]hey describe their work as 'triage.' We are doing triage with workers' wages. Good laws without adequate enforcement render the laws meaningless."²²⁹

Historically, the DOL has admitted to placing a low priority on the subminimum wage program.²³⁰ Most troubling about the lack of allocated government resources is that employers may continue to employ subminimum wages with expired certificates, either purposefully or by mistake, in violation of the Act.²³¹ In 2001, it was reported that the WHD conducted few self-initiated investigations and no mandate ever existed to actually conduct such investigations.²³² However, DOL stated that it had begun to devote additional resources to the program, with a focus on increasing enforcement efforts, and providing its staff and employers with more training and advice.²³³ Still, as found by the GAO, the DOL continued to lack the data required for effective oversight and, as a result, it was recommended that the DOL work to collect and analyze a sufficient amount of data required to properly manage the program and allocate resources.²³⁴

As of 2009, the WHD had conducted 135 14(c) investigations and site visits per year on average over the preceding five years.²³⁵ This number stands in stark contrast to the approximately 5,000 employers who have 14(c) certificates.²³⁶ Although these on-site investigations can be unannounced, they typically are not, and employers are given

226. *Id.* at 18.

227. § 214(c)(5)(F).

228. *Id.*

229. *Preventing Worker Exploitation Senate Hearing, supra* note 1, at 32 (statement of Kim Bobo, Executive Director, Interfaith Worker Justice).

230. 2001 GAO REPORT, *supra* note 4, at 4.

231. SEGREGATED & EXPLOITED, *supra* note 6, at 20.

232. 2001 GAO REPORT, *supra* note 4, at 26.

233. *Id.* at 4.

234. *Id.* at 4-5.

235. *Preventing Worker Exploitation Senate Hearing, supra* note 1, at 11 (statement of John L. McKeon, Deputy Adm'r for Enforcement, Wage and Hour Div., U.S. Dep't of Labor).

236. *See id.*

advance notice to ensure that all 14(c) records kept by the employer will be onsite and ready to be reviewed on the day of the site visit.²³⁷ Furthermore, 14(c) investigations take approximately twice as long as a “normal” FLSA investigation given the requirement that each individual employee’s records must be examined since they must not only have a disability, but also be impaired by the disability for their specific work.²³⁸

Because of the government’s limited resources and the allocation of those resources, there exists a gross deficiency of WHD investigators and attorneys. In each regional office, there are approximately two to four investigators who tend to conduct 14(c) investigations, although there are no DOL investigators who specialize specifically in 14(c) enforcement and oversight activities.²³⁹ As of 2009, there was somewhere between 730 and 750 investigators working for the Wage and Hour Division.²⁴⁰ In 1975, there were approximately 921 Wage and Hour investigators.²⁴¹ As of fiscal year 2004, that number had declined to 788 – a reduction of fourteen percent.²⁴² James B. Leonard, a former U.S. Attorney for the Solicitor’s Office of the DOL, estimates that each full-time investigator in the WHD is responsible for protecting 245,000 workers.²⁴³ The Solicitor’s Office of the DOL has also encountered significant staff reductions.²⁴⁴ The legal staff of the Solicitor’s Office had 786 employees in 1992.²⁴⁵ In 2001, that number had been reduced to 709 employees.²⁴⁶ As of January 2007, the Solicitor’s Office had only 590 employees.²⁴⁷ In the meantime, the population of the workforce has risen and the WHD has acquired a greater workload resulting from more laws and programs to enforce.²⁴⁸

237. *See id.* at 12.

238. *Id.* at 17.

239. *Id.* at 12.

240. *Id.* at 15.

241. *Id.* at 30 (statement of James B. Leonard, Former Att’y, U.S. Dep’t of Labor). John L. McKeon of the WHD claimed, in his testimony, that Wage and Hour actually had 1,500 investigators in 1975. *Id.* at 15. Perhaps he meant to testify that there were approximately 1,500 investigators for the entire DOL.

242. *Id.* at 30.

243. *Id.* The laws that WHD investigators enforce protect more than 135 million workers in over 7 million employment establishments. *Id.*

244. *See id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *See id.* at 30. While staff reductions have occurred in the Wage and Hour Division and Solicitor’s Office of the DOL, “[the WHD] has been given other laws to enforce, and the workforce has increased as well.” *Id.* at 26. Laws and programs that WHD investigators are also tasked with

DOL has begun to improve their oversight and enforcement of the 14(c) program. Several 2001 GAO recommendations²⁴⁹ regarding oversight of the 14(c) program have purportedly been implemented.²⁵⁰ For example, the regional 14(c) team leader position was reinstated and a partnership was formed with several private organizations to assist in educating the 14(c) employers.²⁵¹

B. Improving Oversight

One possible solution for a fairer subminimum wage system is for the DOL to allocate more resources to ensure compliance with all aspects of the certificate program. The DOL faces many obstacles which may prevent the feasibility of this solution.²⁵² That being said, it is possible for oversight to be improved in order to effectively manage the program.

For starters, Congress could increase funding to the DOL in order to support more effective enforcement and oversight.²⁵³ The GAO report highlighted several specific ways for the WHD to improve its oversight effort.²⁵⁴ The DOL must improve the accuracy of data collection with regard to information about employers, employees, certification lapses, renewals, and investigations.²⁵⁵ For example, the DOL claimed to have conducted 234 investigations during a three-year period.²⁵⁶ When comparing this data to data from employers, it turns out that only 141 investigations were field investigations; the rest were simply reviews of renewal applications.²⁵⁷ Improving data could be done through deletion of outdated records and through the continuous verification of discrepancies.²⁵⁸ Additionally, the DOL should keep

enforcing include the FLSA, the Occupational Safety and Health (OSHA), the Mine Safety and Health Act (MSHA), the Employee Retirement Income Security Act (ERISA), and many others. *Id.* at 30.

249. See 2001 GAO REPORT, *supra* note 4, at 5.

250. *Preventing Worker Exploitation Senate Hearing*, *supra* note 1, at 8 (statement of John L. McKeon, Deputy Adm'r for Enforcement, Wage and Hour Div., U.S. Dep't of Labor).

251. *Id.*

252. See 2001 GAO REPORT, *supra* note 4, at 4-5 (citing the low priority of Section 14(c) oversight, lack of accurate information on number of employers and workers who participate in the program, lack of data tracking resources devoted to the program, lack of accurate data on investigations, and lack of follow up when employers do not respond to a renewal notice).

253. SEGREGATED & EXPLOITED, *supra* note 6, at 49.

254. See 2001 GAO REPORT, *supra* note 4, at 35-37.

255. *Id.* at 35-36.

256. *Id.* at 30.

257. *Id.*

258. *Id.* at 35-36.

track of all time that its employees spend managing and overseeing the 14(c) program.²⁵⁹ This recordkeeping would help assess how much time and resources are actually needed to properly oversee the program.

Due to the lack of resources and lack of priority placed on the regulation of the 14(c) program, the DOL has typically only conducted investigations when there was a complaint from an employee.²⁶⁰ Since many workers who participate in the subminimum wage program have cognitive disabilities, they are often unaware of their rights and are particularly susceptible to employer abuse.²⁶¹ As a result, the DOL rarely receives any complaints from workers because many participants do not realize that their employers are taking advantage of them.²⁶² The DOL should encourage outreach to individual workers and their families to ensure that they are aware of their rights under the 14(c) program and are aware of the appeal process to receive back wages if they have not been properly compensated.²⁶³ Also, in order to increase the amount of investigations, the DOL should conduct self-initiated investigations of a random sample of 14(c) employers to estimate the degree of compliance nationwide.²⁶⁴ This would allow investigators to address specific instances of abuse and to get a sense of the amount of resources truly needed to effectively oversee the program. Since the 2001 GAO Report, the DOL has taken some steps to improve the knowledge of its investigators.²⁶⁵

The DOL must also follow up with 14(c) employers who do not reply to renewal notices.²⁶⁶ The risk of a lack of response is that these employers will continue to pay employees below the federal minimum

259. *Id.* at 36.

260. *See id.* at 26.

261. Hutt, *supra* note 144, at 14.

262. *See id.* "The problem with these employers is the workers typically, because of their handicaps, are not necessarily as likely as other workers to understand when they are being exploited, when their wages are improper." *Preventing Worker Exploitation Senate Hearing, supra* note 1, at 25 (statement of James B. Leonard, Former Att'y, U.S. Dep't of Labor).

263. *See* JOHN BUTTERWORTH ET AL., INST. FOR CMTY. INCLUSION, UNIV. OF MASS. BOS., STATE AND INTERNATIONAL EFFORTS TO REFORM OR ELIMINATE THE USE OF SUB-MINIMUM WAGE FOR PERSONS WITH DISABILITIES 5, 7 (2007) [*hereinafter* STATE AND INTERNATIONAL EFFORTS TO REFORM], available at www.drs.virginia.gov/essp/downloads/WIRReport011207.doc (stating that over a six-year period, increased enforcement efforts led the Department of Labor to order violators to pay \$5.6 million in back wages to around 58,000 workers).

264. 2001 GAO REPORT, *supra* note 4, at 36.

265. Some of these steps include the use of training videos. *See e.g., Section 14c Investigations – US Department of Labor Training Video Production* (May 17, 2010), <http://www.solidlinemedia.com/2010/05/section-14c-investigations-us-department-of-labor-training-video-production>.

266. 2001 GAO REPORT, *supra* note 4, at 36-37.

wage without the DOL certificate that permits the lower wages. Such employers may illegally underpay their workers. In addition, the DOL should provide better training for its staff that oversee the program and improve its external website information for employers and employees.²⁶⁷ Another means of providing better information is for the DOL to regularly conduct outreach sessions for employers so they can become more familiar with the requirements, which will foster a higher level of compliance.²⁶⁸ Additionally, the DOL could require 14(c) employers to annually report “wages, progress, attempts to move to integrated employment environments, and reasons why the individual [has not] moved to integrated employment for each employee.”²⁶⁹

Another aspect of better oversight would be to create harsher penalties for employers that violate the requirements of 14(c) because currently employers face weak or no penalties even if they are caught violating the law.²⁷⁰ Potential violations of employers include, but are not limited to, improperly tracking actual hours worked, output for each worker, and output for similarly situated workers in the geographic area.²⁷¹ In 2009, a former DOL attorney, James Leonard, told the Senate Health, Education, Labor and Pensions Committee that the only punishment implemented for employers who violate the subminimum wage rules is to pay employees back wages that they should have received.²⁷² He further explained that “there’s almost a financial incentive to take a chance that you won’t be caught” since the penalties have no bite.²⁷³ Harsher potential penalties might include paying fines to the government, interest to employees on the money they were entitled to, and additional damages for the harm suffered by the employees for not receiving their wages in a timely manner.

A substitute approach to oversight would be to spread some of the responsibility to other public and private organizations in addition to the DOL. It is widely acknowledged that increasing enforcement of 14(c) provisions would not, in and of itself, be enough.²⁷⁴ Oversight and

267. *Id.* at 37.

268. *See id.*

269. SEGREGATED & EXPLOITED, *supra* note 6, at 49.

270. Phillip Brasher, *Labor Officials Admit Atalissa Shortcomings*, THE DES MOINES REG. (Jan. 6, 2009), <http://www.desmoinesregister.com/article/20090310/NEWS10/903100398/Labor-officials-admit-Atalissa-shortcomings>.

271. *See Most Common Violations Found During an Investigation Under FLSA Section 14(c)*, U.S. DEP’T OF LAB., <http://www.dol.gov/elaws/esa/flsa/14c/20b.htm> (last visited Feb. 5, 2013).

272. Brasher, *supra* note 270.

273. *Id.*

274. *See Preventing Worker Exploitation Senate Hearing*, *supra* note 1, at 21 (statement of

assistance could be provided effectively by private organizations such as the National Disability Rights Network through their Client Assistance Program.²⁷⁵ As part of the 14(c) process, individuals who are paid subminimum wages could be assigned a local regulator or guardian to represent their needs and rights. Such persons would act on 14(c) employees' behalf to ensure employer compliance and minimize abuse. A regulator could be employed by a private agency at the local level to ensure 14(c) compliance. One such proposal has been that the DOL simply expand outreach and making greater use of the "eyes and ears" of those organizations most likely to have knowledge of workplace practices.²⁷⁶ Alternatively, state and local governments could assist the DOL with this proposed monitoring process.²⁷⁷

VI. FAILURE TO INTEGRATE DISABLED WORKERS INTO JOBS AND SOCIETY

"Sheltered workshops, like most segregated education programs, were a way to prove that people with disabilities could indeed work and learn. Sheltered programs were not envisioned to develop into industries that precluded people with disabilities from being integrated into society and all facets of community life."²⁷⁸

Although the goal is always to integrate workers with disabilities into competitive employment within the community, work activity centers and sheltered workshops dominate the field. In 2000, work centers employed approximately 400,000 14(c) workers out of an estimated 424,000 total workers with disabilities who earned subminimum wages.²⁷⁹

In 1990, the ADA was passed with one of its major purposes being to end the segregation of individuals with disabilities in the employment

Curtis Decker, Exec. Dir., Nat'l Disability Rights Network).

275. *Id.*

276. *Id.* at 28 (statement of James B. Leonard, Former Att'y, U.S. Dep't of Labor) ("In order to do a better job of finding employers who are violating the law, DOL needs to make more use of the 'eyes and ears' of individuals and organizations who are most likely to have knowledge of workplace practices affecting handicapped workers. DOL has in recent years had various so-called 'partnerships' with employers and employer organizations, but very few if any partnerships with worker advocacy organizations that have ties to local communities. Just as some cities work closely with community groups to bring criminal activity to their attention, DOL must expand its outreach in this manner.").

277. BUTTERWORTH ET AL., *supra* note 263, at 7.

278. Judith E. Heumann, *Foreword* to STEPHEN T. MURPHY & PATRICIA M. ROGAN, *CLOSING THE SHOP: CONVERSION FROM SHELTERED TO INTEGRATED WORK*, at vii (1995).

279. 2001 GAO REPORT, *supra* note 4, at 18.

context.²⁸⁰ As instructed by the ADA,²⁸¹ the Attorney General issued the so-called “integration regulation,” which states that “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”²⁸² “Integrated setting” has been defined to mean “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.”²⁸³ A crucial aspect of the “integration mandate” is individual choice.²⁸⁴ An individual with a disability has the right to receive services in the most integrated setting appropriate, but also has the right to refuse separate or segregated services which are seemingly offered to benefit the individual’s disability.²⁸⁵ Furthermore, under the Rehabilitation Act,²⁸⁶ a recipient of federal funds is supposed to “administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.”²⁸⁷

However, it must be emphasized that the ADA “does not prohibit segregated services that operate to the benefit of people with disabilities and are genuinely chosen and preferred by people with disabilities.”²⁸⁸ In the eyes of the ADA, “integrated service is the rule, and segregated service is the exception.”²⁸⁹ Furthermore, the integration regulation is tempered by the qualification that the setting must be “*appropriate* to the needs of *qualified* individuals with disabilities.”²⁹⁰ This goes along with the requirement for a claim under Title II of the ADA that a plaintiff must not only have a disability but must also be “qualified” for the services they desire.²⁹¹ In 1999, the Supreme Court held in *Olmstead v. L.C.*²⁹² that a “[s]tate generally may rely on the reasonable assessments of its own professionals in determining whether an individual ‘meets the essential eligibility requirements’ for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove

280. See Americans with Disabilities Act, 42 U.S.C. § 12101(a) (2006).

281. See 28 C.F.R. pt. 35, app. A (2012).

282. 28 C.F.R. § 35.130(d) (2012).

283. 28 C.F.R. pt. 35, app. B (2012).

284. See *id.* (providing that “persons with disabilities must be provided the option of declining to accept a particular accommodation”).

285. Stefan, *supra* note 167, at 883.

286. 29 U.S.C. § 794 (2006).

287. 28 C.F.R. § 41.51(d) (2012).

288. Stefan, *supra* note 167, at 878.

289. *Id.* at 935.

290. 28 C.F.R. § 35.130(d) (2012) (emphasis added).

291. 42 U.S.C. § 12131(2) (2006) (defining the term “qualified individual with a disability”).

292. 527 U.S. 581 (1999).

a patient from the more restrictive setting.”²⁹³

The National Disability Rights Network (NDRN) argues strongly, and quite convincingly, that the subminimum wage program and segregated employment environments, such as work activity centers, violate the spirit and purpose of the ADA, the Supreme Court’s holding in *Olmstead*,²⁹⁴ and a general national policy of inclusion of individuals with disabilities.²⁹⁵ In *Olmstead*, Justice Ruth Bader Ginsburg, writing for the majority, articulated that although States “need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities” and must “administer services with an even hand,” “*unjustified isolation*” (operating as a restriction on a disabled individual’s ability to integrate) “is properly regarded as *discrimination based on disability*.”²⁹⁶ The Court recognized and gave weight to the determinations of the Attorney General regarding the integration and reasonable modification regulations of the ADA.²⁹⁷ First, the Attorney General validly concluded that “unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination based on disability prohibited by Title II.”²⁹⁸ Second, the Attorney General found that States could only resist modifications that ““would fundamentally alter the nature of the service, program, or activity.””²⁹⁹ Thus, the Court historically and quite importantly announced the general principal that “unjustified isolation” is “discrimination based on disability.”³⁰⁰ Lastly, but quite importantly for our analysis, the Supreme Court cautioned against situations in which an organization or government entity will be pressured into “attempting [integration] compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition.”³⁰¹

Sheltered workshops and work activity centers have a long history of exploiting their workers’ low wages and failing to rehabilitate and transfer workers with disabilities into integrated and competitive work settings.³⁰² Although workshops often justify paying subminimum

293. *Id.* at 602 (quoting 28 C.F.R. § 35.130(d)).

294. *See id.* at 600-02.

295. SEGREGATED & EXPLOITED, *supra* note 6, at 45.

296. *Olmstead*, 527 U.S. at 597 (emphasis added).

297. *See id.*

298. *Id.* at 596.

299. *Id.* at 597 (quoting 28 C.F.R. § 35.130(b)(7) (1998)).

300. *Id.*

301. *Id.* at 610 (Kennedy, J., concurring).

302. *See* Ellen R. Anderson, *Invisible Laborers: Sheltered Workers Under the National Labor*

wages by claiming that their intention is to prepare workers for competitive jobs in the community,³⁰³ this stated goal of integration is aspirational, in some cases rhetorical, and is rarely achieved on a significant scale.³⁰⁴ Bringing challenges against unnecessarily segregated employment settings is important to solving the problem, but such actions are uncommon and rarely successful.³⁰⁵ In the late 1970s, the DOL reported that only ten to fifteen percent of sheltered workers were placed annually into integrated employment.³⁰⁶ More troubling is that most workers who found integrated employment through their workshops did so during their first year at the workshop.³⁰⁷ Nationally, only three percent of workers who had been working at a workshop for more than two years would be placed in competitive employment.³⁰⁸

An insightful proposal by the National Council on Disability to President Barack Obama seeks to address this problem, in part, through better notification with the goal of increasing worker awareness of opportunities for integrated employment.³⁰⁹ The Council recommends:

The Department of Labor should undertake rulemaking to require all participants of 14(c) certificate programs to provide twice annually to all workers the opportunities to transition from a 14(c) setting to a supported employment situation in an integrated worksite with competitive wages. Such notice should also include information about benefit work incentive counseling and peer support.³¹⁰

In attempting to propose the best approach to achieving greater levels of integrated employment, the Council stressed a supported employment model.³¹¹ The Council noted that an increasing number of

Relations Act, 3 LAW & INEQ. 265, 267-68 (1985).

303. See, e.g., *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. 536, 537 (1977).

304. See Anderson, *supra* note 302, at 268.

305. It has been noted that when challenging the “continued operation of segregated vocational settings,” the best strategy is “not to challenge any individual sheltered workshop or set of workshops, but to challenge the state policies and practices that fund unnecessarily segregated vocational services when people with disabilities would prefer to be involved in integrated supported employment programs.” Stefan, *supra* note 167, at 909. Only one case has ever been brought to challenge a public entity for its funding of sheltered workshops. *Id.* (citing *Schwartz v. Jefferson Cnty.*, No. 2004CV000091 (Jefferson Cnty. Cir. Ct. Feb. 24, 2004)).

306. Anderson, *supra* note 302, at 268.

307. *Id.* at 268, n.19.

308. *Id.*

309. See NAT’L COUNCIL ON DISABILITY, SUBMINIMUM WAGE AND SUPPORTED EMPLOYMENT 11 (2012), available at <http://www.ncd.gov/publications/2012/August232012/>.

310. *Id.*

311. See *id.*

states are adopting what is known as the “Employment First model,” which, in theory, creates the “expectation that integrated employment should be considered the first and preferred option for all people with disabilities,” both developmental and intellectual.³¹² Although the Council reported that the approaches of different states varied significantly, they observed that “[s]tates with strong track records of integrated employment outcomes have reflected a values-based philosophy in their financial arrangements with providers, reflecting a strong preference for integrated employment outcomes as opposed to segregated and non-work options.”³¹³ Thus, in theory, a strong endorsement of an “Employment First model” through the actions of each individual state, as well as the federal government, would be a giant step in the right direction to achieving greater levels of integrated employment.

An important part of this analysis recognizes the incredible changes in public perception of workers with disabilities, as well as technological advances making new accommodations possible. Notably, it was twenty-five years ago that Judge Ellison, writing for the Federal District Court of the Northern District of Oklahoma, recognized the “radical change” in the employment capabilities of persons with severe disabilities:

The Court is cognizant of the radical change which the perception of employment capabilities of persons with severe disabilities has undergone in the past several years. Whereas sheltered workshops and work activity centers were previously considered the only possible place in which to employ people with disabling conditions, now many professionals consider these places the last resort when every other employment option has failed.³¹⁴

To further the argument in favor of increased “supported employment” opportunities,³¹⁵ Judge Ellison went on to suggest that “[h]igh priority should be directed toward development of a partnership with the business community to educate and obtain the assistance of not only the leadership but also rank and file workers in creating integrated employment options for persons with severe disabilities”³¹⁶

312. *Id.* at 13.

313. *Id.*

314. *Homeward Bound Inc. v. Hissom Mem’l Ctr.*, No. 85-C-437-E, 1987 WL 27104, at *38 (N.D. Okla. July 24, 1987).

315. *See* Stefan, *supra* note 167, at 886.

316. *Homeward Bound*, 1987 WL 27104, at *40.

VII. PROPOSALS FOR REFORM, SUPPORTED EMPLOYMENT, AND REPEAL

There should be no doubt that the 14(c) program is in dire need of drastic reform that may require its complete repeal. In his 2005 report for the Congressional Research Service, William Whittaker gave Congress several potential options going forward.³¹⁷ However, each option has advantages and disadvantages for which Congress will have to conduct their own cost-benefit analysis and thoroughly examine the many abuses that have occurred.

A gradual repeal of 14(c) has recently been proposed in Congress.³¹⁸ The gradual repeal would discontinue the issuance of wage certificates and revoke wage certificates from for-profit entities after one year, public or governmental entities after two years, and non-profit entities after three years.³¹⁹ This option would have the effect of putting individuals with disabilities on even financial footing in the workplace. Employers would no longer be able to distinguish such individuals or treat them differently.

Opponents of repealing 14(c) fear that certain consequences could potentially result from repeal of the 14(c) subminimum wage program if no other provisions are enacted to make up for the loss of the subminimum wage. For example, work centers have stated that if required to pay handicapped workers at the federal minimum wage, their payroll expenses would increase significantly and they would require additional funding in order to continue operating at current levels.³²⁰ In 2001, a work center in New York reported that the total wages of all 14(c) workers would increase from \$77,000 to \$289,000 if it was not allowed to pay a subminimum wage to those workers.³²¹ The National Industries for the Severely Handicapped articulated that requiring higher wages for employees with disabilities could lead to the elimination of

317. See TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 36-37 (“[O]ptions might include: developing additional financial subsidies for those in sheltered employment; an attempt to establish a clearer distinction between rehabilitation, on the one hand, and work on the other – with different patterns of activity for workers and for *clients* or *patients* engaged under Section 14(c); reconsideration of the concept of minimum compensation (and *commensurate* rates) in the Section 14(c) context; or elimination of the Section 14(c) exemption entirely. Conversely, Congress may find, upon review, that the present system is functioning as well as any might, and that no remedial action is warranted[.]”).

318. See H.R. 3086, 112th Cong. (1st Sess. 2011).

319. *Id.*

320. 2001 GAO REPORT, *supra* note 4, at 16.

321. *Id.*

employment for individuals with some of the most significant disabilities.³²²

Another possibility is reinstating a subminimum wage floor. This would protect workers from the most extreme forms of wage exploitation. However, critics highlight certain negative consequences of this action. “Under the commensurate wage system [as opposed to having a subminimum wage floor], even employees with extremely low levels of productivity are offered a seat at the workbench and are given an opportunity to improve their skills and their productivity to earn higher levels of compensation.”³²³ On the other hand, a total repeal of the 14(c) program may inhibit employment opportunities for individuals with disabilities, especially in the short term until other programs and laws are put in place.

If the 14(c) program is allowed to remain largely in place, the laws and regulations must be revised and strongly enforced to ensure the effective functioning of the 14(c) program and the protection of individuals with disabilities seeking gainful employment. First, under the principle of self-determination, every individual employee should be allowed to file their own 14(c) application, or have one filed on their behalf.³²⁴

Outreach to parents and guardians of many individuals with disabilities (especially those who have mental or cognitive impairments) is also essential to ensure that employees with disabilities are not being taken advantage of.³²⁵ Such outreach could serve to train representative figures to be in better touch with the desires and employment conditions of the employees with disabilities. As it often exists now, individual workers may be unhappy and dissatisfied with their work program, but, at the same time, their parent or guardian may appreciate the arrangement.³²⁶

Another possibility is for the government to focus on the supported

322. See *Preventing Worker Exploitation Senate Hearing*, *supra* note 1, at 49 (statement of Nat’l Indus. for the Severely Handicapped) (“In order to remain price competitive, the population of people with significant disabilities who are less than 85 percent productive will be supplanted by people with disabilities who have a higher productivity rate. This would eliminate the employment of people with the most significant disabilities—the people that the . . . [p]rogram was initially established to serve. In order to continue the employment of the people with the most significant disabilities, the cost of [production] contracts would increase substantially as full minimum or competitive wages are paid to the population of people with significant disabilities that are less than 85 percent productive.”)

323. *Id.* at 48.

324. See *id.* at 49.

325. See *id.* at 45 (statement of James B. Leonard, Former Att’y, U.S. Dep’t of Labor).

326. TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 35, n.127.

employment model, which would allow workers with disabilities to work in integrated environments while being paid at least the regular minimum wage.³²⁷ Of course, this may not be appropriate for workers with the most severe disabilities. The goal of supported employment is to find competitive employment for individuals with disabilities based on individualized assessments, as opposed to sheltered workshop contracted piecework.³²⁸ Some states have set guidelines for the supported employment model, identifying values and assumptions that are quite different and more preferable than those assumptions upon which the sheltered workshop model operates.³²⁹ Research has indicated that most people with disabilities, if given the choice, would prefer to be placed in a supported employment environment than to work in a sheltered workshop.³³⁰ Recently, the National Council on Disability made several recommendations regarding the 14(c) program in their final proposal to President Barack Obama, emphasizing the gradual phasing out of the entire subminimum wage program, while at the same time expanding supported employment services.³³¹ The proposal noted that between the 1980s and mid-1990s, supported employment services expanded greatly, spurred by federal investments and greater

327. Stefan, *supra* note 167, at 903.

328. *Id.*

329. *Id.* at 902-03. North Dakota's policy, for example, identifies seven key values:

- [1] People with disabilities are capable of being employed.
- [2] People with disabilities who want to work have the same right to work and earn a living wage as people who do not have a disability.
- [3] Facilitating community employment allows people (who have traditionally been excluded from community life) the fullest community participation.
- [4] People learn a job best on the job, not in simulated segregated environments.
- [5] Employment options are based upon preferences, skills and needs of the applicant. Jobs may be carved or created to fulfill the specific needs of an employer and the specific skills of an employee.
- [6] Employer/employee consultation and support is provided after a job has been found for as long as the employer and employee feel it is necessary.

Id. (citing N.D. DEP'T OF HUMAN RES., NORTH DAKOTA VOCATIONAL REHABILITATION SUPPORTED EMPLOYMENT GUIDELINES AND PAYMENT RATES (2007), <http://www.nd.gov/dhs/dvr/docs/guidelines-payment-rates.pdf>).

330. See Stefan, *supra* note 167 at 907 (citing Alberto Migliore et al., *Integrated Employment or Sheltered Workshops: Preferences of Adults with Intellectual Disabilities, Their Families, and Staff*, 26 J. VOCATIONAL REHABILITATION 5, 12 (2007)). However, although individuals with disabilities would themselves prefer to work in more integrated settings, opposition will often come from parents and guardians in cases seeking more integration. *Id.* at 916. Courts have held that a guardian's preference to keep an individual in an institution setting is insufficient when that individual would otherwise have been released. *Id.* at 916-17 (citing *Brown v. Bush*, 194 F. App'x 879 (11th Cir. 2006); *Richard C. v. Houstoun*, No. 89-2038, U.S. Dist. LEXIS 22172 (W.D. Pa. Sept. 29, 1999)).

331. See NATIONAL COUNCIL ON DISABILITY, *supra* note 309, at 14-16.

awareness.³³² However, the Council noted that the integrated employment rate for individuals receiving services from a state intellectual disability or developmental disability agency through supported employment peaked at 25% in 2001 and declined to 20.3% as of 2009.³³³ A key finding made by the Council is that employees in supported employment generate lower cumulative costs than employees in sheltered workshops.³³⁴ The Council made very specific recommendations to expand supported employment services to be implemented at both the state³³⁵ and federal levels.³³⁶ The proposal also notes that “[a]dditional federal investments are necessary to encourage states to shift funds away from sheltered workshops and non-work day services towards supported employment services and integrated employment outcomes.”³³⁷ Although federal investments may not be easy to come by in this decade where the government is looking to cut the budget and the deficit, we believe such a federal investment and infusion of funding are required to improve the sub-par employment situation of many individuals with disabilities and should not be cost-prohibitive.

Arguments against such proposals to reform or repeal the 14(c) program exist but come primarily from work activity organizations themselves, as well as some disability advocacy groups. For example, Joseph Larkin of the General Council of Workshops for the Blind, emphasizes that there are certain benefits of having a commensurate wage determination.³³⁸ By tying an individual’s wages to productivity, it creates motivation and incentive.³³⁹ On the other hand, if workers were to receive the minimum wage regardless of productivity, it could inhibit their motivation toward increased upward mobility and encourage less productivity.³⁴⁰

Some also argue that the use of subsidized or supported employment in place of the subminimum wage “would require a huge

332. *Id.* at 13-14.

333. *Id.* at 14.

334. *Id.* at 7. Notably, the cost-trend of supported employees shifts downward over time while, for individuals receiving sheltered workshop services, the cost-trend shifts upward over time. *Id.*

335. *Id.* at 14 (including expanding customized employment and collaboration among state agencies).

336. *Id.* at 15-16 (including requirements to enhance monitoring and compliance, and other recommendations for Congress).

337. *Id.* at 14.

338. See TREATMENT OF WORKERS WITH DISABILITIES, *supra* note 22, at 17.

339. See *id.*

340. *Id.*

outlay of additional funds.”³⁴¹ Furthermore, if not subsidized by the government, there is skepticism as to whether the costs could be made up in customer contracts.³⁴² What follows, arguably, would be permanent job losses for many workers with disabilities.³⁴³ Carl Ochsner, Executive Director of the Work Training Center, notes that the “economic realities” that prompted the creation of the 14(c) subminimum wage program are still relevant today.³⁴⁴

Building on the groundswell of legal decisions and landmark legislation mandating more integrated opportunities, as well as more inclusionary and respectful thinking about people with disabilities in society in general, many states are gradually embracing the Employment First movement.³⁴⁵ Employment First generally has as its most fundamental tenet the state-by-state commitment that “[e]mployment in the general workforce is the first and preferred outcome in the provision of publicly funded services for all working age citizens with disabilities, regardless of level of disability.”³⁴⁶

The employment idealized in this movement focuses on competitive employment, customized employment (in which a completely new job is created out of a direct matching of an individual’s abilities, skills, and interests with newly identified, unmet needs of an employer),³⁴⁷ or self-employment. Although in some ways the productivity-based pay system that is the 14(c) subminimum wage program may, on occasion, make economic sense, it is indisputable that technology, accommodations, and training have all improved for individuals with disabilities in the employment arena. Simultaneously, public perception has improved with respect to the productivity potential of employees with disabilities.³⁴⁸

341. Ochsner, *supra* note 114. It is estimated that such subsidization of the disabled labor market would cost California alone upwards of \$200 million dollars. *Id.*

342. *See id.*

343. *Id.*

344. *Id.*

345. NATIONAL COUNCIL ON DISABILITY, *supra* note 309, at 13.

346. APSE *Statement on Employment First*, APSE (Oct. 11, 2010), <http://www.apse.org/docs/APSE%20Employment%20First%20Statement.pdf>.

347. *What is Customized Employment?*, U.S. DEP’T OF LAB., <http://www.dol.gov/odep/categories/workforce/CustomizedEmployment/what/index.htm> (last visited May. 7, 2013).

348. *See* *Homeward Bound Inc. v. Hissom Mem’l Ctr.*, No. 85-C-437-E, 1987 WL 27104, at *38 (N.D. Okla. July 24, 1987).

VIII. CONCLUSION

Despite financial concerns for employers who take advantage of the 14(c) scheme, the rights of individuals with disabilities who are paid below minimum wage must not be overlooked. The best approach moving forward would be for Congress to adopt Representative Stearns' most recent proposal that would gradually repeal 14(c).³⁴⁹ First and foremost, individuals with disabilities will achieve financial equality in the workplace and will no longer be susceptible to being paid below the federal minimum wage. Employers will be encouraged to match individuals with disabilities to jobs where their disability does not prevent them from being as productive as their colleagues without disabilities.³⁵⁰ Also, a gradual repeal of 14(c) will allow employers adequate time to adjust their salary scheme to comply with the new financial reality. For those individuals who lose their current subminimum wage jobs as a result of a change in the legislative scheme, the hope would be that other private companies and non-profits organizations would be able to find ways to incorporate these individuals as part of their teams at minimum wage.

In the alternative, if Congress does not adopt a gradual retraction of 14(c), the DOL must pledge to provide significantly better oversight to the process. As this Note highlights, the DOL almost never turns down initial or renewal applications by employers and has done only limited investigations that yield virtually no penalties.³⁵¹ This is not the result of perfect compliance with the requirements by employers; it is the result of poor oversight and inadequate resources. As a result, employers can and do abuse this provision to the detriment of the individuals with disabilities whom they employ.³⁵² Employers should be held

349. H.R. 3086, 112th Cong. (1st Sess. 2011). This bill died in committee at the close of the 112th Congress. A new bill, the Fair Wages for Workers with Disabilities Act of 2013, which proposes virtually the exact same legislation as H.R. 3086, was proposed on February 26, 2013. H.R. 831, 113th Cong. (1st Sess. 2013).

350. For example, a deaf worker may be better situated to work in a very loud factory than his non-deaf colleague.

351. See *supra* Parts III.C, V.B.

352. See, e.g., Kauffman, *supra* note 8.

accountable and receive harsh penalties for failure to comply with 14(c) guidelines.

Increased oversight requires additional resources, which are not always plentiful, especially during tough economic times. However, the right of all individuals not to be discriminated against should be a supreme consideration. The DOL must commit the necessary resources to ensure that employers who hire 14(c) workers do not cut corners and provide outreach to workers with disabilities to better educate them about their rights.

One way or another, the status quo cannot continue. Whether by a full repeal of the outdated legislation or by improved regulation of employers who participate in the 14(c) program, drastic changes must be made to ensure that an important segment of the population is no longer abused in the workplace.

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