ARIZONA DEVELOPMENTAL DISABILITIES PLANNING COUNCIL℠

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Arizona Minimum Wage Report

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WHAT IS A COMMENSURATE WAGE RATE (SPECIAL MINIMUM WAGE)?[1]

To "prevent the loss of employment opportunities for workers with disabilities," Congress established a special minimum wage, which is a wage below the standard minimum wage, through Section 14(c) of the Fair Labor Standards Act (FLSA), passed in 1938. Almost 75 years and numerous amendments later, Section 14(c) remains intact and allows employers, after receiving special certification from the Wage and Hour Division of the U.S. Department of Labor (DOL), to pay less than the minimum wage to individuals whose earning or productive ability is considered to be "impaired by a physical or mental disability for the work to be performed." According to DOL, these special wages do not apply to all employees with disabilities -only to those who have disabilities that affect their production, which (as quoted from DOL) are "blindness, mental illness, mental retardation[2], cerebral palsy, alcoholism and drug addiction."

DOL determines the special minimum wage rates, which are reviewed and re-determined at least every six months, based on:

- Standard production rates for workers who do not have disabilities;
- Quantity and quality produced by the worker with a disability as compared to standard production rates; and
- Prevailing wages or wages paid to experienced workers who do not have disabilities for similar work in the same regions.

Commensurate Wage Rates

Example: An experienced, nondisabled worker who makes boxes can produce 40 boxes in an hour, but a worker with a disability can only produce 10 boxes an hour. The worker with a disability is considered 25 percent as productive as the experienced, nondisabled worker and should receive at least 25 percent of the prevailing wage rate for such work.

If the prevailing wage rate is determined to be $8 an hour, the worker with the disability employed under a special certificate would receive at least 25 percent of that wage rate, or $2 an hour, for performing the work.

(U.S. Department of Labor - http://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=359)

[1] United States Department of Labor, *Fact Sheet #39 The Employment of Workers with Disabilities at Special Minimum Wages;* http://www.dol.gov/whd/regs/compliance/whdfs39.htm. (All quoted comments in this section originate from this source.)
[2] The DOL uses what appear to be out-of-date terms and assumptions in labeling the types of disabilities that are deemed to affect production.

THE STATUS OF SPECIAL MINIMUM WAGES IN ARIZONA

In 2006, Arizona voters passed Proposition 202. Proposition 202 created a state minimum wage that is higher than the federal minimum wage rate and includes an annual cost of living increase.[3] What was noticeably absent from this new law was Section 14(c) of the FLSA that allows the special minimum wage for workers with disabilities. Attorney General Terry Goddard ruled that the special minimum wage was not incorporated in Proposition 202 and was, therefore, considered inapplicable. Goddard further explained:

> *"Developmentally disabled workers are not exempt from the minimum wage enacted in Proposition 202. Thus, developmentally disabled workers formerly earning a sub-minimum wage under the FLSA "special certificate" are entitled to earn the new state minimum wage of $6.75 per hour if they are employees subject to the new law."*[4]

After public pressure to change this voter proposition, the Industrial Commission of Arizona (ICA) released a policy statement[5] clarifying the term 'employee:'

> *"The individual is an employee under the Act when there is an expectation of a wage for services rendered (implied or express) and the services rendered are for the primary benefit of the employer. An individual does not meet the definition of employee, and therefore is not an employee covered under the Act, if that individual performs work activities for the primary or personal benefit of the individual (as opposed to the employer) without an agreement for compensation."*

Additionally, the ICA created caveats,[6] described in the following bullets, to allow employers to continue to pay special minimum wages (or stipends), which are primarily applied in center-based employment, also called supported work centers or sheltered workshops[7,8]:

- Vocational training: The participant is considered a trainee and is temporarily incapable of employment, even with assistance. However, with training, this individual may be able to meet the minimum qualifications for a position in integrated employment[9] earning at least the standard minimum wage. There is no expectation of payment of compensation, though the individual may receive a stipend for the work performed. The training program should not last longer than 7,560 hours[10], but this clock may start over if the individual enters a new training program. The vocational training shall be provided under a program administered by a certified provider with the ultimate

[3] In 2012, the Arizona minimum wage is $7.65 an hour, while the federal minimum wage is $7.25 an hour.
[4] State of Arizona, Office of the Attorney General, *Attorney General Opinion Re: Proposition 202 and the Disabled Worker*, February 7, 2007.
[5] ICA, *Substantive Policy Statement Regarding Application of Arizona Minimum Wage Act to Work Activities Performed By Individuals with Disabilities*, March 29, 2007.
[6] Ibid.
[7] Personal Communication, U.S. Department of Labor, Phoenix Wages and Hours division, May 9, 2012.
[8] Center-based services are provided in a Qualified Vendor owned or leased setting, where the majority of the individuals have disabilities and are supervised by paid Qualified Vendor staff. Participants must be primarily engaged in work and work-related activities, and paid work must be available to participants 75% of the Center's work week. (Available at https://www.azdes.gov/uploadedFiles/Developmental_Disabilities/00_centerbasedemployment_v2011.pdf)
[9] Integrated employment refers to jobs held by people with the most significant disabilities in typical workplace settings where the majority of persons employed are not persons with disabilities. The individuals with disabilities earn wages consistent with wages paid to workers without disabilities in the community performing the same or similar work. (Available at http://www.dol.gov/odep/topics/IntegratedEmployment.htm)
[10] Some trainees have already started to reach their maximum hours under this program.

goal of equipping the individual with skills that lead to *integrated employment at a salary that meets or exceeds the minimum wage*, with long-term support, if necessary.

- Service recipient: Participants in this long-term program are limited to individuals with disabilities who have received vocational training but have not reached the goal of successful integrated employment. While the work activities themselves serve primarily a therapeutic purpose, the ultimate goal is to develop job skills for integrated community employment. While there is no expectation of compensation of any kind, there may be a stipend for work performed. The status of the service recipient is re-examined annually by an interdisciplinary planning team, which includes the guardian and the service recipient.

Seven years later, ICA's policy statement remains in draft form. Essentially, many center-based employment settings continue to distribute federally-issued Section 14(c) certificates for workers with disabilities; yet, these same workers are classified as trainees or service recipients in the state of Arizona, so the State's minimum wage law does not apply.[11] Out of the 39 businesses currently certified to give special wages under Section 14(c) in Arizona,[12] most, if not all, are center-based employment settings. Further, there are significantly more of these settings in the State that have not been issued certificates. Either the remaining providers are paying all of their workers the State's minimum wage, or they have re-classified their workers as "trainees" or "recipients" and are not being monitored by the federal DOL since they are not considered "employees."

A spokesman for ICA stated: "It is up to the individuals or their advocates to complain if they do not believe they are being paid fairly or if they are classified incorrectly. We have yet to receive a complaint."

THE CONTROVERSY…

The special minimum wage remains a contentious issue across the country. Provider groups - many of which are center-based employment facilities - and some families of people with disabilities argue that the special minimum wage is necessary to provide workers with significant disabilities job training and employment opportunities that they would otherwise not be able to access, given they are not as productive as workers with no disabilities. They also earn "something," making the individuals feel good and giving them a productive way to spend their time. Some families also prefer segregated, center-based settings where their loved ones can be protected from harassment and social isolation that can occur in community-based integrated settings. They prefer having a choice of options.

Further, providers argue that they cannot afford to pay the State's standard minimum wage. Reimbursement rates provided through the state's Rehabilitation Services Administration Vocational Rehabilitation (VR) program and the Division of Developmental Disabilities (DDD) do not properly fund job seeking activities to transition individuals into community-based jobs. Thus, providers have to seek outside funding to pursue the goal of community-based employment for individuals who desire it. If they were required to pay the minimum wage, they would have to lay off workers, or they would be unable to

[11] Similarly, British Columbia legally mandated that all workers with disabilities were paid minimum wage, but a loophole for trainees was constructed to allow stipends less than the minimum wage. More than ten years later, much of the work in center based employment settings in British Columbia have been re-classified as non-work with wages administered at less than minimum wage.
[12] U.S. Department of Labor, Wage & Hour Division, *Community Rehabilitation Programs an Patient Worker Certificate Hours*, available at http://www.dol.gov/whd/specialemployment/CRPlist.htm.

compete with private businesses that do not have to pay for attendant and support costs, which could drive them out of business.[13]

In response, disability rights organizations and advocates argue that this position is not accurate. DDD reimburses support costs through the state's Medicaid waiver program. Further, they argue that the "sub-minimum" wage is a violation of the Americans with Disabilities Act. Allowing this reduced minimum wage treats people with disabilities inequitably and serves to segregate them from the rest of the society. While the original intent of the special minimum wage was to incentivize businesses to hire people with disabilities, advocates argue that these wages have only subsidized segregated, center-based employment settings that do not funnel those with disabilities into a mainstream work environment.

They also argue that these work environments have not properly trained "trainees" in the skills needed in the competitive marketplace, or adequately compensated them for work completed.[14] Previous research has shown that these training programs traditionally are "isolated from competitive standards regarding work training, modern equipment, job requirements, behavioral expectations, and social relations." They are a unique environment not applicable to a mainstream work situation. This results in the majority of participants not receiving adequate training for employment in the open market, or integrated employment.[15]

Conclusion

The future of the special minimum wage is in question. 2013 marks the 75th anniversary of the federal minimum wage law's passage, and has thrust section 14(c) of the bill into the national spotlight. Congress introduced the Fair Wages for Workers with Disabilities Act of 2013, which would eliminate Section 14(c) from the FLSA ending special minimum wages. As of December, 2013 it had 48 co-sponsors.

The Association of People Supporting Employment First (APSE) Employment is calling for the complete phase out of the subminimum wage for all people with disabilities by the end of 2014. APSE suggests that a comprehensive national system change movement targeted to community employment should provide support and technical assistance to providers and certificate holders, as well as, secure proper funding of services and long-term supports so that individuals with disabilities can achieve employment at minimum wage or higher. APSE also warns that an individual's day support should not be eliminated as a result of the phase out of the subminimum wage, that individuals should not be re-classified as trainees to justify the subminimum wage, nor should they be unnecessarily placed in day programs.

While some believe that these actions are small steps in the right direction in affirming employment equality for individuals with disabilities, the elimination of the special minimum wage alone will not promote equality. The structure and utilization of current employment programs for people with disabilities need to be re-examined. The program has ended reimbursement for center-based employment placements. DDD has not, but it has attempted to create a disincentive for center based employment settings by offering

[13] Personal Communication, Bev Harmon, Arizona Association of Providers for People with Disabilities, May 7, 2012.
[14] Samuel Bagenstos, *The Case Against the Section 14(c) Subminimum Wage Program*, available at http://thegao.org/wp-content/uploads/2012/03/Bagenstos.pdf
[15] Alberto Migliore, *Sheltered Workshops*, *in* International Encyc. of Rehab. (J.H. Stone & M. Blouin, eds., 2010) ("Even when work is the main focus of sheltered workshops, the work environment tends to be different from the one in mainstream businesses."), *available at* http://cirrie.buffalo.edu/encyclopedia/en/article/136/.

a lower reimbursement rate than group supported employment or individual supported employment.[16] As a result, group supported employment is the most utilized employment option followed by center-based employment. Individual supported employment continues to be the least utilized. Clearly, this disincentive has only been partially successful.

There is an absence of technical assistance, support, and training for providers on how to transition individuals into competitive employment. Thus, many center-based employment providers in Arizona continue to conduct business as usual while they watch their reimbursement rates decline. As a result, individuals are being transitioned from center based employment into adult day treatment programs that offer higher reimbursement rates, but also close the path to employment.

Both federal and state policies should start to prioritize the advancement of diverse employment training opportunities to help individuals with disabilities be more successful in an increasingly competitive marketplace. In addition, technical assistance and funding support should be provided to employment providers, including government agencies. This will assure that everyone has the tools and knowledge necessary to assist people with disabilities achieve full inclusion in the workforce and society- a vision which most proponents and critics of the special minimum wage share.

[16] https://www.azdes.gov/uploadedFiles/Developmental_Disabilities/Ratebook_20111001.pdf

ONE Community Working Together

www.azdes.gov/ADDPC