



Section 14(c) of the Fair Labor Standards Act

Florida ARF opposes phase out of Section 14(c) wage certificates.

Background

In 1938 Congress enacted Section 14(c) of the Fair Labor Standards Act (FLSA) to allow payment of special minimum wages commensurate with individuals' level of productivity. The Act was intended "to prevent the curtailment of opportunities for employment" of persons with significant disabilities. Today, approximately 425,000 workers with disabilities in this country receive special minimum wages. Of this total, about 75% are people with intellectual disabilities.

What are Section 14(c) wage certificates?

Section 14(c) wage certificates allow for payment of special or commensurate wages based on prevailing wages paid for work that a person without a significant disability could normally produce, then adjusted based on the actual productivity levels of individuals with significant disabilities. Such wages provide fair and equitable payment for the amount of work produced.

Florida ARF supports Florida's Employment First strategy for youth with disabilities who are transitioning from school. We also believe individuals with significant disabilities must not be denied the opportunity to work at center-based employment sites earning a fair wage when this is an individual's preferred choice.

Why support continuation of 14(c) wage certificates?

Simply stated, eliminating or repealing Section 14(c) provisions would deny work opportunities for individuals with the most significant disabilities who cannot meet established productivity standards established by the nondisabled workforce unless employer subsidies are provided to bridge the gap between wages paid and productive output generated. While such subsidies routinely occurred in the past, they rarely exist today.

Some argue use of special wage certificates to provide rehabilitation and training to individuals with significant disabilities to prepare them for competitive employment is in reality paying less than federal minimum wage and thereby exploits individuals with disabilities. Done correctly, 14(c) wages are fair and are paid on the basis of actual productivity. If an individual employee can only produce at a 50% productivity level, then two employees with similar productivity levels will be required to generate the same level of production that one employee could generate who produces at 100% capacity.

Combined with supervision and quality oversight needs and the extensive supports that are often involved, the special wage provision can be even more costly to implement; however, it is often valued by many Community Rehabilitation Provider agencies since it provides individuals with significant disabilities an opportunity to experience the inherent benefits of work. Fortunately, the advancements in vocational rehabilitation services, technology, and training now provide many

individuals with disabilities greater opportunities for competitive work; even so, phasing out the special minimum wage would result in many individuals with significant disabilities having no opportunity for productive employment.

We believe public policy regarding employment of individuals with disabilities should assist in finding competitive, integrated employment opportunities (at or above the minimum or prevailing wage) for those who can meet production standards and perform the essential functions of a job with or without a reasonable accommodation. Further, a fair and reasonable policy should support a full continuum of community-based work opportunities for persons with the most significant disabilities, including supported employment, customized employment opportunities provided in integrated settings, and center-based employment opportunities. The right of an individual with a significant disability to make an informed choice should include the right to work in a center-based program that provides individualized jobs, ongoing services and supports, job stability, and the security the individual desires.

What threats exist for continuation of 14(c) wage certificates?

On August 23, 2012, the National Council on Disability (NCD) released a report recommending that the US Congress phase out the 14(c) program as part of a systems change effort and that new mechanisms should be created to support individuals in obtaining integrated employment and other non-work services. Further, the NCD recommended that the Department of Labor cease issuing the certificates 30 days after passage of such legislation.

Florida ARF views the proposal to eliminate 14(c) wages as an instance of “throwing the baby out with the bathwater.” Such a movement would be particularly damaging for individuals with significant disabilities who earn wages as part of their day activity program.

Two current federal initiatives could influence 14(c) wage certificates. The first initiative is House Bill 831 that proposes a phase out and eventual repeal of 14(c) provisions within the Fair Labor Standards Act. Passage of H.R. 831 is not supported because it removes all wage earning opportunities for individuals with severe disabilities and offers nothing in return. The phase out schedule is as follows:

- On the date of enactment of the Act, the Secretary of Labor would discontinue issuing special wage certificates under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)) to any new entities not currently holding a certificate.
- All special wage certificates held on the date of enactment would phase out as follows:
 - Private for profit entity certificates would be revoked 1 year after enactment;
 - Public or governmental entity certificates would be revoked 2 years after the date of enactment; and,
 - Nonprofit entity certificates would be revoked 3 years after the date of enactment.
- Effective three years from the date of enactment of this Act, section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)) would be repealed and any remaining special wage certificates issued under this section would be revoked.

The second initiative, S. 1356, by the Senate Health, Education, Labor and Pensions (HELP) Committee is considered to be a better proposal. This bill proposes to amend the Vocational Rehabilitation Act within the Workforce Investment Act and would add a new section 511 that

contains a list of criteria that must be met before an individual may be employed through the use of special (subminimum) wage certificates. While existing criteria have to be met, the new criteria do not have to apply to individuals who are currently employed by an entity that holds a valid 14c certificate or for individuals older than age 24 when their employment begins. Individuals under age 24 could be employed under a special certificate if they have completed certain pre-employment transition services consistent with their individualized employment plan and have not achieved employment outcomes within a reasonable amount of time. Additionally, there is a six-month limit on employment under a special certificate that may be extended if the individual wishes, and the individual is reassessed every six months to determine ability to transition to competitive integrated employment. Individuals under age 24 would also have to complete the following to begin work at a subminimum wage:

- Receipt of pre-employment transition services;
- Application for vocational rehabilitation (VR) services and either found ineligible or, if eligible, has not achieved success working towards employment outcomes specified in the individualized employment plan within a reasonable amount of time despite having appropriate supports and services, and the individual's vocational rehabilitation case is closed after the individual's VR counselor and individual both agree that continued efforts by the individual to work toward an employment outcome will likely not be successful.
- The individual or parent or guardian has received career counseling, and understands and consents to work for the employer at a subminimum wage.

Under the Senate HELP Committee's proposal, the individual, regardless of age, would receive work readiness or job training services from a certificate holder as part of the individuals' preparation for competitive, integrated employment for not more than six months, which could be extended in six-month increments if the individual wishes and the referring agency conducts an assessment to determine the individual's ability to transition to competitive, integrated employment. The employer would have to provide ongoing career counseling, information about self-advocacy and self-determination, peer mentoring, and guidance on how to provide informed consent in order for individuals to continue to be employed under the special wage certificate employment per each extension. Small businesses with fewer than 15 employees could be exempted from the employer requirements by referring individuals to appropriate state agencies for counseling and information.

Conclusion

The Florida Association of Rehabilitation Facilities opposes phase out of Section 14(c) certificates. The Association also supports strict enforcement and close oversight by the Department of Labor to ensure that the Section 14(c) provisions are used correctly and in the best interest of individuals with significant disabilities.

SB 1356 is seen as a realistic approach to address commensurate wages. However, caution is offered that mandatory vocational rehabilitation involvement should not become a barrier to individuals who have limited opportunities for employment. Ultimately, the right of an individual with a significant disability to make an informed choice should include the right to work in a center-based program that provides individualized jobs, ongoing services and supports, job stability, and the security the individual desires.