

Introduction on PIE and brief series

In October 2011, the Administration on Intellectual and Developmental Disabilities awarded grants to lead agencies in six states: California, Iowa, Mississippi, Missouri, New York, and Wisconsin. Two additional states, Alaska and Tennessee, received grants in October 2012. These states proposed activities to spur improved employment and post-secondary outcomes for youth with intellectual and developmental disabilities (IDD). Until the end of September 2016 the Institute for Community Inclusion and the National Association of State Directors of Developmental Disabilities Services provided training and technical assistance (TA) to the eight state projects through the Partnerships in Employment (PIE) Training and TA Center.

PIE project work is framed by the High-Performing States Transition Model, which contains 8 key elements: collaboration, leadership, state goals and policy, funding and contracting, staff training, service innovation, performance management and quality assurance, and youth leadership development and family engagement. This document is one in a series of PIE Project Fact Sheets that chronicle how PIE grantee states are making change under the elements of the High-Performing States Transition Model.

This document represents the efforts of several PIE grantees to identify and change the use of subminimum wages in their states by examining data on the use of subminimum wages authorized by individual state governments and by the Federal Government. It is the first of two documents that both share information about how to access and use data on federal certificates and, if applicable, state subminimum wage authorizations. Please see the companion brief *Influencing changes in state policy and practice with data on subminimum wages*.

Background on subminimum wage

Policy shifts over the past 20 years have created an agenda that calls for a sustained commitment to integrated employment for

individuals with disabilities. But unemployment and underemployment of people with disabilities continues to be a major public policy issue.

For people with intellectual and developmental disabilities (IDD), the disparity in labor market participation grows. Data suggest that only 14.7% of individuals who receive supports from state IDD agencies work in either individual or group integrated employment, and only 19% of individuals who receive day services from a state IDD agency participate in a service designed to support integrated employment (Butterworth et al., 2013; Human Services Research Institute, 2012). At the same time, participation in sheltered or facility-based employment and non-work services has grown steadily, suggesting that integrated employment services continue to be viewed as an add-on service rather than a systemic change (Butterworth et al., 2015; Mank, Cioffi, & Yovanoff, 2003).

The Fair Labor Standards Act (FLSA) was enacted in 1938 to provide protections to U.S. workers, such as a federal minimum wage and overtime pay. A section of the FLSA, commonly referred to as "14(c)" (29 U.S.C. §214(c)), permitted employers with certificates (14(c) Certificates) issued by the U.S. Department of Labor (DOL) to pay their employees whose earning or productive capacity was impaired by a physical or mental disability a "commensurate wage"¹ which was below the federal minimum wage. The language of the statute indicates that the reason for the inclusion of this provision was to prevent the loss of employment opportunities for individuals with disabilities.

This legislation reflected views at that time that workers with disabilities were less productive than workers without disabilities, and preceded the landmark Americans with Disabilities Act, which prohibited disability discrimination in employment and required employers to provide reasonable accommodations that would enable workers with disabilities to meet job requirements.

¹ "Commensurate wage" is a wage that is based on the individual worker's productivity in proportion to the wage and productivity of experienced workers without disabilities who perform basically the same type, quality, and quantity of work in the vicinity.

The FLSA sets the minimum requirements for wages for employees, and states may enact wage laws that provide greater protections or benefits. To date, New Hampshire and Maryland (fully effective in 2020) have eliminated the option of the payment of less than the minimum wage to individuals with disabilities. However, many other states have enacted laws that regulate the payment of subminimum wages, and employers in those states must meet federal standards, as well as those state requirements that exceed federal requirements. See Appendix A for a list of states with regulations related to payment of subminimum wages.

Strategies that can be used to obtain information about the use of subminimum wages

Obtaining general information about 14(c) Certificate use

The DOL posts and periodically updates lists of employers that hold 14(c) Certificates (DOL Lists). There are 4 different types of 14(c) Certificates, and the DOL lists the 14(c) Certificates that it has issued in 4 separate lists on its website. The 4 types of certificates are:

- » Community Rehabilitation Program (CRP) certificates, which are issued to facilities primarily engaged in providing rehabilitation and employment opportunities to workers with disabilities. CRP certificates remain in effect for 2 years. The CRP list can be found at www.dol.gov/whd/specialemployment/CRPlist.htm
- » School Work Experience Programs (SWEP) certificates, which are issued to programs under which a school system places students in jobs in the community. SWEP certificates expire annually. The SWEP list can be found at www.dol.gov/whd/specialemployment/SWEPlist.htm.
- » Hospital/Residential Care Facility (Patient Workers) certificates, which are issued to hospitals/residential care facilities where the worker also receives care and treatment. Patient Workers certificates remain in effect for 2 years. The Patient Workers list can be found at <http://www.dol.gov/whd/specialemployment/PatientWorkerList.htm>.
- » Business Establishment certificates, which are

issued to other employers that choose to employ workers with disabilities. Business Establishment certificates expire annually. This list can be found at <http://www.dol.gov/whd/specialemployment/BusinessCertlist.htm>.

The DOL lists described above are Excel spreadsheets that can be downloaded and sorted by state to identify:

- » a state's 14(c) Certificate holders,
- » the 14(c) Certificate starting and ending dates and status (pending or issued),
- » the number of workers paid subminimum wages at the time the 14(c) Certificate application was filed, and
- » whether work is performed under the Walsh-Healy Public Contracts Act (PCA) or McNamara - O'Hara Service Contract Act (SCA).²

The DOL Lists can then be used as the basis for a Freedom of Information Act (FOIA) request to obtain additional information on the individual 14(c) Certificate holders.

Using FOIA requests to obtain additional information about 14(c) Certificate holders

A FOIA request is required to obtain the detailed information that DOL has collected on 14(c) Certificate holders. FOIA requests can be used to identify more in-depth information³ about the subminimum wages paid by specific employers on the CRP, SWEP, Patient Workers, and Business Establishment DOL lists, as well as additional information about how those subminimum wages were determined. See Appendix B for sample FOIA request letters.

The DOL will generally charge a fee to provide material that is responsive to the FOIA request. The fee is based on the time it takes for the DOL to gather the requested material. A request can be made for a waiver of fees, and the DOL will determine whether that request will be granted under 29 CFR §70.41. The DOL must respond within 20 business days from the date the FOIA request is received by the DOL Disclosure Officer with

² These statutes generally establish prevailing wages for covered work that may be higher than the federal minimum wage, and therefore may result in higher subminimum wages for individuals engaged in that work under 14(c) Certificates. SCA contracts for services are allowed under Executive Order 13658, which established \$10.10 per hour minimum wage for work performed under contracts resulting from solicitations on or after 1/1/15. Individuals with disabilities covered by 14(c) Certificates who work on such contracts cannot be paid less than \$10.10 per hour.

³ e.g., Form WH-226 and all attachments thereto, all Forms WH-226 A and all attachments thereto, copies of SCA Wage Determinations if applicable, and applicable productivity rating evaluation forms and supporting time studies or work measurements.

responsibility for the records sought. This time limit may be extended under certain circumstances.

FOIA requests for information on 14(c) Certificate holders for a particular state should be directed to:

Email:

FOIARequest@dol.gov

Mail:

Wage and Hour Division
U. S. Department of Labor, Room S3016
Attn: FOIA Coordinator
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Fax: 202-693-0637

Information about FOIA requests directed to the Wage & Hour Division of the DOL can be found at www.dol.gov/whd/foia/foiaRequest.htm.

Reviewing records provided in response to a FOIA request

Upon receipt of the FOIA records from the DOL, the requester should ensure that the requested information has been provided. Any missing materials, including supplementary material set out in the FOIA request, may be requested through a FOIA Appeal. A FOIA appeal must be filed within 90 days of the date of the DOL's response letter accompanying the delivered DOL records. The appeal may be emailed to FOIAAppeal@dol.gov, or may be addressed to:

Solicitor of Labor
Division of Management and
Administrative Legal Services,
Room N-2420
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

The appeal letter or email must state the grounds for the appeal. It should also include a copy of the original FOIA request, the DOL response to the request, and any statements or arguments in support of the appeal. The appeal letter, the envelope, and the email subject line should be clearly marked "Freedom of Information Act Appeal." DOL provides instructions on how to file a FOIA Appeal in their

response letter.

In response to a FOIA request, the DOL will typically provide a copy of the 14(c) Certificate and the following documents submitted by the 14(c) Certificate holder when it applied for the 14(c) Certificate: Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (Form WH-226), and Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (Form WH-226A). See Appendix C for the samples.

A review of records provided by the DOL can identify issues that may indicate that some 14(c) Certificate Holders are not in compliance with the requirements of the FLSA statute or regulations (29 USC §14(c) and 29 CFR §525, respectively). The statute, regulations, and DOL's Wage & Hour Division Field Operations Handbook section on employment of workers with disabilities under 14(c) can be found at <http://www.dol.gov/whd/flsa/index.htm>.

Issues to analyze with respect to each of the documents listed above are included in Appendix D.

State-specific subminimum wages

Some states also regulate subminimum wages for workers with disabilities,⁴ and by state statute or regulation may issue state subminimum wage certificates. For example, Alaska has a secondary subminimum wage certificate, but there is only one entity as of May 2016 holding this type of certificate in the state. In states with this type of subminimum wage regulation, information about the status of subminimum wages within the state can also be requested through that state's labor offices. A list of these offices can be found at http://www.dol.gov/whd/contacts/state_of.htm.

Requesting information from state government regarding subminimum wages regulated by the state is a similar process to requesting the data from the federal DOL, except that it would be requested pursuant to the state's specific statute.

There are many ways that data on 14(c) Certificates can be used to influence changes in state policy and practice. Please see the companion brief Influencing changes in state policy and practice with data on subminimum wages.

⁴ See Appendix A

Appendix A

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

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

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

Appendix B

Sample FOIA Request

Please note highlighted text indicates sections that should be completed by the requesting organization.

ATTENTION: FOIA REQUEST

From: NAME, ORGANIZATION

To: US Department of Labor, Wage & Hour, FOIA Requests

Fax: (202) 693-5389.

Wage & Hour Division

U. S. Department of Labor

Room S-3201

200 Constitution Avenue, N.W.

Washington, D.C. 20210

Sent: DATE VIA FAX

Subject: FOIA Request to U.S. DOL Wage and Hour Division, National FLSA Certification Team, Chicago IL.

This is a Freedom of Information Act request to the National FLSA Certification Team Supervisor at the U.S. Department of Labor, Wage and Hour Division, National FLSA Certification Team, 230 South Dearborn Street, Room 514, Chicago, IL 60604. (312) 596-7189.:

The requested documents are as follows:

1. Copies of any current and pending special minimum wage 14(c) certificates issued for employers listed on **Attachment A** (community rehabilitation programs, hospital/residential centers, school work experience programs or school work experience programs), which are located in the State of X, and any documentation related to those certificates including, without limitation, application forms (WH 226), Supplemental Data Sheet Forms (WH 226A), any appendices or supplemental material submitted therewith (e.g., productivity rating/evaluation forms for employed workers with disabilities and supporting time studies or work measurements) and any prior investigative history with respect to such certificates (collectively, "Supplemental Material").
2. Copies of any special minimum wage 14(c) certificates issued for any other employers in community rehabilitation programs, hospital/residential centers, business establishments or School Work Experience Programs in the State of X currently in effect or pending and any Supplemental Material.

We would be happy to receive the responsive documents by email or in electronic format. If mailing hard copies, please send them to the address below.

Please also consider our request for waiver or reduction of fees pursuant to 29 C.F.R. 70.41. [Insert the applicable basis for the waiver request]. The following is the basis for the fee waiver request for a P & A. X is a non-profit organization and is the designated Protection and Advocacy system ("P & A") for the State of X under federal law. Our purpose in requesting the above documents is not commercial, but is in furtherance of the authority granted to us under federal law to monitor facilities serving individuals with disabilities, including facilities holding special minimum wage certificates issued by the DOL.

Each state's P&A is part of a federally mandated system with the authority and obligation to protect and advocate for the human and legal rights of individuals with developmental disabilities, mental illness and/or other disabilities. See 29 U.S.C. § 794e (Protection and Advocacy of Individual Rights Program, (the PAIR Act)); 42 U.S.C. §§ 10801 et seq. (Protection and Advocacy for Individuals with Mental Illness Act (the PAIMI Act)); 42 U.S.C. §§ 15001 et seq. (Developmental Disabilities Assistance and Bill of Rights Act (the DD Act)).⁵

X is involved with (1) the monitoring of sheltered workshop and subminimum wage programs; (2) related advocacy on these issues with persons with developmental disabilities and self-advocacy organizations; (3) related advocacy with vendors serving individuals with developmental disabilities; and (4) related advocacy with both our state developmental disabilities agency and our state labor agency. Therefore, the disclosure of the information requested will contribute to the public understanding of the operations and activities of the DOL's Wage and Hour Division, in its work related to subminimum wage workers.

If you have any questions about this FOIA request or our request for waiver or reduction of fees, please feel free to contact me.

Thank you in advance for your assistance.

Sincerely,

Name

Address

Email

⁵ We believe that the DOL's cooperation in providing a fee waiver would be consistent with the prominent role and responsibilities given to Protection and Advocacy systems by Congress. As the designated P&A for State X, we are entitled under federal law to have access at reasonable times to any individual with a disability in a location in which services, supports, and other assistance are provided to such an individual. 42 U.S.C. § 15043(a)(2)(H); 42 C.F.R. § 51.42(c). This authority extends to all settings that provide services and habilitation to such individuals, including but not limited to schools and day programs. 42 U.S.C. § 10802(3); 45 C.F.R. § 1386.19. As part of our authority, DRT is entitled to access to individuals with disabilities as well as all areas of the facility used by or accessible to those individuals. 42 U.S.C. § 10805(a)(3); 42 U.S.C. § 15043(a)(2)(H); 42 C.F.R. § 51.42(c); 45 C.F.R. § 1386.22(h). We are permitted "unaccompanied access" to all facility clients at reasonable times, which includes at minimum normal working hours. 42 C.F.R. § 51.42(c); 45 C.F.R. § 1386.22(g). This access includes "the opportunity to meet and communicate privately with such individuals regularly, both formally and informally, by telephone, mail and in person." 42 C.F.R. § 51.42(c); 45 C.F.R. § 1386.22(h). X is permitted to meet with facility clients to provide information and training on, and referral to, programs that address the needs of individuals with disabilities, including the P&A system. 42 C.F.R. § 51.42(c)(1); 45 C.F.R. § 1386.22(g)(1). We are also permitted to access the facility for the purpose of monitoring compliance with respect to the rights and safety of facility clients. 42 C.F.R. § 51.42(c)(2); 45 C.F.R. § 1386.22(g)(2).

ABOUT THE AUTHORS

Evelyn Doxey most recently served as an attorney for Disability Rights Tennessee (DRT) focusing on employment matters affecting people with disabilities. Prior to joining DRT, she worked many years in the private sector as an employment attorney.

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

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