

January 17, 2025

Division of Regulation, Legislation,
and Interpretation
Wage and Hour Division
at the U.S. Department of Labor
Washington D.C.

Regarding: Proposed Rule on Employment of Workers with Disabilities Under Section 14C of the Fair Labor Standards Act, 29 C.F.R. Part 525, Docket No. RIN 1235-AA14 (2024)

Submitted electronically through the online regulation's portal.

Dear Secretary:

We thank the Secretary for the opportunity to provide a public comment related to wage discrimination against workers with disabilities and the Notice of Proposed Rulemaking to phase out such practices. As one author, who happens to be blind, wrote, sheltered workshops once served as a well-intended if flawed “steppingstone” by blind people or perhaps by other people with disabilities to obtain experience and extra funds while on public benefit programs. Short of when innovative programs, such as Ticket to Work were implemented, there may have been validity to that perspective. Yet perhaps there never has been validity as such in that those workshops have never provided more than sub-minimal wages and 19th Century paternalistic working conditions.¹ The time exists to phase out all sheltered workshops and transition qualified people with disabilities to active life in the community, including, in terms of quality employment.²

We agree with the text set forth in Sub-section E of the Proposed Rule, “The disability rights movement, led by a broad coalition of stakeholders including self-advocates, has forged a path toward increased equity, self-determination, and inclusion, thereby expanding access to and opportunities available for employment.”³ As lawyers and advocates of family members and friends with disabilities and as a lawyer with a physical disability, we attest that disability

¹ Generally, Justin Salisbury, *Keeping the Blind in Sheltered Workshops in the After Life*, Braille Monitor (Nov. 2019), <https://nfb.org/images/nfb/publications/bm/bm19/bm1910/bm191011.htm>

² Salisbury *Id.* To its credit, the National Federation of the Blind has been consistent in its advocacy against subminimal wages by those who are blind or visually impaired.

³ Sub-section E of the Proposed Rule on Employment of Workers with Disabilities Under Section 14C of the Fair Labor Standards Act, 29 C.F.R. Part 525, Docket No. RIN 1235-AA14 (2024)

inclusion remains far from fully realized. The Proposed Rule also indicated, “. . .this movement has resulted in a very different—and improved—legal and policy landscape than existed in 1938 or even 1989 when section 14(c) regulations were last substantively updated, reflecting the 1986 amendments to the FLSA.”⁴ Therefore, we hope to show support for the important issue of fully integrating people with disabilities within the community through the power and the health impacts of meaningful employment.

Please accept this letter as a public comment on behalf of a coalition of organizations that represent people with disabilities and employers, the Ohio 14(c) coalition. Our coalition is in support of the proposed rulemaking. We believe eliminating sub-minimum wage will give dignity to and support the economic self sufficiency of workers with disabilities. Legally, the Fair Labor Standards Act explicitly gives the Department of Labor the ability to determine whether allowing employers to pay workers with disabilities subminimum wage is necessary.

The Ohio 14(c) Taskforce

The Ohio 14(c) taskforce is a coalition of advocates in the disability and employment communities who support the elimination of sub-minimum wage for workers with disabilities in Ohio and nationally. We are united in trying to eliminate subminimum wage for workers with disabilities in Ohio. The undersigned organizations are in support of the proposed rulemaking because it is legally permissible, in the best interests of those with disabilities, and subminimum wage is no longer necessary as an incentive for the employment of those with disabilities.

The Authors

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A. The FLSA delegates authority to the Department of Labor to cease the issuance of 14(c) certificates and phase out existing certificates over a three- year period, so this action is permitted under law.

⁴ Sub-section E of the Proposed Rule

First, the plain language of the Fair Labor Standards Act (FLSA) statute grants the Department of Labor the authority to issue this rule.

i. The Legal Standard

The Administrative Procedures Act (APA) gives agencies the authority to promulgate rulemaking in accordance with the authority given to them under the authorizing statute. Under the APA, each agency may promulgate regulations, pursuant to notice and receipt of public comment. 5 U.S.C. 552(a)(6)(D). In interpreting regulatory authority, courts must seek aid from the interpretations of those responsible for implementing particular statutes. *Loper Bright Enters. v. Raimondo*, 144 S.Ct.2244,2261(U.S.2024).

Where a statute gives explicit authority to an agency to issue regulations in accordance with a section of the statute, there is no question that the agency has the authority to issue such regulations. Agency interpretations constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance consistent with the APA. *Id.* There are times where a statute’s meaning is that the agency is authorized to exercise a degree of discretion. *Id.* This is when a statute expressly delegates to an agency the authority to give meaning to a particular statutory term, where a statute empowers and agency to prescribe rules to fill up the details of a statutory scheme; or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility such as “appropriate” or “reasonable.” *Id.*

In this case, the plain language of the Fair Labor Standards Act gives the Department of Labor discretion to determine whether 14(c) certificates are “necessary to prevent curtailment of opportunities for employment.” As laid out by the Supreme Court in *Loper Bright*, FLSA both expressly gives the DOL discretion whether to issue a regulation or order giving 14(c) certificates where *necessary* and also provides discretion regarding whether to issue the certificate once a regulation has been established. Thus, in passing FLSA, Congress explicitly wanted to rely on the expertise of the DOL in whether or not to issue exceptions to the minimum wage requirement for workers with disabilities.

ii. The plain language of the FLSA gives the Department of Labor discretion to determine whether 14(c) certificates are, “necessary to prevent curtailment of opportunities for employment.”

The plain language of the FLSA statute leaves it within the discretion of the Department of Labor whether or not to allow a company to pay workers less than minimum wage. Under the Fair Labor Standards Act:

The Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals * * * whose earning or productive capacity is impaired * * * at wages which are (A) lower than the minimum wage.

29 U.S.C. 214(c). Here, the statute explicitly gives discretion to the Department of Labor to create a “regulation or order,” to provide for special certificates for sub-minimum wage. Further, the statute explicitly gives the Department of Labor authority to determine whether sub-minimum wage is “necessary to prevent curtailment of opportunities for employment.” Thus, by the plain language of the statute, the Department of Labor has the authority to create a regulation or order that creates a method for companies to apply for 14(c) certificates and also gives the Department of Labor the authority to determine whether that regulation or order is necessary to prevent curtailment of opportunities for employment. It follows, then that if the Department of Labor determines that such a regulation or order is not necessary to prevent curtailment of opportunities for employment, then it has the discretion to issue an order or regulation not permitting less than minimum wage to be paid.

The statute also, once the regulation or order for 14(c) certificates has been issued, leaves whether to issue those certificates up to the discretion of the Department of Labor. The title of the FLSA Section where the 14(c) exception is found is called, “Employment Under Special Certificates.” 29 USC 214, *et seq.* The statute gives the DOL the ability to create rules to issue “special certificates” and to determine whether the employer meets the three- prong legal test required to issue special certificates. *Id.* at (c)(1).

Additionally, if an employee or the guardian of an employee does not believe that the subminimum wage is justified, FLSA sets up a due process procedure for them to challenge the subminimum wage before the DOL. *Id.* at 5. Thus, the statute explicitly gives the DOL the discretion to issue or not issue special wage certificates depending on whether an employer can show that it is necessary and the ability to remove special wage certificates if an employer can no longer show that it is necessary or if an employee challenges such certificate. In this case, the statute explicitly relies on the expertise of the agency to determine whether or not

sub minimum wage certificates are necessary to prevent the curtailment of employment and whether or not employers can prove that it is legally justified. Thus, the Department of Labor has the authority to issue a rule or order ending 14(c) certificates where it is no longer necessary to curtail the employment of workers with disabilities.

B. It is reasonable for the Department of Labor to make the decision that issuance of 14(c) certificates is not necessary to prevent curtailment of opportunities for employment for those with disabilities.

FLSA was passed in 1938.⁵ At that time, none of the civil rights laws that protect people with disabilities had yet been passed. In 1938, many people who had disabilities were refused access to education and employment and were institutionalized simply because they had a disability.

Yet over the past eighty-seven years, the landscape of disability employment has changed measurably. Given the civil rights protections and support available in the current age, 14(c) certificates are no longer necessary. First, people with disabilities, once refused an education as “uneducable” or sent to separate schools, have the right to a Free, Appropriate, Public Education in their Least Restrictive Setting. In 1975, the U.S. passed the Education for All Handicapped Children Act, which became the Individuals with Disabilities Education Act. The IDEA required public schools to admit children with disabilities and give them access to education.⁶ Similarly, the Americans with Disabilities Act, passed in 1990, made it unlawful for post-secondary institutions and vocational schools to refuse admittance to a person solely because of their disability.⁷ Second, the Americans with Disabilities Act also makes it unlawful for an employer to refuse to hire or to take a negative employment action against a person solely on the basis of disability.⁸

While much progress still needs to be made in education and employment gains for people with disabilities, the measures that might make a person less productive in the workforce – the lack of access to education, training, and community- based employment –

⁵ Jonathan Grossman, Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage, U.S. Department of Labor Website, available at <https://www.dol.gov/general/aboutdol/history/flsa1938> (accessed 1/13/2025).

⁶ U.S. Department of Education, Individuals with Disabilities Education Act, available at <https://www.ed.gov/laws-and-policy/individuals-disabilities/idea> (accessed 1/13/2025).

⁷ 28 C.F.R. 35, *et. seq.*; 28 C.F.R. 36, *et. seq.*

⁸ 42 U.S.C. 12111-12117.

are now legally accessible to those with disabilities. The holdover of 14(c) certificates only challenges those gains by still holding out the expectation that people with disabilities must be paid less than others in order to find work.

Additionally, the landscape of services to assist people with disabilities in finding community-based employment have increased dramatically. The federal Rehabilitation Services Administration gives funding for a Bureau of Vocational Rehabilitation in all 50 states.⁹ In Ohio this is the OOD, a state sponsored employment agency that provides case workers to individuals with disabilities seeking community based employment.¹⁰ Through the OOD, Ohioans with disabilities can set employment goals and have access to educational and training opportunities, job coaches, job placement resources, and assistance with removing any additional barriers to finding community based employment.¹¹ Additionally, job placement and support are available through a myriad of disability-only employment agencies and non-profits and our state Department of Developmental Disabilities.¹² Community based employment support is even funded by Home and Community Services Based Waivers. The idea of a disability-only setting where workers with disabilities are less productive and thus require an exception to minimum wage requirements is outdated and only serves to limit the dignity and quality of life of many workers with disabilities.

Most tellingly, the rate of workers seeking sub-minimum wage has declined over the years. The number of employees with sub-minimum wages has fallen by 90% since 2001.¹³ More than a dozen states have barred employers from paying workers less than minimum wage or have barred minimum wage from public contracts.¹⁴ This decrease in the use of the sub-minimum wage shows that it is no longer necessary, and the DOL has a reasonable basis for exercising its discretion in phasing out the certificates.

⁹ <https://rsa.ed.gov/about/states>

¹⁰ <https://ood.ohio.gov/home>.

¹¹ *Id.*

¹² See Capabilities, <https://capabilities.org/services-we-offer>; DODD Individual Employment Support <https://dodd.ohio.gov/waivers-and-services/services/individual-employment-support/>, Disability Solutions, <https://www.disabilitytalent.org/jobseekers>, Project Search, <https://www.projectsearch.us/>.

¹³ Justin R. Barnes, Proposed Rule Would End Subminimum Wage for Workers with Disabilities, National Law Review (December 6, 2024), available at <https://natlawreview.com/article/proposed-rule-would-end-subminimum-wage-employees-disabilities> (accessed 1/13/2025).

¹⁴ *Id.*

C. The history of services and civil rights for people with disabilities demand an end to the issuance of 14(c) certificates.

The Ohio 14(c) taskforce is united in asking for an end to the 14(c) provisions of the Fair Labor Standards Act. The Americans with Disabilities Act, and IDEA, were passed to remedy a history of discrimination against people with disabilities in the form of denials of employment, education, and community access. While 14(c), at first, was intended to help remedy that discrimination, it has become a form of discrimination of its own that perpetuates the low estimation of the skills of people with disabilities and their ability to be independent. Sheltered work keeps employers from challenging workers with disabilities with new skills and training, maintains low expectations for the lives of those with disabilities, and can operate as a trap for workers to remain in poverty and institutionalization. People with disabilities want, and have the right, to work for real jobs for real pay. The rights of people with disabilities should not be held hostage to the bottom line of an employer's business model.

Disability provides society with a quantifiable and qualitative benefit, not an undesirable loss. This has been recognized across the political aisle. Republican Administrations have helped enact the Americans with Disabilities Act of 1990, as amended, and have also advocated less reliance on public benefits programs.¹⁵ Notably, Democrats have promoted affirmative disability inclusion through such policy measures as the 2021 Executive Order on Diversity, Equity, Inclusion, and Accessibility. Both of these approaches are not contradictory but are complementary. Arguably, bi-partisan support exists for ensuring that people with disabilities are an active part of the community through employment and the health and self-reliance this fosters. We applaud phasing out these waivers as a step towards this goal.

a. As a coalition comprised of people with disabilities and advocates, we have seen this through lived experience.

This is arguably a great republic. One of the instant co-authors is a person who happens to be blind. These United States have enabled one of us to be employed through the call to public service and more recently to work as an adjunct law professor. Therefore, one of the instant co-

¹⁵ See generally, Ellis Switzer, Yang-Tang Institute on Employment and Disability, What the Proposed Rule to end Sub-minimal Wage Means for Workers with Disabilities, December 9, 2024, <https://www.ilr.cornell.edu/carow/carow-policy/what-proposed-rule-end-subminimum-wage-means-workers-disabilities>

authors know personally and professionally the power of policy and programs to open opportunities to full participation in the community.

Additionally, one co-author is the sister of a person who has Down syndrome who has never needed sheltered workshops. Throughout her life, she has taken advantage of the resources available through the Ohio Department of Developmental Disabilities and Project Search to find integrated, community-based employment opportunities, and has worked at private country clubs and universities in food service. Her jobs in those settings have paid her a real wage and assisted her in developing skills that are useful in the workplace.

In conclusion, we thank the Department for the opportunity to file this public comment. To ensure the benefits provided by people with disabilities, society may need to engage in affirmative measures. Yet “To summarize, in a society founded on institutional structures that naturally produce polarization, and in a time when a technological revolution has allowed for a kind of selective segregation to re-emerge, it will take more than legislation “to transform the jangling discords of our nation into a beautiful symphony of brotherhood.”¹⁶ Our society should evolve to understand that our strength exists in our commonality.

Respectfully submitted,

The Ohio 14(c) Taskforce:

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The Ability Center of Greater Toledo
Linking Employment, Abilities, and Potential (LEAP)
The Center for Disability Empowerment
Services for Independent Living
University of Cincinnati Center for Excellence in Developmental Disabilities
National Federation of the Blind of Ohio
Mid-Ohio Board for an Independent Living Environment, Inc.
Western Reserve Independent Living Center, Inc.
Ohio Statewide Independent Living Council

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¹⁶ Al Sturgeon, *From Integration to Multiculturalism: Dr. King's Dream Fifty Years Later*, 13 Pepp. Disp. Resol. L.J. 483, 493-94 (2013) (Citing A Call to Conscience: The Landmark Speeches of Dr. Martin Luther King, Jr. 86 (Clayborne Carson & Kris Shepard eds., 2001))

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