

Subminimum Wages for Persons with Disabilities Under Section 14(c) of the Fair Labor Standards Act



A Summary of Testimony received by the Arizona Advisory Committee to the United States Commission on Civil Rights

April 2020

Advisory Committees to the U.S. Commission on Civil Rights

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

**Arizona Advisory Committee to the
U.S. Commission on Civil Rights**

The Arizona Advisory Committee to the U.S. Commission on Civil Rights submits this summary of testimony detailing civil rights concerns associated with subminimum wages for disabled people in Arizona. The Committee submits this summary as part of its responsibility to study and report on civil rights issues in the state of Arizona. The contents of this summary are based on testimony the Committee heard during a hearing held on October 18, 2019 in Tempe, Arizona.

This summary documents civil rights concerns raised by panelists with respect to subminimum wages for disabled people throughout the state of Arizona and discusses possible strategies for improving the opportunities available to disabled workers. Based on the findings of this summary, the Committee will ultimately offer to the Commission recommendations for addressing this issue in Arizona. The Committee recognizes that the Commission is currently reviewing this issue and hopes that the information presented here aids the Commission in its continued work on this topic.

**Arizona State Advisory Committee to the
U.S. Commission on Civil Rights**

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Note: The Arizona Committee would like to thank Herald Sohn, USCCR intern, who conducted research and helped with the summary of testimony of this report.

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Arizona Advisory Committee

Subminimum Wages Briefing – October 18, 2019, Tempe, Arizona

Panelists

Kristen Mackey - Arizona Department of Economic Security Rehabilitation Services

The Arizona Rehabilitation Services Administration oversees several programs which are designed to assist eligible individuals who have disabilities to achieve employment outcomes and enhanced independence by offering comprehensive services and supports.

Kristen was born with congenital bilateral hearing loss. She learned to prove herself at a young age and is now the administrator for Rehabilitation Services. She advocates for individuals with disabilities to have equal employment opportunities.

Susan Voirol – University of Arizona Sonoran Center for Excellence in Disabilities

University Centers for Excellence in Developmental Disabilities (UCEDD) exist in every state to serve as a resource for people in the areas of education, research and service relative to the needs of people with developmental disabilities. Authorized by the Developmental Disabilities and Bill of Rights Act of 2000 and funded by the Administration on Intellectual and Developmental Disabilities within the U.S. Department of Health and Human Services, there are 67 UCEDDs in the United States and its territories.

Susan's work in disability, transition, and employment brings together multiple stakeholders - education, state agencies, local government, community provider agencies, advocacy groups, self-advocates, and family members as well as the broader public - to support and promote the belief that community-based, integrated employment should be the primary day activity for working age youth and adults with disabilities.

J.J. Rico - Arizona Center for Disability Law (ACDL)

J.J. has dedicated his legal career to advancing the rights of people with disabilities through litigating for systemic changes and collaborating to train and educate others about disability-related laws and policies and fulfill ACDL's mission.

J.J. served as the Chair of the University of Arizona's Hispanic Advisory Council, worked as a Fellow for the Mexican American Legal Defense and Educational Fund, and was the lead attorney in an instrumental case that ensured appropriate accommodations for individuals with sensory disabilities. Mr. Rico is currently the executive director of the ACDL.

Mark Jacoby - Gompers

Gompers mission is to develop innovative opportunities for individuals with disabilities. A community leader since 1947, Gompers provides exceptional services to more than 350 individuals from the age of 5 to 90 every day.

Mr. Jacoby has worked at Gompers since 1991 starting as a front-line staff and now working as Executive Director. His passion and commitment has been to advocate, support, energize, and assist individuals with developmental disabilities in finding their passion and helping them maximize their abilities.

Jennifer Baier - ValleyLife

Founded in 1947, ValleyLife provides services to individuals with developmental and/or physical disabilities. The goal for these individuals, referred to as “members,” is to provide opportunities for increased independence, community involvement, and to subsidize—or eliminate—dependence on government funded support programs. The vocational training center, located on the ValleyLife campus, models a professional work environment, accommodates trainees, and includes new offices and conference rooms that can accommodate new training classes and programs.

Ms. Baier is senior program manager and leads a staff of highly skilled job coaches and developers. They provide job search services, interview skills training, resume building, and dress for success programs.

April Reed - Ability 360

Ability360 continues a 35-year tradition offering and promoting programs to empower people with all disabilities to take personal responsibility so that they may achieve or continue independent lifestyles within the community. The independent living philosophy states that people with disabilities should have the same civil rights, options, and control over choices in their own lives as do people without disabilities.

April Reed is the Vice President of Advocacy and Designated Legislative Lobbyist at Ability360. Reed received her master’s degree in Social Work from Arizona State University in May 2005. Reed creates programs that empower individuals with disabilities and their families. These programs include advocacy-related workshops, one-on-one mentoring, facilitating wellness groups, providing technical assistance to develop consumer-driven initiatives, and developing community partnerships that address barriers to consumer choice, equal rights, and self-determination.

Kelli O'Toole - The Opportunity Tree

The Opportunity Tree is a nonprofit organization that provides quality individualized supports to people with intellectual or developmental disabilities in dynamic and innovative environments. The Opportunity Tree provides services like adult day program for members to increase independence in daily living, employment services that help members gain skills to be more independent in the employment, residential services, youth transition programs, and creative arts programs.

Kelli O'Toole is the President and CEO of the Opportunity Tree. She has a diverse background in finance and non-profit leadership. Kelli is a passionate leader with success in organizational transformation based on data and outcomes.

Gina Griffiths - The Opportunity Tree

Gina Griffiths serves as the Director of Programs at The Opportunity Tree, joining the team in 2017. Gina has spent her career working with individuals with special needs whether by being an advocate, volunteer, direct service provider, DDD support coordinator or non-profit program manager.

Dr. Rickey Williams - Pediatrician and Parent of disabled worker

Benard H. Simelton Sr. was born in Tiplersville, MS and attended College at Mississippi Valley State University in Itta Bena, MS. He graduated with a B.S. degree in Sociology in 1976 and received a Master's in Public Administration from the University of North Dakota 1981. He is a life member of the NAACP and served as President of Limestone County for six years and is in his fifth year as President of Alabama State Conference of the NAACP. Since joining the NAACP in Alabama, he has received the Regional Medgar Evers, Regional Kelly M. Alexander, and Regional Director Award and numerous branch awards. Benard served 23 years in the Air Force and retired in 2000 as a Lieutenant Colonel.

Eva Hamant - Parent of a disabled worker

I. Introduction

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin, or in the administration of justice.¹ The Commission has established advisory committees in each of the 50 states and the District of Columbia. These State Advisory Committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction.

On August 28, 2019, the Arizona Advisory Committee (Committee) to the U.S. Commission on Civil Rights voted to undertake a study focused on subminimum wages for persons with disabilities under Section 14 (c) of the Fair Labor Standards Act (Labor Act)². The objective of the study was to investigate the civil rights implications of paying people less than minimum wage based on their disability status, and the oversight of this program by state and federal agencies. To that end, the Committee sought to understand if wages paid to these employees are commensurate with the law, if they gain marketable skills, and if they are assisted in transitioning to competitive employment.

According to the United States Commission on Civil Rights, “The Department of Justice has found state systems supporting these (14(c)) programs may violate the Americans with Disabilities Act when they do not serve people with disabilities in the most integrated setting appropriate.”³

This topic falls within the Committee’s jurisdiction as it concerns a specific program authorized under federal law, specifically Section 14(c) of Fair Labor Standards Act.⁴ In addition, the Americans with Disabilities Act protects persons with disabilities from discrimination in the workplace.⁵ Other federal statutes concerning the topic of study include the Workforce Innovation and Opportunity Act.⁶

¹ 42 U.S.C. §1975a.

² Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 214(c).

³ U.S. Comm'n On Civil Rights, Planned Public Briefings for Fiscal Years 2020 & 2021 (2019).

⁴ 29 U.S.C. § 214(c).

⁵ Americans with Disabilities Act of 1990, 42 U.S.C. § 12112.

⁶ Section 458 of the Workforce Innovation and Opportunity Act added section 511 to the Rehabilitation Act, 29 U.S.C. 794g (section 511). This provision requires counseling services, for example, for employees under the 14(c)

II. Background

Under Section 14(c) of the Fair Labor Standards Act⁷, persons with various physical or mental disabilities (or persons who have vision impairment or are blind) can be employed at rates below the otherwise applicable federal minimum wage. Under certificates issued by the Secretary of Labor, their wages are set at a level commensurate with their productivity and reflective of rates found to be prevailing in the locality for essentially the same type, quality, and quantity of work. For these workers, under current law, there is no other statutory wage rate.

The origins of Section 14(c) treatment of persons with disabilities go back at least to the National Industrial Recovery Act⁸ of 1933. Under the National Industrial Recovery Act, a productivity-based sub-minimum wage, arranged through a system of certificates, was established for persons with disabilities. In competitive industry, such workers were payable at 75 percent of the industry minimum. In what are known as sheltered workshops, there was no wage floor. The Act was declared unconstitutional in 1935⁹.

With passage of the Labor Act in 1938, the certification system was reestablished under Section 14 of the Act. No statutory wage floor was set for persons with disabilities, though, administratively, minimum wages for the disabled in competitive industry came to be set at 75 percent of the federal/Labor Act minimum.¹⁰ In the sheltered workshops, the floor was productivity-based with no lower limit. Under the 1966 Labor Act amendments¹¹, the system was modified. The rate for persons with disabilities was set in statute at not less than 50 percent of the Labor Act minimum, both in competitive industry and in workshops, except that in separate work

programs. See U.S. Dep’t of Labor, Wage and Hour Division, *Fact Sheet #39H: The Workforce Innovation and Opportunity Act and Limitations on Payment of Subminimum Wages under Section 14(c) of the Fair Labor Standards Act*, 2019, p. 1, <https://www.dol.gov/whd/regs/compliance/whdfs39h.pdf>.

⁷ 29 U.S.C. § 214(c).

⁸ National Industrial Recovery Act of 1933, Pub. L. 73-67, invalidated by *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁹ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹⁰ Congressional Research Service, *Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act*, by William G. Whittaker, 2005, p. 8,

https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1211&context=key_workplace.

¹¹ Fair Labor Standards Amendments of 1966, Pub. L. 89-601, 80 Stat 830.

activities centers where employment was largely therapeutic and its economic content inconsequential there was no statutory floor.¹²

In 1986, Section 14(c) was amended to remove the separation of workshops and work activities centers — and to eliminate any statutory wage floor for persons with disabilities in certificated employment¹³. In theory, such workers were to be paid a wage commensurate with their productivity. In 1994, further hearings were held, and it was asserted that the entire system of productivity-based sub-minimum wage rates was inequitable and unworkable.¹⁴ The law, however, supported by employers of workers with disabilities, was not altered.

The issue resurfaced in the 107th Congress but no action was taken on the proposed legislation.¹⁵ Since that time, the issue has remained legislatively dormant. One may expect however, to see some movement in this area in keeping with other adjustments to the Labor Act.

III. Subminimum Wages for Persons with Disabilities under Section 14(c)

a. Most Recent Developments

On January 1, 2020, the minimum wage in Arizona was raised to \$12.00 an hour.¹⁶

On March 26, 2019, the City of Tempe became the first Employment First City in the state of Arizona. By becoming an Employment First City, “Tempe becomes a model for city-wide initiatives promoting competitive, integrated outcomes for individuals who have disabilities.”¹⁷

¹² *Id.*

¹³ Pub. L. 99-486.

¹⁴ *Section 14(c) of the Fair Labor Standards Act: Hearing Before the Subcomm. on Labor Standards, Occupational Health and Safety of the H. Comm. on Education and Labor*, 103rd Cong., (1994).

¹⁵ H.R. 881, 107th Cong. (2001).

¹⁶ Ariz. Rev. Stat. Ann. § 23-363(A)(4).

¹⁷ “Employment First Tempe Proclamation,” Arizona Employment First, <https://dev-az-employment-first.pantheonsite.io/story/employment-first-tempe-proclamation>.

Legislation was introduced in the 116th Congress, called the Transformation to Competitive Employment Act, that would phase out section 14(c) of the Fair Labor Standards Act effectively ending subminimum wages for the disabled.¹⁸

On November 16, 2017, the Governor of Arizona signed an executive order establishing Arizona as an Employment First state¹⁹. The executive order directs state agencies providing services to job seekers and students with disabilities to implement strategies to improve employment outcomes.

Section 511 of the federal Workforce Innovation and Opportunity Act of 2014, which took effect July 22, 2016, demonstrated the intent of Congress that “individuals with disabilities must be afforded a full opportunity to prepare for, obtain, maintain, advance in, or re-enter competitive integrated employment.”²⁰

b. General Introduction to Fair Labor Standards Section 14(c)

Under Section 14(c) of the Labor Act, “to the extent necessary to prevent curtailment of opportunities for employment,” the Secretary of Labor may permit payment of wages lower than the otherwise applicable federal minimum to persons “whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury.”²¹ The reduced wage option operates under a system of certificates issued by the Secretary. No specific wage floor is mandated, however, the Section 14(c) rate is to be, broadly, “commensurate with those [wages] paid to nonhandicapped workers, employed in the vicinity in which the individuals under certificates are employed for essentially the same type, quality, and quantity of work.”²² The Section 14(c) wage is to be “related to the individual’s productivity.”²³

¹⁸ Transformation to Competitive Employment Act, S. 260, 116th Cong. (2019).

¹⁹ *The establishment of Arizona as an Employment First State*, Ariz. Exec. Order No. 2017-08 (Nov. 15, 2017).

²⁰ U.S. Dep’t of Labor, *Workforce Innovation and Opportunity Act (WIOA), Limitations on Use of Subminimum Wage, Notice of Proposed Rulemaking*, p. 2,

<https://www.dol.gov/odep/pdf/WIOALimitationsUseOfSubminimumWage.pdf>.

²¹ 29 U.S.C. § 214(c)(1).

²² 29 U.S.C. § 214(c)(1)(B).

²³ 29 U.S.C. § 214(c)(1)(C).

Section 14(c) of the Labor Act is narrowly focused. It deals only with workers who, because of a disability, are deemed to have their productivity (for the particular type of work in which they are engaged) reduced below that of non-disabled workers.²⁴

Because of that putative diminished productivity, they are payable at a wage below the otherwise applicable federal minimum. Where such workers earn in excess of the federal minimum wage, Section 14(c) is not applicable.

Some Section 14(c) workers are employed in sheltered workshops: others, in regular firms. By the mid-1990s, there were 5,912 certificated rehabilitation centers employing about 241,000 disabled workers.²⁵ In competitive employment, there were 1,809 certificates for authorized employment of 6,807 workers.²⁶ Of the universe of workers with disabilities covered by Section 14(c), only a small number list visual impairment as their primary disability: the most numerous categories being retardation or mental illness.²⁷ Statistical measurement in this area is complicated in that workers may have a single disability or may have multiple disabilities. Further, with training (or placed in a specialized work environment), they may be able to overcome one of their disabilities but not another. And, those employed under Section 14(c) represent a relatively small proportion of persons with disabilities — or, for that matter, of persons with disabilities who are employed but who are outside the Section 14(c) system.²⁸

Under Department of Labor regulations, a worker with a disability is one “whose earning or productive capacity is impaired by a physical or mental disability, including those relating to age or injury, *for the work to be performed.*”²⁹ (Italics added.) Such disabilities may “include blindness, mental illness, mental retardation, cerebral palsy, alcoholism, and drug addiction.”³⁰ The regulations acknowledge that “a disability which may affect earning or productive capacity for one type of work may not affect such capacity for another.”³¹

²⁴ 29 U.S.C. § 214(c)(1).

²⁵ U.S. Dep’t of Labor, Employment Standards Administration, *Minimum Wage and Overtime Hours Under the Fair Labor Standards Act: 1998 Report to the Congress Required by Section 4(d)(1) of the Fair Labor Standards Act*, p. 42.

²⁶ *Ibid.*

²⁷ U.S. Bureau of Labor Statistics, *Labor Force Characteristics of People With a Disability*, by Janie-Lynn Kang, <https://www.bls.gov/spotlight/2018/labor-force-characteristics-of-people-with-a-disability/home.htm>.

²⁸ Congressional Research Service, *Treatment of Workers with Disabilities*, p. 2.

²⁹ 29 C.F.R. § 525.3(d).

³⁰ *Id.*

³¹ *Id.*

Employment is defined broadly in the Labor Act: i.e., “to suffer or permit to work.”³² The existence of an employment relationship “does not depend upon the level of performance or whether the work is of some therapeutic benefit.”³³ Patient workers (as they are defined in the Labor Act), working within an institutional context, may be classified as employees if “the work performed is of any consequential economic benefit to the institution.”³⁴ Some difficulty may arise in distinguishing strictly charitable or therapeutic activity from marginally profitable work. Case-by-case judgments are necessary.

Disability is not a unilateral judgment on the part of an employer. The “nature and extent” of the disability must be assessed, together with the precise relationship between the disability and reduced productivity: a disability unrelated to productivity is insufficient for Section 14(c) purposes.³⁵ A comparison must be made between the “productivity of the workers with disabilities” and “the norm established for nondisabled workers” — with careful documentation maintained by the employer.³⁶

When a certificate has been issued to an employer for employment of workers with disabilities, the terms of the certificate are to be made known to the worker “and, where appropriate, a parent or guardian of the worker.”³⁷ When a disabled worker is hired, an “initial evaluation” of his productivity “shall be made within the first month after employment begins in order to determine the worker’s *commensurate wage rate*.”³⁸ Further, the employer must agree (a) to review the wage rates paid to such workers at least once every six months and (b) to review the wages of all Section 14(c) employees at least once each year to insure that the Section 14(c) wages “reflect changes in the prevailing wage paid to experienced nondisabled individuals employed in the locality for essentially the same type of work.”³⁹ The worker (“or the parent or guardian” of the worker) may appeal to the Secretary concerning the circumstances of his or her employment.⁴⁰

³² 29 C.F.R. § 525.3(g).

³³ *Id.*

³⁴ 29 C.F.R. § 525.4.

³⁵ 29 C.F.R. § 525.9(a)(1).

³⁶ 29 C.F.R. § 525.9(a)(3).

³⁷ 29 U.S.C. § 214(c)(5).

³⁸ 29 C.F.R. § 525.12(j)(2).

³⁹ 29 U.S.C. § 214(c)(2)(B).

⁴⁰ 29 C.F.R. § 525.22(a).

Under the *commensurate rate*, there is no effective floor; it can vary from zero to the full Labor Act minimum.⁴¹ Where workers are paid in excess of the regular Labor Act minimum wage, the wage requirements of Section 14(c) are basically moot.

c. The Case Against the Section 14(c) Program

Work-related programs to assist persons with disabilities share a common purpose: to allow the client/worker population “to work and to acquire the benefits that come from work.”⁴² Those benefits may include skill development, socialization to the world of work, a sense of personal confidence and esteem, rehabilitation, and social contact. *But* they may also include an employer’s desire for productivity and a worker’s desire for wages earned under decent working conditions. Thus, arguably, public policy might be expected to seek a balance between humane considerations and economic interests.

When congress adopted the Americans with Disabilities Act (ADA) in 1990, it found that “individuals with disabilities continually encounter various forms of discrimination,” including “overprotective rules and policies,” “segregation,” and “relegation to lesser services, programs, activities, benefits, jobs and other opportunities.”⁴³ This discrimination, Congress found, results “from stereotypical assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”⁴⁴ In the post-ADA world, some consider Section 14(c) to be a federal law that discriminates against people with disabilities by allowing employers to pay less than the minimum wage to certain employees with disabilities.

Under Section 14(c), the wages of individuals with disabilities who are not entitled to earn the minimum wage must simply be “commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for

⁴¹ 29 C.F.R. § 525.10.

⁴² Nathan Nelson, *Workshops for the Handicapped in the United States: An Historical and Developmental Perspective*, (1971), 5.

⁴³ 42 U.S.C. § 12101(a)(5).

⁴⁴ 42 U.S.C. § 12101(a)(7).

essentially the same type, quality, and quantity of work,” and “related to the individual’s productivity.”⁴⁵

People point to the discrimination against the disabled in this law because the law does not authorize below-minimum wages for all less-productive workers – only those with disabilities. The Labor Act authorizes below minimum wages for learners, apprentices, messengers, and students in Section 14(a) and (b)⁴⁶, Section 14(c) is different from those provisions because in contrast to 14(a) and (b) which permits below minimum wages because of the job they perform or are at a particular stage in their careers, Section 14(c) denies people the guarantee of a minimum wage for potentially any job, and at any point in their career, based on their own disability status which can be lifelong.

The Committee’s research suggests Section 14(c) cannot be justified as a policy to increase open-market employment opportunities for people with disabilities.⁴⁷ The Committee learned that most individuals in sheltered workshops will not move to competitive employment.⁴⁸ The Government Accountability Office described the jobs that are generally available in sheltered workshops:

Assembly jobs generally involve uncomplicated one-or two-step processes that are mainly performed by hand. For example, 14(c) workers at a work center in Illinois that we visited assembled small plastic automobile parts, while 14(c) workers at a New York work center snapped together plastic pieces to assemble a lint remover. The service-related jobs involved basic tasks, such as mopping floors and picking up trash. For example, 14(c) workers from a California work-center maintained restrooms at public beaches under contracts with local city governments.⁴⁹

Opponents of 14(c) say it has not served its original purpose of ensuring that open market employers hire people with disabilities. Instead, it has simply provided a subsidy for sheltered workshops, which have done a poor job of preparing workers for open-market employment, and which pays wages that cannot reliably be said to be related to their productivity.

⁴⁵ 29 U.S.C. § 214(c)(1).

⁴⁶ 29 U.S.C. § 214(a)-(b).

⁴⁷ Peter Blanck, *Labor Force Participation, and Income of Individuals with Disabilities in Sheltered and Competitive Employment: Cross-Sectional and Longitudinal Analyses of Seven States During the 1980's and 1990's*, 44 Wm. & Mary L. Rev. 1029, 1044 (2003).

⁴⁸ Ibid.

⁴⁹ U.S. Government Accounting Office, *Report to Congressional Requesters, Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers with Disabilities, But Labor Should Improve Oversight*, 2001, p. 10, <https://www.gao.gov/new.items/d01886.pdf>.

d. Subminimum Wages in Arizona

As discussed above, Section 14(c) of the Labor Act authorizes the payment of subminimum wages to persons with disabilities in often segregated or “sheltered” workshops. A recent study of this topic by the National Council on Disability, an independent federal agency tasked with advising the federal government on disability policy, states there are “approximately 321,131 Americans with disabilities who, even while living in the community, still earn subminimum wages in segregated sheltered workshops under Section 14(c) of the Labor Act.”⁵⁰

The U.S. Department of Labor maintains a public database listing employers with 14(c) certificates.⁵¹ In Arizona, most of the certificate holders are identified as “Community Rehabilitation Programs,”⁵² which are also identified as “Work Centers” and as “Sheltered Workshops.”⁵³ According to this data, as of April 2019 there were 44 employers in Arizona with pending or issued Section 14(c) certificates.⁵⁴ There are approximately 2,088 Arizona workers being paid Section 14(c) wages.⁵⁵

The Arizona Fair Wages and Healthy Families Act⁵⁶ was passed as Proposition 206 on the 1998 ballot. It raised the minimum wage in Arizona, to above federal minimum wages. The Act did not contain a provision for subminimum wages for disabled workers.

In 2007, the Industrial Commission of Arizona released a substantive policy statement regarding

⁵⁰ National Council on Disability, “National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future,” 12, at https://ncd.gov/sites/default/files/Documents/NCD_Deal_Report_508.pdf (accessed June 17, 2019), citing Letter from Patricia Davidson, Deputy Administrator for Program Operations, United States Department of Labor to Senator Elizabeth Warren (July 5, 2018).

⁵¹ U.S. Dep’t of Labor, Wage and Hour Division, *14(c) Certificate Holders*, <https://www.dol.gov/whd/workerdisabilities/certificates.htm> (accessed May 14, 2020).

⁵² U.S. Dep’t of Labor, Wage and Hour Division, *Community Rehabilitation Programs (CRPs) List*, <https://www.dol.gov/whd/specialemployment/CRList.htm>.

⁵³ U.S. Dep’t of Labor, Wage and Hour Division, *Fact Sheet #39A, How to Obtain a Certificate Authorizing the Payment of Subminimum Wages for Workers with Disabilities under Section 14(c) of the Fair Labor Standards Act (FLSA)*, 2012, p. 2, <https://www.dol.gov/whdregs/compliance/whdfs39a.pdf>.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ariz. Rev. Stat. Ann. § 23-363.

the applicability of the Arizona Minimum Wage Act to individuals who have developmental, cognitive, mental, or physical challenges. The policy statement was limited to the Commission's interpretation of who is an "employee" under the Act. The Commission found that under the Arizona Minimum Wage Act (Act), it "did not have the authority to establish processes or procedures to authorize the payment of subminimum wages to employees. The Act requires individuals meeting the definition of an employee to be paid at least the applicable minimum wage."⁵⁷

According to the policy guideline, an individual meets the definition of "employee" and is entitled to be paid at least the minimum wage if "after meeting the minimum qualifications for a position, with or without public or privately provided assistance such as a job coach or reader, the individual is hired by an employer to perform work for the employer."⁵⁸ This individual is an employee under the Act because "there is an expectation of a wage for services rendered (implied or expressed) and the services rendered are *for the primary benefit of the employer.*"⁵⁹ (emphasis added) An Individual does not meet the definition of employee 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."⁶⁰ (emphasis added)

The Commission further identified and classified individuals who meet this criterion in two types of programs: vocational training programs and service recipient programs. The fundamental difference between the programs is vocational training is intended for individuals who are currently incapable of employment, but with training the individual "may be capable of meeting the minimum qualifications for a position in employment."⁶¹ By contrast, the work in a service recipient program is primarily therapeutic.⁶²

The Act does not condition payment of minimum wage based on an employee's level of proficiency or productivity at work. As the Commission outlines in the policy statement: "In other words, an employer who hires a trainee, beginner, apprentice, learner, or worker with a disability,

⁵⁷ The Industrial Commission of Arizona, *Substantive Policy Statement Regarding Application of Arizona Minimum Wage Act to Work Activities Performed by Individuals with Disabilities*, March 29, 2007.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

and expressly or impliedly agrees to pay that individual compensation, is required to pay that individual the prescribed [minimum wage].⁶³

For the Arizona Industrial Commission, whether or not an individual is considered an employee hinges on whether the work in question benefits the individual or the employer. The Commission cited well established FLSA case law in its opinion⁶⁴ and said it would interpret the definition of “employee” consistent with the principles set forth in those cases.

Recent legislative reform efforts on this topic include the following: The National Council on Disability advocates for the phase out of the Section 14(c) program. The National Disability Rights Network also advocates for changes to the current law.⁶⁵ A bill supported by the National Disability Rights Network that was recently introduced in Congress, the Raise the Wage Act, would phase out the 14(c) program over a period of years.⁶⁶

The Arizona Advisory Committee to the United States Commission on Civil Rights held an in-person public meeting in Phoenix on **October 18, 2019**, during which the Committee solicited testimony from stakeholders about the Section 14(c) program. This meeting was publicly advertised and recorded. The meeting included time for public input from any Arizona resident who wished to comment. The Committee also accepted written statements submitted by individuals who are unable to attend the public meeting in person. The following sections represent a summary of the testimony captured by the Arizona Advisory Committee.

⁶³ Ibid.

⁶⁴ See Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985); McLaughlin v. Ensey, 877 F.2d 1207 (4th Cir. 1989); Donovan v. Am. Airlines, Inc., 686 F.2d 276 (5th Cir. 1982); Isaacson v. Penn Cnty. Servs., Inc., 450 F.2d 1306 (4th Cir. 1971).

⁶⁵ “Issues,” National Disability Rights Network, <https://www.ndrn.org/issues/employment/> (accessed May 15, 2020).

⁶⁶ Raise the Wage Act, H.R. 582, 116th Cong. (2019).

IV. Summary of Testimony

a. Socioeconomic effects of employers paying less than minimum wage

The Committee heard conflicting testimony regarding the potential economic impact of eliminating 14(c). Several panelists mentioned the economic benefits for employers that hire people with disabilities. In contrast, there were opposition opinions regarding phasing out 14(c). These panelists testified that eliminating 14(c) will disincentivize employers to hire people with disabilities.

According to Ms. Voirol, hiring people with disabilities is beneficial for businesses. In a report called Getting to Equal in 2018: The Disability Inclusion Vantage Report, which was developed by the American Association of People with Disabilities and DisabilityIN for Businesses, “disability inclusion efforts can benefit employers by increasing innovation, improving shareholder value, improving productivity, improving market share and enhancing business reputations.”⁶⁷ Ms. McFadden's opinion supports the argument that hiring people with disabilities increases business reputation. “We conducted a study of 898 Arizona voters, and we found that 80 percent of them said that not only would they look more highly upon businesses that were recruiting people with disabilities, but they would be more likely to be loyal to them.”⁶⁸

Ms. McFadden argued that hiring people with disabilities bring macro-economic benefit. She referred to a report called the Power of Disability Employment. “Marginally including people with disabilities in part-time employment... compared to similar states like ours... we have an increase of 281 million to 800 million GDP in Arizona.” “In addition, we get 700 to 2,000 new jobs that are created each year...” She added, “in the short term, state tax revenues would be expected to increase anywhere between 14 and \$41 million a year.”⁶⁹ Ms. Voirol also discussed the economic benefits of hiring people with disabilities. In the Power of Disability Employment: The Impact to Arizona's Economy report, which was funded by the Arizona Developmental Disabilities Planning

⁶⁷ Susan Voirol, testimony, *Hearing Before the Arizona Advisory Committee U.S. Commission on Civil Rights, Phoenix, AZ*, Oct. 18, 2019, transcript, pp. 41-42 (hereinafter *Phoenix Hearing*).

⁶⁸ McFadden Testimony, *Phoenix Hearing*, p. 160.

⁶⁹ *Ibid.*, p. 161.

Council, reported that “if the state increases labor force participation of people who have disabilities, Arizona could, in turn, significantly see increases in its gross domestic product, job creation and tax revenue...”⁷⁰

Ms. Voirol mentioned federal programs that incentivize employers for hiring people with disabilities. First, “is on-the-job training, which is a service in voc rehab that... we pay an employer partial wages but the person with the disability being paid full wages, and it's -- kind of naturally have training within that employer...”⁷¹ “There's multiple federal business tax credits, deductions for employing people with disabilities that cover accommodation... and accessibility costs, architectural, transportation, tax deductions... Small business tax credit and the work opportunity tax credit.” There were also indications of “for people who have disabilities to go to work on benefits as well, whether it's a Pass program or Access Freedom to Work.”⁷² She added that “often -- people just don't know.”⁷³ Ms. McFadden, who supports the elimination of subminimum wage, also mentioned benefits for employers. “Work opportunity tax credit which is available to employers who hire workers on SSI, which is most of our people, and employers can earn anywhere between \$1,200 to \$9,600 per employee.” She added, “in addition, there is a federal disabled access credit which subsidizes the cost and accommodations such as American sign language interpreters and job coaches which help -- which help people, train them on the job and help them hold a job. So through this credit, small businesses can receive a maximum credit of \$5,000 annually.”⁷⁴

Arizona state law also provides protections to employers and providers. Ms. McFadden said, “we have these things called the learner and apprentice wage rates which allows employers to pay less than the minimum wage for a fixed period of time for both workers with and without disabilities.”⁷⁵ She added, “there's also a special license for work less than the minimum wage... it allows a minor whose earning capacity is impaired by age, physical or mental deficiency or injury can receive for a fixed period of time.” She added, “if it's for the personal benefit of the individual without an

⁷⁰ Voirol Testimony, *Phoenix Hearing*, p. 42.

⁷¹ Ibid., p. 62.

⁷² Ibid., p. 63.

⁷³ Ibid., p. 64.

⁷⁴ McFadden Testimony, *Phoenix Hearing*, p. 161.

⁷⁵ Ibid., pp. 161-162.

agreement for compensation, then they can be a trainee or a service recipient, and under either category, in Arizona, you don't have to pay them anything. They can get a stipend.”⁷⁶

Ms. Voirol talked about benefits in the individual context by referring to the In the Power of Disability Employment: The Impact to Arizona's Economy report. “According to the report, we could expect to see fewer people who have disabilities living in poverty, improvements in health and a reduction in health care costs, increased opportunities for individuals to be self-developed, more independent and experience improved self-confidence, to experience the benefits of contributing to society and have more control in their personal lives.”⁷⁷

Meanwhile, Ms. Baier asserted that phasing out 14(c) will cause reduction of opportunities for employees. “...the elimination or phasing out of the special minimum wage may result in many of the individuals that we, as well as other community service agencies, serve receiving no wages at all instead of the special minimum wage...” She explained her experience, “once employers determine that basic production standards and/or productivity goals are unable to be met, our candidates are often not considered for current openings. The flexibility to carve out positions or substantially modify job descriptions has decreased with increased wages.”⁷⁸

Ms. Griffiths argued that the rising minimum wage causes more expectation from employers. “When it was \$8, it was a little easier for us to go to an employer and tell them, hey, we have this great worker. They're going to show up every day; they're going to do a great job, maybe slightly less productive.”⁷⁹ She added, “now that the minimum wage is \$11, the employers are demanding more... we've had several individuals who aren't performing the way the employers want in their integrated work settings and the employers have said, hey, I can't handle this person anymore. I don't want them here, even when they're still within one of our training programs.”⁸⁰

⁷⁶ Ibid., p. 162.

⁷⁷ Voirol Testimony, *Phoenix Hearing*, p. 42.

⁷⁸ Baier Testimony, *Phoenix Hearing*, p. 96.

⁷⁹ Griffiths Testimony, *Phoenix Hearing*, pp. 119-120.

⁸⁰ Ibid., p. 120.

Ms. Hamant claimed that employers would cut hours if they have to pay minimum wage. "...what happened was when I went to an ARC of Arizona meeting down in Tucson, parents were not happy because while their child got -- their adult child got minimum wage, the agencies cut their hours."⁸¹

Mr. Natvig argued that people will lose jobs. "We feel that cutting 14(c) off for a large majority of people who are under it now would force them into non-work activities... we need that time to work with them."⁸² He contended that 14(c) benefits employers and employees. "Many nonprofits wouldn't be able to continue if they must pay minimum wage to people with disabilities with low productivity." Mr. Natvig explained the economic burden if 14(c) was unavailable. "Beacon currently serves over 1,800 people with disabilities. About 225 are paid according to 14(c)... nearly all of them have Social Security or SSI in addition to their pay at Beacon. If Beacon had to pay \$12 minimum wage to everyone, we would spend an extra \$1.5 million a year just on wages, and adding all the employee taxes and worker's compensation, it would be about \$1.75 million and not many businesses could withstand such a change."⁸³

Mr. Williams mentioned that switching to day treatment would cost more. "The 225 people with disabilities could switch to Beacon's day treatment program, and that would cost the State of Arizona substantially more than they're currently paying for services for those individuals."⁸⁴

Mr. Jacoby shared statistics of employment rates of states that had phased out center-based employment. "When Maine ordered a phase-out of center-based employment starting in 2008, two-thirds of individuals were unable to find other paid positions, according to a June 2015 study by George Washington University. This has led to Maine's unemployment levels for people with disabilities being five percentage points higher than the national average. As troubling, enrollment in day and other programs soared from 550 to 3,178." He added, "in Vermont, when similar steps were taken, the percentage of working age people in supported employment dropped from 39 percent to 36 percent. The average hours worked her week dropped from 15 hours to nine hours."⁸⁵

⁸¹ Hamant Testimony, *Phoenix Hearing*, p. 151.

⁸² Natvig Testimony, *Phoenix Hearing*, p. 157.

⁸³ Ibid., p. 146.

⁸⁴ Williams Testimony, *Phoenix Hearing*, p. 147.

⁸⁵ Jacoby Testimony, *Phoenix Hearing*, p. 84.

There were testimonies explaining the economic benefits for employers hiring people with disabilities even without 14(c), and testimonies arguing that eliminating 14(c) will discourage employers from hiring people with disabilities. However, it is notable that the argument between phasing out and retaining 14(c) is not distinctively bilateral. For example, Ms. Voirol testified that unintended consequences occur when states shut the doors without proper replacements. “I know Massachusetts closed in 2016. I know a lot of individuals ended up in group support employment and some in day treatment which is not competitive integrated employment.” In addition, they “have been watching states now for five, eight plus years who have chosen, out of their own accord, to make these decisions, and they are still struggling to get the right practices in place and get the employers on board and get people in place.”⁸⁶

b. Existing possibilities for the disabled to secure competitive employment

Panelists from the Washington hearing had different opinions regarding the statistics of 14(c). Some testified that the statistics are showing that 14(c) is working as intended, while others disagreed.

Ms. Reed revealed that according to “a report released this month by the Arizona Developmental Disabilities Planning Council entitled *The Power of Disability Employment: The Impact to Arizona's Economy* found that Arizona ranks 32 out of 50 states in employment for people with disabilities.”⁸⁷

Ms. Reed shared some available statistics regarding 14(c). She cited the Department of Labor Community Rehabilitation Program list that, “there are 45 total pending and issued 14(c) certificates across Arizona.” She continued, “the 45 pending and issued certificates, 27 of the employers registered at addresses within Maricopa County and 24 employers registered at addresses within cities with more than 150,000 residents. A 14(c) certificate is not necessarily a rural matter then, as a majority of certificate-holding employers exist in areas where other employment services should be available.”⁸⁸

⁸⁶ Voirol Testimony, *Phoenix Hearing*, p. 52.

⁸⁷ Reed Testimony, *Phoenix Hearing*, p. 126.

⁸⁸ Ibid., pp. 126-127.

Ms. Reed also revealed the unavailable data regarding 14(c). “We do not know the demographic information of these 2,088 workers, their ages, their business abilities, et cetera. We don't know how long each of these 2,088 workers have been receiving subminimum wage, and if a worker stops making subminimum wage, why? Did they enter integrated employment? Did they retire? Are there other reasons?” She added, “we also do not know what training and supports for integrated employment have been provided and whether or not workers wish to retain their current subminimum wage employment, and we do not know if workers have been provided regular informed consent on all their work options.”⁸⁹

Mr. Natvig acknowledged that people using 14(c) has decreased. “The use of 14(c) for Beacon has been declining pretty significantly the last couple of years... the number of people that we were serving through 14(c) had dropped by 20 percent over those two years,”⁹⁰ He assumed, “I think younger people are getting better preparation in school and aspiring to work in community settings and higher wage settings... we are finding people jobs at competitive wages.”⁹¹

Ms. Mackey presented some positive trends of youth transitioning to competitive integrated employment. In 2018, they “processed 553 individuals,” and in 2019, they “processed 96.” This shows a “decrease in the numbers of youth that are coming to us to be determined ineligible to move into subminimum wage.” For pre-employment transition services, in 2018, they had “113 youth” “to participate in pre-employment transition services,” and in 2019, “603.” So, individuals are increasingly “wishing to prepare for competitive integrated employment.”⁹² For the Career Counseling and Information/Referral presentations, they are “on course to deliver about 1100 presentations over the course of the year,” which can be perceived as “folks are now becoming aware of the requirement and reaching out to Vocational Rehabilitation to get that information.”⁹³ According to Mr. Jacoby, an “increasing number of individuals at Gompers are earning at or above the prevailing wage while utilizing 14(c).”⁹⁴

⁸⁹Ibid., p. 127.

⁹⁰ Natvig Testimony, *Phoenix Hearing*, p. 157.

⁹¹ Ibid., pp. 157-158.

⁹² Mackey Testimony, *Phoenix Hearing*, p. 16.

⁹³ Ibid., pp. 16-17.

⁹⁴ Jacoby Testimony, *Phoenix Hearing*, p. 83.

Meanwhile, Mr. Rico expressed skepticism. General Accounting report in 2001 noted that “only five percent ever leave sheltered workshops for competitive integrated employment.”⁹⁵ He added, “once one is in placement, they may not want to move for a number of factors.” Mr. Rico said, “over 2,000 Arizonans with disabilities and 321,000 people nationwide are legally paid subminimum wage, largely in settings where they are segregated from non-disabled peers and broader society.”⁹⁶

Ms. O’Toole revealed that some people have different preference. “Some of our members choose to be in community employment options, but some of our members choose to be in our employment training center.” She added, “We’ve had many individuals over the years graduate to group-supported employment and competitive integrated employment in the community.”⁹⁷

As shown above, each panelist used different statistics to back their respective opinions of 14(c). Some claimed 14(c)’s significance in assisting the transition to competitive integrated employment, while others revealed statistics that rejects this contention.

c. Employee’s work experience

The Committee heard testimony regarding the experiences of employees. Panelists either argued that 14(c) is discriminatory or testified its positivity.

Mr. Rico claimed that 14(c) is discriminatory, “one of the t[h]ings that we see in our office is that some of those evaluations still are focusing on one’s disability rather than their abilities. We’ve seen contractors or evaluators who have an antiquated view of disabilities. So, when they’re writing their report on whether someone can maintain employment or be employed, it’s from a Social Security determination on the extent of one’s disability, not evaluating what accommodations could assist that person in an employment setting.”⁹⁸

⁹⁵ Rico Testimony, *Phoenix Hearing*, p. 32.

⁹⁶ Ibid., p. 38.

⁹⁷ O’Toole Testimony, *Phoenix Hearing*, p. 115.

⁹⁸ Rico Testimony, *Phoenix Hearing*, p. 31.

Mr. Rico shared his experience as an attorney. “I was hired because of a discrimination lawsuit against Walmart who discriminated against two young deaf members.”⁹⁹ He added, “Walmart has been an adversary for the Center for Disability Law for many years. I do think they have improved in some areas, but the reality is when I was hired 18 years ago, it was the result of two young deaf men who were discriminated against. 14 years later, we had a very similar lawsuit.”¹⁰⁰

Mr. Rico mentioned that they have witnessed discriminatory acts, for example, “employers sometimes see a disability come up during an interview or application and subject someone to things that are un job-related but will then just test the extent of the disability, and then that screens the person out.”¹⁰¹

Mr. Rico talked about the community’s input regarding phasing out 14(c). One of their advocates “felt they exhibited the requisite skills to have competitive integrated employment and they don’t know how to get out of that.”¹⁰² The voices that the Center for Disability Law receives are people “who have been mistreated, feel that they need access and they’ve been denied access by a discriminatory employer or by a system that may not have truly evaluated their abilities and then have said that they’re not qualified for services or that they don’t qualify for the job.”¹⁰³

Meanwhile, Mr. Jacoby presented case examples of people benefiting from 14(c). “Regina actually began in our adult day program but realized she wanted to try that employment thing, and so she transitioned to our center-based employment program.”¹⁰⁴ He added, “progressing on to group-supported employment, Regina continued to refine her skills and began inquiring about someday working in the community... after going through the interview process, Regina’s dream was realized and she became a Gomper’s employee.”¹⁰⁵

Mr. Jacoby presented another case example. “Alfred began working in center-based employment because he felt that was the best place for him. But as he began to do more job exploration, he

⁹⁹ Ibid., p. 79.

¹⁰⁰ Rico Testimony, *Phoenix Hearing*, pp. 79-80.

¹⁰¹ Ibid., p. 71.

¹⁰² Ibid., pp. 68-69.

¹⁰³ Ibid., p. 69.

¹⁰⁴ Jacoby Testimony, *Phoenix Hearing*, p. 85.

¹⁰⁵ Ibid., pp. 85-86.

realized that maybe he could work in the community. Then on a job exploration outing, he saw an ad for AMC Theatres, and after talking with the manager, he was hired.” He added, “when Alfred decided he didn’t like working at the theater anymore, he didn’t just quit, because of the lessons that he had learned while in center-based employment and group-supported employment. Instead, he worked with the Gompers team to find a job at the Fry’s courtesy desk close to home.”¹⁰⁶

Mr. Jacoby presented a third case example. “Shane was working in center-based employment, often feeling uncomfortable about being around people and fully interacting with them. That is why we were surprised when a position at our reception desk became available and Shane asked if he could try. Shane not only flourished. He excelled.”¹⁰⁷ He added, “recently, Shane learned that we were starting a new group-supported employment site at an engraving company, Refresh Glass. Again, Shane asked if he could try and, once again, he excelled. The story doesn’t end there. Shane did so well that Refresh Glass hired him on as an employee, now working 20 hours a week.”¹⁰⁸

Ms. Reed had cases with successful outcomes. “But we also hear successes, like a consumer with a developmental disability who began at Ability 360 as a volunteer, grew his skills as a self-advocate, began to co-train and present to participants at vocational centers about self-determination and self-advocacy and who has also now worked at Target for over 20 years.”¹⁰⁹ She added, “or a young consumer with a developmental disability who came to Ability 360 for socialization and a peer mentor to help support developing communication skills has gone on to volunteer and is now working at a restaurant part time.”¹¹⁰

Dr. Williams shared his daughter’s experience, Sarah, who has been receiving less than minimum wage since she became employed at Beacon Group at age 22. He claimed that Beacon will receive more for Day treatment than supervising employment. “Beacon is currently paid \$6.10 per hour from the Arizona Division of Developmental Disabilities to supervise... If Sarah would choose not to work in production and instead spend her time in a day treatment program, Beacon would

¹⁰⁶ Ibid., p. 86.

¹⁰⁷ Ibid., pp. 86-87.

¹⁰⁸ Jacoby Testimony, *Phoenix Hearing*, p. 87.

¹⁰⁹ Reed Testimony, *Phoenix Hearing*, pp. 128-129.

¹¹⁰ Ibid., p. 129.

receive \$10.61 an hour...”¹¹¹ Instead, she has other benefits. “...in addition to Sarah's Beacon paycheck, she currently receives \$1,319 per month from Social Security after her Medicare is paid. She became eligible for Social Security after I retired a few years ago at age 65.” He added, “before Sarah received Social Security, she was on Supplemental Security Income or SSI... and nearly every individual at Beacon who's on the 14(c) program belongs to either the SSI program or Social Security.” Dr. Williams said, “now, having Sarah work at Beacon has allowed my wife and me to work full time as a pediatrician and a pediatric nurse. It's not safe for Sarah to stay at home alone.”¹¹²

There were significant contrasts in testimonies of lived experience. Panelists from the advocacy perspective testified their experience of witnessing discriminatory acts, while panelists from the parent perspective testified their children’s experience of benefitting from 14(c).

d. Abuses Due to Ineffective Monitoring

Panelists testified loopholes of subminimum wages. Many agreed that the required processes are overwhelming, which discouraged participation. In addition, there were misled fears that demotivated people who are earning subminimum wages from transitioning to competitive and integrated jobs.

Ms. Mackey explained that “Section 511 of the Work Force Innovation and Opportunity Act placed new responsibilities on [Vocational Rehabilitation], 14(c) certificate holders, public education agencies, Division of Developmental Disabilities and persons and their families engaged in seeking or wanting subminimum wage.”¹¹³ She added that “youth with disabilities now must engage with the [Vocational Rehabilitation] program and complete several required activities.” For example, “individuals of any age working in subminimum wage employment must receive career counseling and information referral services from the [Vocational Rehabilitation] program every six to 12 months.” Ms. Coffland said that it is Arizona Rehabilitation Services’ job to “provide documentation that they've completed all of the required activities within the law.”¹¹⁴

¹¹¹ Williams Testimony, *Phoenix Hearing*, p. 142.

¹¹² Ibid., p. 143.

¹¹³ Mackey Testimony, *Phoenix Hearing*, p. 9.

¹¹⁴ Coffland Testimony, *Phoenix Hearing*, p. 10.

Ms. Coffland explained their roles of determining the youth's eligibility for Vocational Rehabilitation. "If they are eligible, they proceed with developing an individualized plan for employment and then we help them to seek competitive and integrated employment." She added, "if they are ineligible, essentially, we have determined that they do not want to seek competitive integrated employment or they're not able to; we feel like they do not have the potential to actually be successful in obtaining competitive integrated employment, and we will determine them ineligible." They make sure that the clients "thoroughly understand what subminimum wage employment is versus competitive integrated employment and that they understand all the services and supports that are available to them to seek competitive integrated employment."¹¹⁵

When asked about the existence of reassessment procedures, Ms. Coffland indicated that they can "come back at any time."¹¹⁶ However, they go through thorough reinvestigation, which is "time consuming," and "requires a lot of participation."¹¹⁷ She mentioned challenges of the overall assessment process. "They take a decent amount of time, depending on the individual's particular situation and what types of services they might require."¹¹⁸ As a result, they "received a very small number of referrals as a result of our career counseling."¹¹⁹

When asked the reason of people dropping out of subminimum wage, Ms. Mackey said "we do not have an adequate mechanism to track those moving out of subminimum wage into competitive integrated. Some of those numbers where you see a decrease, there's not a tracking mechanism for where they've gone. So, it is unknown what caused them to move out of or where they went to."¹²⁰ But based on anecdote, "folks sometimes will find a job on their own and not come back and let us know,"¹²¹ or may "worry about losing benefits."¹²² They provide the disability 101 calculator to "build in all the state benefits and federal benefits you earn and then

¹¹⁵ Ibid., p. 11.

¹¹⁶ Ibid., p. 19.

¹¹⁷ Ibid., p. 20.

¹¹⁸ Ibid., p. 13.

¹¹⁹ Ibid., p. 16.

¹²⁰ Mackey Testimony, *Phoenix Hearing*, p. 21.

¹²¹ Ibid., p. 22.

¹²² Ibid., p. 23.

input what the impact of employment wages might be on those benefits.”¹²³ Ms. Reed also mentioned that people tend to fear they may lose their job if they earn too much. “Families and individuals with developmental disabilities fear losing public benefits if they work too many hours or earn too much.”¹²⁴

Youth who are being referred for subminimum wage may not complete the process because it is too cumbersome. Ms. Coffland said, “sometimes when people hear that process, they just decide that it's not worth it.”¹²⁵ As for parents, the high requirement of independence is a burden. For example, parents find out that “we're not going to say we're going to send someone to pick up your youth and we're going to keep them until 5 o'clock to provide these job training services; they would have to be available throughout the day.”¹²⁶ She added, “that instability they find with the VR program as opposed to subminimum wage employment or perhaps a day program where they are involved in something from 8:00 to 5:00, that's also a barrier that people have expressed to us.”¹²⁷ Ms. Griffiths discussed about the lack of monitoring 14(c). “The process of renewing the 14(c) certificate is very thorough. We submit a lot of paperwork work... in like eight months, we'll get something back.”¹²⁸

Mr. Rico mentioned “there is a fear from the community that have children, adult children in these placements, that they're going to be at home all day.” He urged to ensure opportunities that “addresses those fears... so they can have a successful transition from the subminimum wage into a competitive integrated employment or through another type of program that may best fit their needs.” For example, he suggested monitoring while phasing out 14(c) whether training people to “learn how to navigate a para transit public transportation system to go from work...”¹²⁹ is appropriately conducted. He also suggested ensuring people are “free from abuse and neglect and they have the opportunities presented to them.”¹³⁰

¹²³ Ibid., p. 24.

¹²⁴ Reed Testimony, *Phoenix Hearing*, p. 125.

¹²⁵ Coffland Testimony, *Phoenix Hearing*, p. 23.

¹²⁶ Ibid., p. 24.

¹²⁷ Ibid., pp. 24-25.

¹²⁸ Griffiths Testimony, *Phoenix Hearing*, p. 122.

¹²⁹ Rico Testimony, *Phoenix Hearing*, p. 49.

¹³⁰ Ibid., p. 50.

Ms. Reed recommended improved monitoring. “We urge further accountability, documentation and regular review that each person and their families were provided informed consent on their rights for meaningful skill training on all work options.”¹³¹ Ms. Reed explained what informed consent would look like. “Typically, we would have a document that all parties sign, documenting that that person has been provided their rights... to review all of their options and is documenting that they have made that choice.”¹³² She concluded, “we believe that now is the time for us to fully commit to system change that views integrated employment and equal compensation as the final outcome and best practice for individuals with disabilities.”¹³³

The Washington Advisory Committee heard the barriers of 14(c). It has been revealed that the requirements are too cumbersome, which potentially demotivates people from participating. Also, there were misled fears among people earning subminimum wages that they would lose benefits if they moved to competitive integrated employment.

e. Effectiveness and value of the program

The Committee heard testimony regarding the need for individualized support for people with disabilities. Some argued that the inefficiency of the available alternatives of 14(c) and supported its retainment. Others urged the necessity of individualized support for people with disabilities, with a particular focus on people with significant disabilities.

Ms. Griffiths first acknowledged that each member has various needs. “Some of our members have very little confidence in their skills,” “some of our members haven’t had much exposure to employment services and training programs yet so they need comprehensive skill building.”¹³⁴ “...we have quite a few members who are a lot older and have a lot of physical impairments due to age that make it so that they can no longer compete in the competitive integrated environment. They don’t want to retire. They want to be productive.” “...for some folks, it’s kind of their step

¹³¹ Ibid., p. 129.

¹³² Ibid., p. 130.

¹³³ Ibid., p. 129.

¹³⁴ Griffiths Testimony, *Phoenix Hearing*, p. 116.

back when they're not ready to give up on the world of work. They want to have a meaningful way to fill their days. They want the pride of earning an income.”¹³⁵

Ms. Griffiths argued that resources are limited. “There are limited resources for training for job coaches... there's limited funding across the board for all of the supports that we're provided to get people employed.” She added, “14(c) certificate is an important tool for us to use to provide effective comprehensive employment supports to individuals with intellectual and developmental disabilities.”¹³⁶

Ms. Griffiths claimed that the current day program is insufficient. “Without the option of our employment training center... they would end up going into a day program which is inappropriate.¹³⁷ She added, “a day program service funded through the Division of Developmental Disabilities is predominantly social, recreational, rehabilitation and personal skill building... but it's never related to employment.”¹³⁸ According to Mr. Jacoby, current employment services are inefficient without 14(c). “Arizona's employment services venue simply is not sufficiently funded or individualized enough to fully support large numbers of individuals with significant intellectual and developmental disabilities.”¹³⁹

Ms. Baier criticized the current sheltered employment settings. “Valley Life supports the dissolution of sheltered employment settings. We have seen limited progress for many individuals engaged in this type of employment setting, as well as the ineffectiveness of these programs to help develop meaningful employment skills that would promote progress into competitive integrated settings in the community.” She added, “the model of train-in-place is outdated, and we support the elimination of this type of setting, along with the ability to use the 14(c) certificate to pay individuals that are working in a sheltered non-integrated setting.”¹⁴⁰

¹³⁵ Ibid., p. 117.

¹³⁶ Ibid., p. 123.

¹³⁷ Ibid., p. 120.

¹³⁸ Ibid., p. 133.

¹³⁹ Jacoby Testimony, *Phoenix Hearing*, pp. 90-91.

¹⁴⁰ Baier Testimony, *Phoenix Hearing*, p. 95.

In 2018, the National Council on Disabilities, an independent federal agency called for the elimination of subminimum wages under 14(c) in its recent report entitled National Disability Employment Policy from the New Deal to the Real Deal, Joining the Industries of the Future. According to Mr. Rico, the report states, “the past two decades of research pertaining to supported employment reveals that it is easier and more effective to place a person in a job that matches his or her interests and then train them with appropriate services and supports than it is to train someone in a segregated setting where they learn skills that are not transferable or even desirable in competitive integrated employment. As such, the strong consensus of decades of research and study is that employment services are most successful through individualization, strong job matches and the appropriate intensity of flexible services and supports provided in typical work settings.”¹⁴¹

Ms. Reed urged recommendations to State agencies. “We continue to hear from our consumers that state agencies and staff they work with need more training opportunities to learn how to support and effectively work with people with cognitive and intellectual disabilities.” She added, “consumers and families report that some languish in an endless cycle of skills training with few moving to community employment.” She added, “we also hear from youth and their families that... there is still a need for additional community-based opportunities for paid and unpaid vocational experience for youth.”¹⁴²

According to Ms. Voirol, “Arizona's overall employment rate of all working-age individuals who have a disability is 36 percent, while those individuals with an intellectual disability are employed at a rate of about 26.3 percent... However, we know from research and from hearing directly from people with disabilities that people who have disabilities want to work and be in the labor force just like the rest of society.” She added, “evidence-based practices such as support, and customized employment strategies have demonstrated that people with significant support needs can work successfully in competitive jobs and community businesses. This includes individuals who may be in non-competitive center-based or group-supported settings, as well as those in-services such as day treatment and training.”¹⁴³

¹⁴¹ Rico Testimony, *Phoenix Hearing*, pp. 34-35.

¹⁴² Reed Testimony, *Phoenix Hearing*, p. 128.

¹⁴³ Voirol Testimony, *Phoenix Hearing*, p. 40.

Mr. Natvig argued that providing “an array of employment options for each individual and their person-centered team is the best way to achieve the maximum employment outcome.”¹⁴⁴ He claimed that transitioning needs different efforts according to each individual. “It’s a very individualized process... You have to evaluate every individual’s aspirations, evaluate their abilities, and we have to work very hard to find just the right job for the individuals in many cases.”¹⁴⁵

Mr. Natvig emphasized the importance of focusing on people with significant disabilities. “...working age people with significant disabilities in Arizona, there are 268,000 who are not working.” He added, “many more people with significant disabilities who are completely out of the workplace right now, and that’s the group that we should be working with the most.”¹⁴⁶

Panelists testified that people with disabilities have different needs. Therefore, panelists urged individualized support, especially those with significant disabilities.

V. Recommendations from Panelists

Mr. Jacoby and Ms. Baier proposed recommendations for 14(c). While both argued the retainment of 14(c), both acknowledged its flaws.

Mr. Jacoby recommended four areas of the 14(c) legislation:

1. First, “reevaluate the appropriateness of the business establishment list and patient worker list.”¹⁴⁷ He added, “it was nonetheless astonishing to hear that businesses such as state and local health care institutions, Chili’s and Quality Inn Hotels have 14(c)’s. Maybe there are good reasons for this, but on the surface, that seems counterintuitive to the original intent of the legislation.”¹⁴⁸

¹⁴⁴ Natvig Testimony, *Phoenix Hearing*, p. 155.

¹⁴⁵ Ibid., p. 156.

¹⁴⁶ Ibid., p. 158.

¹⁴⁷ Jacoby Testimony, *Phoenix Hearing*, pp. 87-88.

¹⁴⁸ Ibid., p. 88.

2. Second, is greater oversight and stricter enforcement. “Every three years, Gompers completes a lot of paperwork to renew our 14(c), then turns it into an understaffed and overworked group of reviewers... When we renewed our certificate back in 2015, it took eight months to hear back.”¹⁴⁹ He added, “we connected with the Department of Labor Office in Chicago to speak with them about an issue and we were told we would receive an answer not in weeks but in months. And once we get our certificate, we don't hear from or see anyone for three years unless there is an issue.”¹⁵⁰ He added, “more rigorous oversight would assist in catching these problems sooner and could also be used to point out the fact that most agencies using 14(c) are doing so in the best interests of the numbers.”¹⁵¹
3. Third, is reexamining who is eligible to work under 14(c). “In too many cases, it's become a catch-all for anyone with a disability, and that is wrong.”¹⁵² He added, “I can think of jobs that even those with the most significant disability could complete and, yet, they work under 14(c). In addition, I can think of individuals who were labeled disabled but were as capable as any able-bodied individual and, again, worked under the auspices of 14(c) certificate.”¹⁵³ He added, “we need to ensure that the only people who benefit from the 14(c) certificate are those who would more than likely never have another chance to try employment.”¹⁵⁴
4. Fourth, is limiting the time. “In too many cases 14(c) is no longer a training wage but a destination. If we're going to say that 14(c) is honestly only being used to assist individuals as they build skills, then it probably shouldn't go on forever... it seems punitive to arbitrarily pick a number. Despite this, for me, the question is not should we do this but how do we do this.”¹⁵⁵

Ms. Baier also enumerated some general recommendations.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid., pp. 88-89.

¹⁵¹ Ibid., p. 89.

¹⁵² Ibid.

¹⁵³ Ibid., pp. 89-90.

¹⁵⁴ Ibid., p. 90.

¹⁵⁵ Ibid.

1. First, is “establishing an advisory committee through the Department of Labor wage and hour division. This committee would include community rehabilitation providers, such as ourselves, to review the current administration of the Section 14(c) and would make recommendations on streamlining the program and enhancing accountability of certificate holders.”¹⁵⁶
2. The rest of Ms. Baier’s recommendations include, “increased funding to enforce wage and hour laws for the DOL Wage and Hour Division and the Office of the Solicitor;” “increased number of on-site inspections to ensure compliance and provide technical assistance;” “increased availability of technical assistance;” “provided direction by DOL to ensure compliance;” “increased penalties for willful violations;” “and then finally, improved marketing of the Section 14(c) program to increase awareness of limitations and benefits to certificate for the individual's families and the general public.”¹⁵⁷

Although Mr. Jacoby and Ms. Baier were panelists arguing the necessity of 14(c), amendments were proposed. The proposals are intended to supplement the shortcomings of 14(c).

¹⁵⁶ Baier Testimony, Phoenix Hearing, p. 99.

¹⁵⁷ Ibid.

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U. S. Commission on Civil Rights**



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