DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 525

RIN 1235–AA14

Employment of Workers With Disabilities Under Section 14(c) of the Fair Labor Standards Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Fair Labor Standards Act (FLSA or Act) authorizes the Secretary of Labor to issue certificates allowing employers to pay productivity-based subminimum wages to workers with disabilities, but only where such certificates are necessary to prevent the curtailment of opportunities for employment. Employment opportunities for individuals with disabilities have vastly expanded in recent decades, in part due to significant legal and policy developments. Based on that evidence, the Department has tentatively concluded that subminimum wages are no longer necessary to prevent the curtailment of employment opportunities for individuals with disabilities and thus proposes to phase out the issuance of section 14(c) certificates.

DATES: Interested persons are invited to submit written comments on this notice of proposed rulemaking (NPRM) on or before January 17, 2025.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235–AA14, by either of the following methods:

- *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Address written submissions to: Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210.

Instructions: Response to this NPRM is voluntary. The Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this NPRM. Commenters submitting file attachments on *https://www.regulations.gov* are advised that uploading text-recognized documents—*i.e.,* documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration.

Anyone who submits a comment (including duplicate comments) should understand and expect that the comment, including any personal information provided, will become a matter of public record and will be posted without change to *https://www.regulations.gov.* The Department posts comments gathered and submitted by a third-party organization as a group under a single document ID number on *https://www.regulations.gov.* All comments must be received by 11:59 p.m. ET on January 17, 2025, for consideration in this rulemaking; comments received after the comment period closes will not be considered.

The Department recommends that commenters submit their comments electronically via *https://www.regulations.gov* to ensure timely receipt prior to the close of the comment period. Please submit only one copy of your comments by only one method.

Docket: For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at *https://www.regulations.gov.* In accordance with 5 U.S.C. 553(b)(4), a summary of this rule may also be found at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Daniel Navarrete, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division (WHD), U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Alternative formats are available upon request by calling 1–866–487–9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at *https://www.dol.gov/agencies/whd/contact/local-offices* for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The FLSA generally requires that employees be paid at least the Federal minimum wage, currently $7.25 per hour, for every hour worked and at least one and one-half times their regular rate of pay for each hour worked over 40 in a single workweek. 29 U.S.C. 206(a), 207(a). Since its enactment in 1938 through today, section 14 of the FLSA has included a provision authorizing the Department to issue certificates permitting employers to pay workers at wage rates below the Federal minimum wage when the worker's disabilities impair their earning or productive capacity. The section 14 statutory provision, however, has always provided that such certificates may only be issued to the extent ''necessary to prevent curtailment of opportunities for employment.'' [1] As the Supreme Court explained in 1947, the language and legislative history of the section show that its purpose is to prevent the imposition of a full minimum wage from depriving those with ''physical handicaps'' of ''all opportunity to secure work.'' [2] However, as the Court emphasized, ''to have written a blanket exemption of all [such workers] from the Act's provisions might have left open a way for wholesale evasions. Flexibility of wage rates for them was therefore provided under the safeguard of administrative permits.'' [3] Hence, section 14(c) authorizes the Secretary to issue certificates allowing payment of subminimum wages to individuals with disabilities only when conditions make it ''necessary'' to do so.

The Department first promulgated regulations governing the issuance of these ''administrative permits'' in 1938, and last substantively updated them in 1989, more than 35 years ago. Since 1989 (and profoundly more so since the time the statutory provision was enacted and its implementing regulations were promulgated nearly 85 years ago), opportunities for employment have dramatically changed for individuals with disabilities. Fueled by the disability rights movement, societal and cultural assumptions, beliefs and expectations regarding the employment of individuals with disabilities have evolved, and opportunities for individuals with disabilities have

[1] 29 U.S.C. 214(c)(1).

[2] *Walling* v. *Portland Terminal Co.,* 330 U.S. 148, 151 (1947). The Department notes that some terminology used in this NPRM reflects the terms used in the statute and regulations at the time of their issuance or quotations from various sources. Quotations are attributable to the sources indicated and do not necessarily reflect the current views or terminology of the Department. Since the early 1990s, the government has replaced outdated and offensive terms like ''the handicapped'' with more respectful, person-first terminology, such as ''individuals with disabilities.'' Throughout this NPRM, the Department references outdated terms only when necessary to accurately reflect quoted sources or to illustrate changes that have occurred.

[3] *Id.*

dramatically expanded. Federal legislation and judicial precedent have established and enshrined fundamental legal protections requiring equal access, opportunities, and respect for individuals with disabilities in both education and employment. Of these legislative and judicial developments, the landmark Americans with Disabilities Act (ADA) of 1990,[4] enacted the year after the section 14(c) regulations were last substantively updated, has had a profound impact on employment opportunities for individuals with disabilities. In addition, the President and executive agencies have taken steps to end the payment of subminimum wages to workers with disabilities on certain government contracts. Numerous States and localities have prohibited or limited the payment of subminimum wages to workers with disabilities within their jurisdictions. In short, employment opportunities for individuals with disabilities have advanced significantly since the FLSA's enactment in 1938, when it was much more difficult for individuals with disabilities to secure employment at the full minimum wage.[5]

Although it is widely acknowledged that individuals with disabilities continue to face challenges in obtaining equal opportunity and treatment, the extent of legal protections, opportunities, resources, training, technological advancements, and supports has dramatically expanded since 1989, when the Department's regulation was last substantively updated, to assist individuals with disabilities both in obtaining and maintaining employment at or above the full minimum wage.[6] Employers similarly have substantially more resources and training available to recruit, hire, and retain workers with disabilities in employment at or above the full minimum wage. This comprehensive system of new approaches has rendered it unnecessary to depend upon subminimum wages to secure employment opportunities for individuals with disabilities and, given the enhanced opportunities for employment since the Department last substantively updated its regulations in 1989, vastly more individuals with disabilities—including intellectual or development disabilities (I/DD)—work at full-wage employment than work under section 14(c) certificates. Recognizing the expansion of full-wage employment options for individuals with disabilities, an increasing number of oversight and advisory reports, such as those published by the U.S. Commission on Civil Rights (USCCR) and the National Council on Disability (NCD), have vigorously called for a ''phase out'' of section 14(c) certificates. As another indication that subminimum wages are not necessary to prevent the curtailment of employment opportunities, an increasing number of States and localities, including many jurisdictions with higher minimum wages than the FLSA minimum wage, have prohibited or limited the payment of subminimum wages in their respective jurisdictions, and an increasing number of employers themselves are voluntarily opting out of paying subminimum wages, as is reflected in the rate at which the number of section 14(c) certificate holders has substantially declined in recent years.

Against this backdrop, the Department must fulfill its statutory mandate of assessing whether section 14(c) certificates continue to be necessary in order to prevent the curtailment of employment opportunities for individuals with disabilities. After careful review, consideration of input from stakeholders with a wide variety of viewpoints, and for the reasons discussed in this notice of proposed rulemaking, the Department preliminarily concludes that section 14(c) certificates that allow employers to pay subminimum wages to workers with disabilities are no longer necessary and thus proposes to amend 29 CFR part 525 to phase out the issuance of such certificates.

Accordingly, the Department proposes to stop issuance of new section 14(c) certificates and to phase out existing certificates over several years. At the conclusion of the phaseout period, this proposal would require only that subminimum wages no longer be paid to workers with disabilities. This proposed rule would not require workers to leave their current places of employment, where they often also receive a number of services, such as rehabilitation and training, nor would it require current section 14(c) certificate holders to amend the type of services that they currently provide or to modify the settings in which work is performed.[7]

The Department specifically proposes to cease issuance of new section 14(c) certificates to employers submitting an initial application on or after the effective date of a final rule and permit existing section 14(c) certificate holders, assuming all legal requirements are met, to continue to operate under section 14(c) certificate authority for up to 3 years after the effective date of a final rule. The Department is also requesting comment as to whether, if this proposed rule is finalized, it would be appropriate to grant an extension for existing section 14(c) certificate holders who demonstrate a need and seeks comments on the need for such an extension period, and, if needed, its scope, structure and length.

II. Background

A. Introduction

The FLSA provides basic labor protections including Federal minimum wage and overtime compensation requirements. Section 6 of the FLSA establishes that the Federal minimum wage for covered employees is currently $7.25 per hour, ''except as otherwise provided'' in the Act.[8] Since its enactment in 1938, the FLSA has authorized the Department to issue certificates permitting the employment of certain workers with disabilities at wage rates lower than the otherwise applicable Federal minimum wage ''to the extent necessary to prevent curtailment of opportunities for employment.'' [9] To provide appropriate contextual information about section 14(c), this section of the proposed rule provides a high-level summary of the Department's legal authority regarding the issuance of section 14(c) certificates, the relevant statutory and regulatory history pertaining to FLSA section 14(c), an overview of how the Department's Wage and Hour Division (WHD) administers section 14(c) certificates and enforces the section 14(c) provisions, and a description of how

[4] The ADA was subsequently amended by the ADA Amendments Act of 2008, 42 U.S.C. 12111 *et seq.* As discussed in section III.B, the ADA mandates equal employment opportunity for individuals with disabilities by prohibiting discrimination and requiring reasonable accommodation.

[5] *Id.*

[6] This expansion of employment opportunities, resources, training, and supports is applicable for all individuals with disabilities, including individuals with intellectual and developmental disabilities who comprised about 90 percent of the workers with disabilities still being paid subminimum wages as of August 2021. *See* U.S. Gov't Accountability Office, GAO–23–105116, ''Subminimum Wage Program: DOL Could Do More to Ensure Timely Oversight'' (2023) (2023 GAO Report), at 24, *https://www.gao.gov/products/gao-23-105116.*

[7] For example, if an employer currently employs a worker with disabilities to perform an assembly line job for 2 hours per day and then provides rehabilitation services to that same individual for 6 hours per day, this proposed rule would require only that the employer pay at least the full Federal minimum wage for the 2 hours of work performed by the worker. This proposed rule would not require any changes be made to the setting or rehabilitation services offered.

[8] 29 U.S.C. 206.

[9] 29 U.S.C. 214(c)(1).

employers are currently using certificates. The Department then discusses its recent review of section 14(c) and addresses the current need for rulemaking.

B. Statutory Authority

Section 14(c)(1) of the FLSA provides that the ''Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals . . . whose earning or productive capacity is impaired by age or physical or mental deficiency'' at productivity-based subminimum wages.[10] The FLSA explicitly authorizes the Secretary to issue regulations governing the issuance of subminimum wage certificates.

In authorizing the Secretary to issue certificates allowing employers to pay subminimum wages, Congress included a significant statutory limitation by permitting the issuance of certificates only ''to the extent necessary to prevent curtailment of opportunities for employment.'' At the same time, Congress determined that the Secretary ''shall by regulation or order'' provide for subminimum wage certificates, thereby conferring authority upon the Department to determine whether that standard has been met and under what circumstances subminimum wages should be paid. To best implement the statute at this point in time, the Department proposes to exercise its authority to find that subminimum wages are no longer necessary to prevent the curtailment of employment opportunities for workers with disabilities and to phase out the issuance of section 14(c) certificates.[11]

The Secretary's issuance of certificates prior to permitting employers to pay a subminimum wage acts as a ''safeguard'' against widespread abuse.[12] Section 14(c) requires the curtailment clause determination to be made by the Secretary prior to permitting employers to pay a subminimum wage because the right to a minimum wage under the FLSA is not waivable. The provision places this obligation on the Secretary to safeguard the program against abuse and ensure that no individual employer or employee can effect a waiver of their rights, contrary to the FLSA.

It is a fundamental principle of FLSA jurisprudence that the Act's rights, including the right to the Federal minimum wage, cannot be waived. The Supreme Court's ''decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right[s] . . . under the Act'' and ''have held that FLSA rights cannot be abridged by contract or otherwise waived.'' [13] The Supreme Court has identified at least three reasons for this nonwaiver rule. First, the Court has determined that the Act constituted ''a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency.'' [14] According to the Court, the protective purposes of the Act thus ''require that it be applied even to those who would decline its protections''; otherwise, ''employers might be able to use superior bargaining power to coerce employees to . . . waive their protections under the Act.'' [15] Second, the FLSA sought to establish a ''uniform national policy of guaranteeing compensation for all work'' performed by covered employees.[16] Third, the Court has held that permitting employees to waive their FLSA rights is inconsistent with the explicit purpose of the Act to protect employers against unfair methods of competition.[17]

Accordingly, just as employees cannot choose to forego overtime compensation due, employees cannot choose to be paid subminimum wages. Rather, an employer may only pay subminimum wages to workers with disabilities after obtaining a certificate from the Secretary. In turn, the Secretary may only issue such certificates when the threshold statutory requirement is met, that is, the Secretary determines that such certificates are necessary to prevent the curtailment of employment opportunities.

Recognizing the uniqueness of the certificate process for subminimum wages, the Supreme Court has observed that in enacting the FLSA, Congress wished to increase opportunities for gainful employment, and not impose requirements that would deprive any worker of ''all opportunity to secure work.'' [18] The Court further recognized, however, that a ''blanket exemption'' of workers with disabilities from the minimum wage could have invited ''wholesale evasions'' and accordingly subminimum wages could only be paid under the very specific ''safeguard of administrative permits.'' [19] Thus, the Secretary continues to be responsible for monitoring the payment of subminimum wages and ensuring that the statutory prerequisites for both certificate issuance and use of such certificates have been met.

The FLSA expressly confers authority to the Department to make the determination under the curtailment clause that certificates are necessary to prevent the curtailment of employment opportunities prior to issuing certificates.[20] The most logical reading of the statutory phrase ''opportunities for employment'' is that the term ''opportunities'' refers to ''a time or place favorable for executing a purpose'' or ''a suitable combination of conditions.'' [21] Thus, the statutory language does not require a particular employment outcome for a worker with a disability being paid subminimum wages pursuant to a section 14(c) certificate. Rather, the statute requires the Department to evaluate the necessity of issuing section 14(c) certificates to prevent the curtailment of employment opportunities. In other words, the Department must consider whether the payment of subminimum wages is necessary to prevent the curtailment of ''a suitable combination of conditions,'' for employment opportunities, advancement, or progress broadly, not whether all workers attain a particular employment outcome, or a specific worker attains a particular job in a particular setting.

[10] 29 U.S.C. 214(c)(1).

[11] WHD has legal authority to require payment of the full Federal minimum wage for all hours worked by covered, non-exempt employees. As previously noted, this proposed rule would not require workers to leave their current places of employment, nor would it require current section 14(c) certificate holders to amend the type of services that they currently provide or to modify the settings in which work is performed.

[12] *Portland Terminal,* 330 U.S. at 151.

[13] *Barrentine* v. *Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 740 (1981) (listing cases).

[14] *Brooklyn Sav. Bank* v. *O'Neil,* 324 U.S. 697, 706 (1945).

[15] *Tony & Susan Alamo Found.* v. *Sec'y of Labor,* 471 U.S. 290, 302 (1985) (citing *Barrentine,* 450 U.S. 728 and *Brooklyn Sav.,* 324 U.S. 697).

[16] *Jewell Ridge Coal Corp.* v. *Local No. 6167, UMWA,* 325 U.S. 161, 167 (1945).

[17] *See* 29 U.S.C. 202(a); *Brooklyn Sav.,* 324 U.S. at 710.

[18] *See Walling* v. *Portland Terminal,* 330 U.S. at 151–52.

[19] *Portland Terminal,* 330 U.S. at 151–52.

[20] The Secretary has exercised this authority in various ways. Although the statutory language states that a certificate for subminimum wages may be issued when productive capacity is impaired by ''age, physical or mental deficiency, or injury,'' the granting of certificates has historically focused on disability, and today employers are paying subminimum wages almost exclusively to workers with I/DD. As an example of the Department's exercise of its authority, the Department promulgated regulations in 1939 which stated that workers with ''temporary, or readily correctible, disabilities,'' and those ''where age alone is cited as a disability for a worker under 65,'' would be ineligible for a certificate. 29 CFR 524.7(a), (c) (1939).

[21] *See* ''Opportunity,'' Webster's New International Dictionary 1709 (1938 ed.).

The statute gives the Department discretion to determine whether the curtailment standard has been met, and the Department proposes that, at this time, the issuance of certificates does not appear to be necessary to prevent the curtailment of employment opportunities for individuals with disabilities. Today, the Department is proposing to find that, due to the legal, social, and technological changes since that determination was made in 1989, subminimum wage certificates are unnecessary to prevent employment curtailment. This proposed rule considers the framework that the Department's current section 14(c) regulations, last substantively revised in 1989, uses to determine whether subminimum wages are necessary to prevent curtailment of employment opportunities. The current regulations (explained in more detail below) presume, without further analysis, that subminimum wages are necessary to prevent the curtailment of employment opportunities provided that (i) an individual has a disability that impacts their productivity in performing a particular job offered by a single certificate-holding employer and (ii) the employer can demonstrate it has calculated a productivity-based wage rate in accordance with the regulations for that particular job. In adopting this approach, the 1989 regulations collapse the statutory curtailment clause requirement into the statutory requirement that any commensurate wage for a particular job must be ''related to the individual's productivity'' at that job. The regulatory framework from 1989 thus rests on an implicit assumption that the two statutory requirements are the same, that disability-related impacts on an individual's productivity at a particular task means that a subminimum wage was necessary in order to prevent the curtailment of employment opportunities. Given the substantial developments in law and policy that have occurred since the regulations were last updated nearly 35 years ago and the expansion of opportunities now available to individuals with disabilities, the Department proposes to take into account the current scope of those employment opportunities instead of assuming that certificates are necessary to prevent the curtailment of employment opportunities for individuals with disabilities.

Given this, the proposed rule proposes to fulfill the curtailment clause requirement by assessing whether subminimum wages are still necessary based on a comprehensive consideration of how employment opportunities are both curtailed and created across the employment market. In assessing the statutory curtailment clause requirement, the Department today has more tools at its disposal than ever before—such as, for example, information from the nearly half of States that have prohibited or limited the use of subminimum wages—to make a preliminary determination that the payment of subminimum wages is not necessary to prevent the curtailment of employment opportunities. Particularly in view of the substantial social, structural, and legal changes that have occurred since 1989 to systemically reshape employment opportunities for individuals with disabilities (also discussed in detail below), the Department proposes herein that this comprehensive approach better fulfills the Secretary's statutory obligation to provide for the issuance of certificates only when ''necessary.''

C. Overview of Statutory and Regulatory History of FLSA Section 14(c)

The FLSA provision allowing the payment of subminimum wages to certain workers with disabilities became effective when the FLSA was signed into law on June 25, 1938. As passed in 1938, section 14 of the FLSA instructed that the WHD Administrator, ''to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for . . . the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 [of the FLSA] and for such period as shall be fixed in such certificates.'' [22] As is plain from the statutory text, the precondition that certificates may only be issued to the extent necessary to prevent the curtailment of employment opportunities has been an essential part of the section 14 provision since enactment.

The legislative history shows that Congress intended to limit the circumstances under which subminimum wage certificates could be issued so as to avoid undermining the larger purposes of the FLSA and granted the Department authority to administer these limits. The initial legislative history of the Act includes statements from the joint Congressional hearings on the enactment of the FLSA in 1938 which addressed the purposes of establishing a Federal minimum wage and the Department's discretion in applying that standard under section 14. Congress explained that the Act ''provides a floor below which the hourly wage ought not to fall and a limit beyond which the working week should not be stretched. These are the rudimentary standards of human decency at which the relatively automatic provisions of the bill are directed.'' [23] Regarding the clause limiting the issuance of certificates to circumstances where they are ''necessary in order to prevent curtailment of opportunities for employment'' (the ''curtailment clause''), Congress further explained that ''even in the application of these rudimentary standards, a certain discretion is given to the enforcement agency so that it can protect the earning power of the workers and their opportunities for employment from unreasonable curtailment.'' [24] Additionally, Congress advised that, in considering subminimum wages, the Department was to give ''due consideration to the maintenance of the minimum standard of living, the health, efficiency, and well-being of the employees, and the avoidance of unreasonable curtailment of opportunities for employment and the earning power of the employees.'' [25]

The Department has exercised the authority Congress gave it to evaluate the curtailment clause throughout the history of its administration of section 14. As a reflection of the determination that payment of subminimum wages was, at that time, necessary under certain circumstances to prevent the curtailment of employment opportunities, the Department promulgated its initial regulations implementing section 14 in 1938. Among other matters, the initial regulations established procedures whereby certificates were issued on an individual basis, set a general wage floor at 75 percent of the FLSA section 6 minimum wage, and allowed for a lower wage rate if an investigation showed that it was justified.[26] The Department amended its regulations in 1939, exercising its ''curtailment clause'' authority to limit the issuance of certificates by specifying that, for

[22] Fair Labor Standards Act of 1938, Public Law 75–718, 52 Stat. 1060 (1938) (codified at 29 U.S.C. 214). The original version of the FLSA also provided for subminimum wage rates for learners, apprentices, and messengers. 29 U.S.C. 214(1).

[23] Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Educ. and Labor, and House Comm. on Labor, 75th Cong. 1st Sess. Part 1, p. 55 (June 2–5, 1937).

[24] *Id.*

[25] *Id.* at 57.

[26] 29 CFR 524.5 (1938).

example, certain groups of workers, including those with ''temporary, or readily correctible, disabilities,'' those ''where age alone is cited as a disability for a worker under 65,'' and those ''whose piecework earnings are generally equal to or above the statutory minimum [wage],'' would be ineligible for a certificate.[27] The Department also amended its regulations in 1940 to provide specific requirements governing the payment of subminimum wages to individuals with disabilities working in ''sheltered workshops.'' [28] The Department made a number of changes to its regulations implementing section 14 of the FLSA over the next 25 years, changing how certificates were issued and how wages were determined for workers.

In 1966, Congress amended the FLSA to, in relevant part, establish a wage floor for persons with disabilities in both general employment and in certain sheltered workshops at not less than 50 percent of the FLSA minimum wage.[29] The 1966 statutory amendments also created three special categories of certificates for workers who were not subject to the wage floor [30] and extended FLSA coverage to hospitals and other institutions as employers.[31] The statutory language limiting the issuance of certificates to only circumstances where subminimum wages were necessary to prevent the curtailment of opportunities for employment was not changed by these amendments. The 1966 FLSA amendments also required the Secretary to submit a study to Congress ''of wage payments to handicapped clients of sheltered workshops and of the feasibility of raising existing wage standards in such workshops.'' [32]

The 1966 amendments demonstrated Congress' continued intent to give the Department discretion to issue section 14 certificates based on a determination of need. In 1967, the Department updated its regulations based on the 1966 statutory amendments. That same year, the Department submitted its report to Congress, recognizing that the Congressional intent of the 1966 FLSA amendments was ''aimed at 'improving the economic circumstances of handicapped workers, speeding their movement into fully productive private employment, and assuring that such workers are not exploited through low wages.' '' [33] Reflecting the rapidly shifting views on the employment of individuals with disabilities since the FLSA was passed 28 years earlier, the report continued by noting that ''it is now clearly the intent of the Congress that handicapped workers' wages be raised to at least the minimum wage as soon as feasible.'' [34]

The Department's report made additional observations about subminimum wage employment and made recommendations on changes needed to support movement at that time from section 14(c) employment to full wage employment. In describing sheltered workshops, the Department observed that while individuals with disabilities being paid subminimum wages by the workshops (described as ''clients'' in the report) may be limited in their ability to produce, they were also limited by ''the frequently obsolete methods of organization and production of the workshop.'' [35] The report concluded that ''[t]o measure the 'worth' of a handicapped client by his 'productivity' while making him work with outmoded equipment, or on jobs long ago automated, or with modern equipment which is not adapted to the individual's needs is to foredoom the great majority of handicapped clients to subminimum wages.'' [36] Additionally, of particular note, the Department reported about the demographics of workers receiving subminimum wages in sheltered workshops, including by disability. The Department observed that, in 1967, workers with I/DD comprised approximately one-third of all workshop clients and were paid the lowest wages of any group of workers with disabilities employed under certificates.[37]

In 1971, the Department again amended its regulations to include, in part, the introduction of a new 25–50 percent wage floor for ''multi-handicapped and other workers whose earning capacity is severely impaired'' working under the sponsorship of a public rehabilitation agency.[38] In 1974, Congress amended the FLSA by moving the subminimum wage provision for workers with disabilities to section 14(c) of the Act but yet again left the substantive requirements, including the statutory ''curtailment clause,'' unchanged.[39] At this juncture, Congress's maintenance of the Department's authority, through the ''curtailment clause,'' to determine the extent to which subminimum wage certificates were necessary is especially notable in light of the Department's 1967 report seven years earlier, which, as discussed above, emphasized the Department's understanding that Congress sought to have individuals with disabilities earn full minimum wages ''as soon as feasible.'' [40]

In 1986, Congress amended the FLSA to eliminate the specific types of certificates and wage floors that previously applied to section 14(c) employment.[41] These revisions again retained the ''curtailment clause'' standard as a precondition governing the issuance of certificates. While the revised statute retained the basic requirement that workers with disabilities employed under section 14(c) certificates be paid commensurate wages, it added a requirement that the wages be ''related to the individual's productivity.'' In full, section 14(c)(1), which remains in effect today, provides that ''[t]he Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the

[27] 29 CFR 524.7(a), (c), and (d) (1939).

[28] 5 FR 655 (Feb. 13, 1940) (defining ''sheltered workshop'' as ''a charitable organization or institution conducted not for profit, but for the purpose of carrying out a recognized program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, and to provide such individuals with remunerative employment or other occupational rehabilitating activity of an educational or therapeutic nature.''); *see also* 29 CFR 525.1 (1940).

[29] Public Law 89–601, 80 Stat. 830, 843–44 (1966) (29 U.S.C. 214(d)(1)).

[30] *Id.* (29 U.S.C. 214(d)(2)(A)–(B), 214(d)(3)). The three categories of certificates for workers who were not subject to the wage floor established by the 1966 FLSA amendments included, in certain specified circumstances, ''handicapped workers engaged in work which is incidental to training or evaluation programs,'' ''multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment,'' and ''handicapped clients in work activities centers.'' *Id.*

[31] *Id.* at 831–32 (29 U.S.C. 203(r), (s)).

[32] *See id.* at 845.

[33] U.S. Dep't of Labor, ''Sheltered Workshop Report of the Secretary of Labor and Technical Report on Wage Payments to Handicapped Clients in Sheltered Workshops'' (1967) (1967 DOL Report) at 1 (quoting Senate Report No. 1487, August 23, 1966, at 23).

[34] 1967 DOL Report at 1. The report did not explicitly address the curtailment clause regarding certificate issuance. However, as evidenced by the quoted passage, lawmakers' understanding of the potential employment of individuals with disabilities rapidly evolved since the 1938 passage of the FLSA. In 1938, Congressional documents were replete with references to individuals with disabilities as ''subnormal'' and, in contrast to the 1967 report cited herein, often assumed, without discussion, they were ''unable to compete with their fellow workers.'' *See, e.g.,* Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 before the Senate Comm. On Educ. And Labor; House Comm. On Labor, 75th Cong. 1st Sess. Part 1, p. 38 (June 2–5, 1937) (statement of Robert H. Jackson, Assistant Attorney General, U.S. Dep't of Justice); Cong. Rec. Vol. 83, Part 6, 75th Cong. 3d Sess. P. 7134 (May 19, 1938).

[35] 1967 DOL Report at 2.

[36] *Id.*

[37] *Id.* at 21.

[38] *See* 36 FR 50–51 (Jan. 5, 1971) (29 CFR 524.1(c)).

[39] *See* Public Law 93–259,88 Stat. 55, 72 (1974).

[40] *See* n. 34, above.

[41] *See* Pub. L. 99–486, 100 Stat. 1229 (1986) (29 U.S.C. 214).

employment, under special certificates, of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are: (A) lower than the minimum wage applicable under section 206 of this title, (B) commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work, and (C) related to the individual's productivity.'' [42] The 1986 statutory amendments also required that employers provide ''written assurances'' that wages for hourly workers be reviewed at least every 6 months, and that wages for all employees be adjusted at least once a year to reflect changes in the prevailing wages in the locality.[43] Additionally, the new language set forth a ''wage petition'' procedure by which an employee or their parent or guardian can ''petition the Secretary to obtain a review of'' the subminimum wage rate paid by the employer.[44] The revised statute also requires that the appeal process include a hearing before an Administrative Law Judge (ALJ), placing the burden on the employer to prove that the subminimum ''wage rate is justified as necessary in order to prevent curtailment of opportunities for employment.'' [45] Since these 1986 amendments, Congress has not directly amended the statutory text of section 14(c), but, as discussed in more detail below, Congress has passed several significant laws that impact employment opportunities for individuals with disabilities.

The Department's section 14(c) regulations have remained substantively untouched for the last 35 years.[46] In 1989, the last time the Department made significant regulatory updates regarding section 14(c), the Department among other things, amended and consolidated regulations governing the section 14(c) provisions to 29 CFR part 525 (the regulations had previously existed in three parts: parts 524, 525, and 529), addressed the 1986 amendments to the FLSA, and made other administrative changes.[47] In its 1989 regulations, the Department defined a ''worker with a disability'' as ''an individual whose earning or productive capacity is impaired by a physical or mental disability . . . for the work to be performed,'' and cautioned that ''a disability which may affect earning or productive capacity for one type of work may not affect such capacity for another.'' [48] The regulations also provide that ''[a]n individual whose earning or productive capacity is not impaired for the work being performed cannot be employed under a certificate issued pursuant to this part and must be paid at least the applicable minimum wage.'' [49]

The Department's 1989 regulations also state that the Department will consider four criteria in determining whether subminimum wage rates are necessary in order to prevent curtailment of opportunities for employment. As set out in the 1989 rule, these criteria, still in effect today, examine the impact of the worker's disability on their productivity compared to the earnings and productivity of experienced workers without disability doing essentially the same type of work and employed in the vicinity; as previously noted, the criteria do not include an assessment of the general scope of employment opportunities available to individuals with disabilities. The specific criteria are: (1) the nature and extent of the disabilities of the individuals employed as these disabilities relate to the individuals' productivity; (2) the prevailing wages of experienced employees not disabled for the job who are employed in the vicinity in industry engaged in work comparable to that performed at subminimum wage rates; (3) the productivity of the workers with disabilities compared to the norm established for nondisabled workers through the use of a verifiable work measurement method or the productivity of experienced nondisabled workers employed in the vicinity on comparable work; and (4) the wage rates to be paid to the workers with disabilities for work comparable to that performed by experienced nondisabled workers.[50] To determine whether these criteria are met, the Department's regulations also provide guidance on determining the prevailing wage in a vicinity using different methods, instructions on establishing piece rates and hourly rates for workers with disabilities, and procedures to be used in deciding petitions for review of a subminimum wage rate under section 14(c).[51] In determining whether subminimum wages are necessary to prevent curtailment of employment opportunities for individuals with disabilities, the 1989 regulations do not consider the opportunities generated by the employment market as a whole, do not contemplate structural measures such as pre-employment training and skill-matching job placement services, and, notably, were published a year prior to the 1990 passage of the original ADA, and thus do not take into account the fundamental anti-discrimination and reasonable accommodation protections of the ADA.

D. Administration, Use, and Enforcement of Section 14(c) Certificates Today

1. Administration and Enforcement of Certificates

The Department's WHD administers and enforces the section 14(c) provisions.[52] The administration, use, and enforcement of section 14(c) certificates is governed by the FLSA and WHD's current regulations at 29 CFR part 525, as explained above. Specifically, the current § 525.9 identifies the criteria that the Department considers in determining whether to issue a section 14(c) certificate. In effect, the current regulation conditions the issuance of a certificate on satisfaction of the standards set forth in other regulatory provisions governing the proper computation and payment of subminimum wages. Section 525.11 likewise provides that ''[u]pon consideration of the criteria cited in these regulations, a special certificate may be issued.'' The regulations also outline procedures, further elaborated upon in subregulatory guidance, that WHD generally must use to deny or revoke certificates as well as appellate procedures for stakeholders who may be ''aggrieved'' by any WHD certificate action.[53] Employees and their parents or guardians also have the ability to

[42] *Id.* (29 U.S.C. 214(c)(1)).

[43] *Id.* (29 U.S.C. 214(c)(2)(A), (B)).

[44] *Id.* (29 U.S.C. 214(c)(5)(A)).

[45] *Id.* (29 U.S.C. 214(c)(5)(B)–(G)).

[46] Since 1989, the only revisions to the section 14(c) regulations were technical corrections to the recordkeeping regulation at 29 CFR 525.16. *See* 82 FR 2221 (Jan. 9, 2017), and non-substantive updates to the regulation governing the administrative appeal process at 29 CFR 525.22. *See* 82 FR at 2228; 86 FR 1772 (Jan. 11, 2021).

[47] 54 FR 32920 (Aug. 10, 1989) (1989 final rule).

[48] *Id.* (29 CFR 525.3(d)).

[49] *Id.* (29 CFR 525.5(a). *See also* 29 CFR 525.12(b) (noting that a subminimum wage certificate applies only to such workers who ''are in fact disabled for the work they are to perform'')).

[50] *Id.* (29 CFR 525.9(a)).

[51] *Id.*

[52] The Secretary has delegated authority to WHD to issue regulations governing FLSA section 14(c), as well as to administer and enforce the section 14(c) provisions. *See* Sec'y of Labor's Order No. 01–2014, Delegation of Authority and Assignment of Responsibility to the Administrator, Wage and Hour Division, 79 FR 77527 (Dec. 24, 2014) (Secretary's Order No. 01–2014).

[53] 29 CFR 525.11(b) and 525.13 (certificate denials), 525.17 (certificate revocations), and 525.18 (administrative review process).

petition for review of their subminimum wage rates.[54]

If an employer applies for and is issued a section 14(c) certificate, the certificate allows the employer to pay individualized subminimum wage rates to workers with disabilities whose disabilities impact their productivity on the work being performed that are ''commensurate'' with the rates paid to workers without a disability performing the same type of work in the vicinity.[55] Generally, to determine the proper commensurate wage rate, an employer must: (1) identify the prevailing wage rate paid to experienced workers without disabilities performing essentially the same type, quality, and quantity of work in the vicinity where the worker with a disability is employed, often by conducting a prevailing wage survey; (2) determine the productivity standard for experienced workers without disabilities (the ''standard setter'') against which the productivity of the worker with disabilities must be measured; and (3) assess the quality and quantity of the productivity of the worker with a disability.[56] Employers generally determine the productivity of both the standard setter and the worker with a disability on a particular job by performing an observational stopwatch time study (''time study'').[57] Employers holding a section 14(c) certificate must also maintain adequate documentation of each worker's disability that impairs their productivity for the work performed, each required step that the employer took in determining the relevant commensurate wage, and time and pay records. Employers must also conduct periodic evaluations and make appropriate updates to the wage rates.[58]

In 2014, the Workforce Innovation and Opportunity Act (WIOA) established new limitations on the payment of a subminimum wage in section 511 of the Rehabilitation Act of 1973 (Rehabilitation Act or section 511), which became effective in 2016.[59] As discussed further in section III.B. below, section 511 prohibits an employer who holds a section 14(c) certificate from paying a subminimum wage to a worker with a disability unless the worker receives certain services and information prior to, and/or during, as applicable, their employment at subminimum wages.[60] The Secretary has authority to enforce the terms under which individuals are employed at a subminimum wage, including the section 511 provisions, and WHD has issued guidance providing detailed instructions on the requirements.[61]

As previously discussed, an employer must obtain an authorizing certificate from WHD as a prerequisite to paying subminimum wages to workers with disabilities. The certificate application requires employers to provide WHD information about themselves and a snapshot of information about the way they use or seek to use the subminimum wage certificate.[62] WHD reviews each application to determine whether to issue or deny a certificate. Having an active section 14(c) certificate does not provide the employer with a good faith defense should violations of section 14(c) or other provisions of applicable law be found during an investigation of the employer.

Certificates issued to employers by WHD have both an effective date and an expiration date and are generally valid for either 1 or 2 years, depending on the employer type (discussed in more detail below). To remain authorized to pay subminimum wages, the employer must properly and timely file an application for renewal with WHD before the expiration of its certificate.[63] Employers submit applications to renew certificate authority in the same manner as when seeking an initial application but are required to provide additional information, including a snapshot of information about the applicant's workforce paid a subminimum wage during their last completed fiscal quarter. If an application for renewal has been properly and timely filed with WHD, the employer's existing subminimum wage certificate remains in effect and its authority to pay subminimum wages continues while the application for renewal is under review.[64]

Each year, WHD investigates a number of section 14(c) certificate holders to determine their compliance with all the provisions and requirements of section 14(c) as well as their compliance with section 511.[65] WHD may initiate these cases due to a complaint or based upon agency selection. In fiscal year 2023, WHD concluded 89 investigations of employers holding section 14(c) certificates, found violations in approximately 88 percent of cases, and recovered more than $2 million in back wages for nearly 3,000 workers.[66] WHD checks for compliance with the section 511 requirements in every investigation of an employer holding a section 14(c) certificate and, since 2016, has identified violations of these provisions in more than 250 investigations. If WHD discovers a violation of the section 14(c) or section 511 requirements during the course of an investigation, WHD can assess back wages in addition to seeking action by the employer to ensure future compliance with the applicable laws. In certain circumstances, WHD can also assess liquidated damages and civil monetary penalties and can also revoke the employer's section 14(c) certificate.[67] Certificate revocation is an enforcement tool that WHD uses in certain circumstances such as misrepresentations or false statements made in obtaining the certificate or egregious violations of statutory requirements. In cases where employers

[54] 29 U.S.C. 214(c)(5), and 29 CFR 525.22.

[55] Although the term ''subminimum wages'' typically refers to wage rates that are less than the Federal minimum wage, section 14(c) certificates also allow the payment of wages that are less than the required prevailing wage to workers who have disabilities for the work being performed on Federal contracts subject to the McNamara-O'Hara Service Contract Act (SCA) and the Walsh-Healey Public Contracts Act. *See* 41 U.S.C. 6701 *et seq.,* 6501 *et seq.* The SCA's implementing regulations generally incorporate the ''conditions and procedures'' governing section 14(c) employment set forth in 29 CFR 525. 29 CFR 4.6(o).

[56] *See* 29 CFR 525.10; 29 CFR 525.12; WHD Field Operations Handbook (FOH) 64g05, *https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-64.*

[57] *See* FOH 64g06.

[58] 29 CFR 525.16.

[59] 29 U.S.C. 794g.

[60] Section 511 generally requires that youth with disabilities who are age 24 or younger complete certain activities, including pre-employment transition services under section 113 of the Rehabilitation Act or transition services under the Individuals with Disabilities Education Act (IDEA) (to the extent either of these services are available to them), an application for vocational rehabilitation services, and career counseling, information and referrals, to enable them to explore, discover, experience, and attain competitive integrated employment before they are employed at subminimum wage rates. *See* 29 U.S.C. 794g. Section 511 also requires that all workers with disabilities who are paid subminimum wages, regardless of their age, receive regular career counseling information and referrals and information about self-advocacy, self-determination, and peer mentoring training opportunities in their local area, every 6 months during the first year of employment and annually thereafter. *Id.*

[61] *See* U.S. Dep't of Labor, ''Materials for Employers with Section 14(c) Certificates,'' April 2024, *https://www.dol.gov/agencies/whd/workers-with-disabilities/employers.*

[62] *See* U.S. Dep't of Labor, ''14(c) Certificate Application,'' April 2024, *https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/apply.*

[63] 29 CFR 525.13(b).

[64] *Id.*

[65] Enforcement data collected by the Department's enforcement agencies can be found at: *https://enforcedata.dol.gov/views/data_catalogs.php.* The ''Wage and Hour Compliance Action Data'' dataset contains all concluded WHD compliance actions since fiscal year 2005. The dataset includes whether any violations were found, the back wage amount, number of employees due back wages, and civil money penalties assessed.

[66] *Id.*

[67] 29 U.S.C. 214(c), 216(c); 29 CFR 525.17.

do not voluntarily agree to pay back wages and come into compliance, WHD can also file suit in Federal court to resolve violations of the law.

2. Use of Section 14(c) Certificates

In recent decades, the estimated number of workers with disabilities paid subminimum wages has dramatically declined, as has the number of employers holding section 14(c) certificates. In 2001, the U.S. Government Accountability Office (GAO) estimated that approximately 424,000 workers with disabilities were paid subminimum wages while working for 5,612 employers holding section 14(c) certificates.[68] As of May 1, 2024, the Department's data shows there were 801 employers with either an issued certificate or a pending certificate application.[69] Employers with an issued certificate reported paying approximately 40,579 workers at subminimum wages in their previously completed fiscal quarter.[70] The number of employers holding or pursuing a section 14(c) certificate as of May 1, 2024, had dropped by nearly 86 percent from those in 2001. Further, there were roughly one-tenth the number of workers being paid subminimum wages under section 14(c) certificates as there were in 2001—approximately a 90 percent reduction over that 23-year period.[71] Additionally, very few employers seek new section 14(c) certificates; over 97 percent of certificate applications received annually seek renewal of an existing section 14(c) certificate.[72]

WHD issues section 14(c) certificates to business establishments, community rehabilitation programs (CRPs), hospitals/patient worker facilities, and school-work experience programs (SWEPs). The overwhelming majority of current certificate holders are CRPs, representing approximately 93 percent of current certificate holders in 2023.[73] In the context of section 14(c), WHD defines CRPs as ''not-for-profit agencies that provide rehabilitation and employment for people with disabilities.'' [74] Such establishments are sometimes referred to as ''sheltered workshops'' [75] as they typically are facility-based and often serve workers with disabilities in sheltered, or segregated, settings. Only a small number of private-sector, for-profit businesses hold certificates for the payment of subminimum wages, as reflected by the fact that only approximately 4 percent of current section 14(c) certificate holders are businesses.[76] [77]

Many CRPs provide both employment and other services, such as rehabilitation and training, and receive public funding. GAO has noted that many employers holding a section 14(c) certificate pay their operating costs through a mix of public funding and public and private contracts for goods or services.[78] Specifically, GAO noted in a 2021 report that Medicaid is the largest source of Federal funds for day and employment services (such as those provided by CRPs) for individuals with developmental disabilities.[79] Likewise, in a 2020 report, the USCCR found that ''the majority of community rehabilitation programs which provide supports and services for people with intellectual and developmental disabilities to obtain a job are funded by the vocational rehabilitation [program].'' [80] As the USCCR explained, in addition to Medicaid funding noted by GAO, the vocational rehabilitation funding includes U.S. Department of Education program grants under the Rehabilitation Act, in addition to State and local funding used for match purposes under the Vocational Rehabilitation program.[81]

As noted above, Congress removed any wage floor for section 14(c) employment nearly 40 years ago. As summarized in the table below, in a 2023 report, the GAO analyzed section 14(c) data for 62 percent of renewal certificates for the period covering 2019 to 2021 and found that more than 50 percent of workers in the data analyzed were paid less than $3.50 per hour, while approximately 14 percent were paid at or above the current Federal minimum wage of $7.25 per hour.[82] Nearly 5 percent of workers were paid 25 cents per hour or less. Approximately 14 percent were paid $1.00 per hour or less. GAO observed that higher-paid workers under section 14(c) certificates were more likely to be paid by the hour, while lower-paid workers were more likely to be paid on a piece rate basis [83] (a piece rate fixes a wage payment on each completed unit of work).[84] Using WHD's administrative data of issued certificates that were valid in the first two quarters of fiscal year 2024 (between October 2023 and

[68] U.S. Gov't Accountability Off., GAO–01–886, ''Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers With Disabilities, But Labor Should Improve Oversight'' 10, 18 (2001) (2001 GAO Report).

[69] *See* U.S. Dep't of Labor, ''14(c) Archive,'' June 2024, *https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders/archive.*

[70] *Id.* The Department notes that data collected by the Department from section 14(c) applications is not census data. Data is derived from information received by WHD during the certificate application process, which is used for the purposes of determining whether to issue a certificate. The application requires the employer to provide a snapshot of its operations and workforce that is paid a subminimum wage during its most recently completed fiscal quarter at the time of its renewal application, and the submission date varies per applicant. Because certificates are issued to the employer, not individuals employed at subminimum wages, the specific number of employees may change over the duration of the certificate. The certificate application data is self-reported by employers and is not independently verified by WHD. Additionally, the data provided reflects active certificates as of the date that the Department's website list was revised and does not include the number of employees on ''pending'' 14(c) certificates.

[71] The Department notes that the May 1, 2024, employee count (40,579) does not reflect any employment changes an employer may have made subsequent to the data provided to WHD in its certificate application nor does it reflect the workers with disabilities paid under pending renewal certificates. Notwithstanding, the Department believes this data comparison remains valid and would be little changed with these additional data points.

[72] This statistic is compiled from WHD's listing of 14(c) certificate holders between October 1, 2020, and April 1, 2024. WHD maintains a listing of employers who hold or have applied for 14(c) certificates at *https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders.*

[73] WHD listing of certificate holders from October 1, 2023, indicating that approximately 93 percent of certificate holders are CRPs, *https://www.dol.gov/agencies/whd/workers-with-disabilities/reports-to-congress.*

[74] FOH 64k00.

[75] FOH 64b00.

[76] WHD listing of certificate holders from October 1, 2023, *https://www.dol.gov/agencies/whd/workers-with-disabilities/reports-to-congress.*

[77] Currently, the small number of private sector businesses amongst section 14(c) certificate holders is a marked contrast to the Congressional understanding of how such certificates would be used at the time of the original enactment of section 14 in 1938. During the debate preceding the passage of the FLSA, members of Congress focused on the provision as being intended for employment in the private sector, discussing the impact on ''industry,'' ''manufacturers,'' and ''small businessmen.'' 82 Cong. Rec., 88–89 (1937).

[78] *See* 2001 GAO Report at 14; *see also* U.S. Gov't Accountability Office, GAO–21–260, ''Subminimum Wage Program: Factors Influencing the Transition of Individuals with Disabilities to Competitive Integrated Employment'' (2021), at 6, *https://www.gao.gov/products/gao-21-260* (''2021 GAO Report'').

[79] *Id.* at 6, n.19.

[80] U.S. Comm'n on Civ. Rts., ''Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,'' *https://www.usccr.gov/files/2020/2020-09-17-Subminimum-Wages-Report.pdf,* at 6 n.101 (2020) (''USCCR Report'').

[81] *See, for example,* USCCR Report at 9 (explaining that in Vermont, sites that have transitioned from subminimum wage employment use Federal and State funding to provide employment and non-work services for individuals with disabilities).

[82] *See* 2023 GAO Report at 16. A worker employed under a section 14(c) certificate may be paid more than the Federal hourly minimum wage of $7.25 if the prevailing wage upon which their productivity-based commensurate wage is based exceeds the Federal minimum wage.

[83] *Id.* at 18–19.

[84] FOH 64g06(a)(1).

March 2024), WHD found that approximately 16 percent of workers were reported by the employer on their most recent application (reflecting average hourly wages from their prior fiscal quarter) to have been paid at least the current Federal minimum wage of $7.25 per hour while nearly 49 percent made less than $3.50 per hour. Based on WHD's administrative data, approximately 10 percent made $1.00 per hour or less and nearly 2 percent made 25 cents per hour or less.

Scope of data studied	GAO's 2019 to 2021 analysis	WHD's October 2023 to March 2024 analysis
	62 percent of renewal certificates	administrative data of issued certificates
Workers paid 25 cents or less per hour	Nearly 5 percent	Nearly 2 percent.
Workers paid $1.00 or less per hour	Approximately 14 percent	Approximately 10 percent.
Workers paid less than $3.50 per hour	More than 50 percent	Nearly 49 percent.
Workers paid at or above the current Federal minimum wage of $7.25 per hour	Approximately 14 percent	Approximately 16 percent.

Most workers currently employed under section 14(c) certificates have I/DD as their primary disability. In the years immediately after section 14(c) was enacted, it was assumed that workers with a wide range of disabilities, including physical disabilities, might be paid subminimum wages. Over time, however, subminimum wage payments to all groups other than individuals with I/DD substantially diminished. As noted above, in 1967, one-third of workers in sheltered workshops were individuals with I/DD.[86] In 2001, GAO estimated that three-quarters of workers employed under a section 14(c) certificate experienced some form of I/DD.[87] By 2021, GAO estimated approximately 90 percent of workers employed under a section 14(c) certificate experienced I/DD.[88]

E. Comprehensive Review of Section 14(c)

On September 26, 2023, Acting Secretary Julie Su announced that the Department would conduct a comprehensive review of the section 14(c) program. As part of this review, between October 20, 2023, and November 20, 2023, the Department held a series of stakeholder engagement sessions to hear diverse views on section 14(c) from members of the public, including workers with disabilities and their family members, disability rights advocates, service providers, and section 14(c) certificate holders.

In holding these listening sessions, the Department received wide-ranging feedback about section 14(c), including viewpoints regarding the impacts of potentially ceasing to issue 14(c) certificates in the future. Approximately 2,000 individuals participated in these sessions. During these listening sessions, the Department heard from individuals and groups that oppose permitting employers to pay subminimum wages under section 14(c); those stakeholders emphasized, among other points, that the payment of subminimum wages is outdated, discriminatory, and no longer needed to provide employment opportunities for individuals with disabilities. The Department also heard from individuals and groups in support of the continued payment of subminimum wages who focused, among other things, on the importance of individuals with disabilities, and their families, being able to choose whether to remain in their subminimum wage jobs and on the benefits that they have experienced in such employment. The Department deeply valued those listening sessions and it greatly appreciates and has considered the wide-ranging and diverse input gathered from them in the formulation of this proposed rule. The Department also welcomes comments from the general public, including any individuals or entities who participated in these earlier listening sessions, on its proposed rule.

The Department has included the section 14(c) regulations on its long-term Regulatory Agenda for many years and has carefully reviewed the history of section 14(c) and its current operations. In crafting this proposal, the Department consulted with other Federal agencies to better understand how their programs may intersect with the employment of workers under section 14(c) as well as to discuss any foreseeable impacts to those programs if changes were to be made to the section 14(c) regulations. In addition, the Department has extensively reviewed numerous oversight reports, existing data, and information concerning relevant trends in the availability of supports for employment opportunities for workers with disabilities. The Department has also reviewed numerous examples of legislative, policy, and executive actions at all levels of government and analyzed their effect on the employment of workers with disabilities. The Department summarizes this research and analysis, and presents its conclusions based on this comprehensive review, below.

III. Need for Rulemaking

A. Introduction

Since 1938, the FLSA has authorized the Secretary to issue certificates to employers permitting them to pay workers whose disabilities impair their earning or productive capacity at wage rates below the Federal minimum wage rate.[89] WHD is responsible for administering the issuance of certificates and enforcing the provisions of section 14(c). The Department issued its most recent substantive revisions to the regulations pertaining to the issuance of section 14(c) certificates in 1989, more than 35 years ago. Since 1989, and even more so since 1938, employment opportunities have changed dramatically for workers with disabilities. In stark contrast to the New Deal era in which section 14(c) was enacted, disability rights are now enshrined in Federal civil rights laws and enforced by the Federal government.[90] Through the disability rights movement, advocates, including self-advocates, have worked to ensure that individuals with disabilities have the same access to employment and

[86] 1967 DOL Report at 21.

[87] 2001 GAO Report at 19.

[88] 2023 GAO Report at 24. The Department notes that GAO's findings in this area generally match the Department's internal data, derived from the information self-reported by certificate holders; the Department cites to the GAO herein as an independent source. From WHD's listing of section 14(c) certificate holders between October 2020, and April 2024, the percentage of workers identified by their employers on their certificate applications as having I/DD as their primary disability was 91 percent.

[89] *See* 29 U.S.C. 214(c).

[90] *See, e.g.,* U.S. Dep't of Justice, Civil Rights Div., ''The Americans with Disabilities Act (ADA) protects people with disabilities from discrimination,'' *https://www.ada.gov/;* U.S. Equal Emp't Opportunity Comm'n, ''What Laws Does EEOC Enforce?,'' *https://www.eeoc.gov/statutes/laws-enforced-eeoc;* 42 U.S.C. 12101 *et seq.* (1990); 29 CFR part 1630.

other opportunities as others and that individuals with disabilities are not subject to segregation and discrimination on the basis of a disability.[91] This access includes the legal right to reasonable accommodation and prohibitions on discrimination in the workplace. During this time, largely due to the efforts of self-advocates and their allies, society's views about what it means to live and work with a disability have evolved. In contrast to historical approaches that may have viewed disability as a deficiency that needed to be ''fixed'' or ''cured'' or as a tragic condition, current understandings emphasize the social model of disability, which identifies structural and social barriers as the primary reason that individuals with disabilities experience limitations on full engagement in all aspects of community life, focuses on removing those barriers to facilitate full engagement, and recognizes disability as a natural part of the human experience.[92] Thus, there has been a striking and consistent movement away from the medical [93] and charitable [94] models of disability, toward a social model of disability focused on various barriers which may hinder full and effective participation in society.[95]

The successes of the disability rights movement and the changing views regarding disability have been reflected in legislative, legal, policy, and programmatic changes that have broadly influenced available employment options for individuals with disabilities today. As described below, there have been several significant pieces of Federal legislation that have vastly expanded opportunities for individuals with disabilities, requiring better access and accommodations in educational, work, and community settings.[96] Supreme Court and other judicial precedent has amplified the impacts of this legislation, most notably by requiring that individuals with disabilities be able to live, work, and play in the most integrated setting appropriate to their needs.[97] As part of this movement, various non-partisan entities, including the USCCR and the National Council on Disability (NCD), along with a number of non-profit advocacy organizations, have published detailed reports urging the cessation of subminimum wage payments to individuals with disabilities.[98] Multiple States and localities have prohibited or are in the process of phasing out the payment of subminimum wages, and, as discussed below, for nearly a decade, the Federal government has maintained a wage floor above the FLSA's Federal minimum wage for certain government contracts that fully applies to workers with disabilities who work on or in connection with those contracts. Simultaneously, numerous Federal, State, and local programs have emerged to increase access to opportunities for competitive integrated employment (CIE) [99] for workers with disabilities.[100] Amidst these advancements, the employment experiences of workers with many types of disabilities indicate that subminimum wages are unnecessary to safeguard their employment opportunities. In 2023, the unemployment rate for individuals with disabilities was as low as has ever been recorded.[101]

As a result of these changes, today, subminimum wage employment under section 14(c) certificates is no longer the most common form of employment for individuals with disabilities. It bears emphasizing that, currently, only a miniscule fraction of those working individuals with disabilities are employed by section 14(c) certificate holders; in the present day, millions of individuals with disabilities who are working are doing so without section 14(c) certificates.[102] Also, as the number

[91] *See, e.g.,* Nicole LeBlanc, ''Why Employment Matters: A Resource Guide by and for Self-Advocates Interested in Pursuing Competitive, Integrated Employment,'' Administration on Disability Employment Technical Assistance Center, September 2021, *https://aoddisabilityemploymenttacenter.com/wp-content/uploads/2021/10/DETAC-2021-GEN-3_Final_508.pdf.*

[92] Arlene S. Kanter, ''The Law: What's Disability Studies Got To Do With It or an Introduction to Disability Legal Studies,'' 42 Columbia Human Rights Law Review 403, 410 (2011) (''2011 Kanter Paper'').

[93] The medical model generally views disability as some deficiency to be ''fixed'' or ''cured.'' ''As a result of viewing disability through a medical lens, societies have erected large institutions to protect and exclude people with disabilities from society.'' 2011 Kanter Paper at 420; *see also* Samuel R. Bagenstos, ''Subordination, Stigma, and 'Disability' '', 86 Va. L. Rev. 397, 427 (2000) (''2000 Bagenstos Paper'') (citations omitted) (''Indeed, virtually the entire ideology of the modern disability rights movement can be seen as a reaction to that 'medical/pathological paradigm' of disability.'').

[94] ''People who work with blind, deaf, autistic, developmentally disabled, and/or physically disabled individuals often see their clients' or patients' impairment as a great personal tragedy. Yet, people with disabilities do not necessarily see their own lives that way.'' 2011 Kanter Paper at 412, 414.

[95] *See, e.g.,* World Health Organization Policy on Disability (2021), *https://iris.who.int/bitstream/handle/10665/341079/9789240020627-eng.pdf?sequence=1.* ''By relying on the social model of disability, it is impossible to say that any person is 'unable' or 'unqualified' to exercise rights or to participate fully in society. Instead, it is affirmatively the obligation of society to change or adapt its services, programs, facilities, systems, and other entities, so that all people can exercise their rights to the best of their ability, regardless of their particular impairment.'' 2011 Kanter Paper at 427–28.; *see also* 2000 Bagenstos Paper at 427–28.

[96] For example, legislation such as the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq,* and the Workforce Innovation and Opportunity Act, 29 U.S.C. 3101 et seq, are discussed in detail later in this section.

[97] *See Olmstead* v. *L.C. ex rel. Zimring,* 527 U.S. 581 (1999); *see also Tennessee* v. *Lane,* 541 U.S. 509 (2004); *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams,* 534 U.S. 184 (2002); *Sutton* v. *United Air Lines, Inc.,* 527 U.S. 471 (1999); *Cedar Rapids Community School District* v. *Garret F.,* 526 U.S. 66 (1999).

[98] *See, for example,* USCCR Report; National Council on Disability (NCD), ''Has the Promise Been Kept? Federal Enforcement of Disability Rights Laws (Part 1),'' (October 2018), *https://www.ncd.gov/report/has-the-promise-been-kept-federal-enforcement-of-disability-rights-laws-part-1-october-2018/(''2018 NCD Progress Report'');* NCD, ''Report on Subminimum Wage and Supported Employment'' (2012), *https://www.ncd.gov/report/national-council-on-disability-report-on-subminimum-wage-and-supported-employment/* (''2012 NCD Report'').

[99] The term ''competitive integrated employment'' (CIE) is defined at 29 U.S.C. 705(5), and in the Department of Education's regulations at 34 CFR 361.5(c)(9). Those regulations define CIE as work that is performed on a full-time or part-time basis for which an individual is: compensated at or above minimum wage and comparable to the customary rate paid by the employer to employees without disabilities performing similar duties and with similar training and experience; receiving the same level of benefits provided to other employees without disabilities in similar positions; at a location where the employee interacts with other individuals without disabilities; and presented opportunities for advancement similar to other employees without disabilities in similar positions. *See also https://www.dol.gov/agencies/odep/program-areas/cie.*

[100] The Department of Education amended regulations at 34 CFR parts 361 and 363, and established new part 397, in response to the WIOA amendments to the Rehabilitation Act. These amended and new regulations govern the State Vocational Rehabilitation Services program and the State Supported Employment Services program, and placed greater emphasis on the achievement of CIE. *See* U.S. Dep't of Education, *State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage,* Final Regulations, 81 FR 55630 (Aug. 19, 2016).

[101] *See* U.S. Dep't of Labor, Bureau of Labor Statistics, ''Economic News Release: Persons with a Disability: Labor Force Characteristics Summary,'' Feb. 22, 2024, *https://www.bls.gov/news.release/pdf/disabl.pdf* (noting that the unemployment rate for individuals with a disability was 7.2 percent in 2023, and also stating that ''[i]n 2023, 22.5 percent of people with a disability were employed—the highest recorded ratio since comparable data were first collected in 2008'' and that such rate reflected a 1.2 percentage point increase from 2022); *see also* U.S. Dep't of Labor, Bureau of Labor Statistics, ''Data Retrieval: Labor Force Statistics (CPS)'', *https://www.bls.gov/webapps/legacy/cpsatab6.htm* (making available historical data on unemployment and employment rates).

[102] As discussed above, as of May 1, 2024, employers with an issued certificate reported to the Department that they paid approximately 40,579 workers at subminimum wages in their previously completed fiscal quarter. This is a tiny fraction of the total number of individuals with disabilities working today, as in each month in the first half

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of workers being paid subminimum wages under section 14(c) certificates has continued to shrink,[103] available data indicates that the numbers of individuals with I/DD (who, as discussed above, comprise approximately 90 percent of the workers paid subminimum wages by section 14(c) certificate holders today), working for full Federal minimum wages (or higher) has continued to grow.[104] Specifically, as shown by a 2023 Thinkwork Report, there are now many more individuals with I/DD who are being paid full wages than who are being paid subminimum wages; the Department has preliminarily assessed that the total number of working individuals with I/DD is at least twice the total number of individuals working under section 14(c) certificates.[105] In other words, the existing data—though limited—shows that, by a significant margin, most workers with I/DD do not rely on subminimum wages to gain employment opportunities and have demonstrated therein that section 14(c) certificates are no longer necessary for them to do so. The Department welcomes comments on this data and the Department's preliminary analysis.[106]

Cognizant of this changed employment landscape, the Department now assesses, pursuant to its statutory mandate, whether the issuance of section 14(c) certificates authorizing the payment of subminimum wages is necessary to prevent the curtailment of opportunities for employment for workers with disabilities.

B. Federal Legislation, Regulations, and Supreme Court Precedent

The current section 14(c) regulations were promulgated prior to having the benefit of nearly all the most significant legislative and legal developments regarding individuals with disabilities, and thus do not contemplate the protections, rights, and opportunities created by these developments. The discussion that follows is intended to highlight several of the most notable and relevant of these developments since 1989, and is not intended to provide a comprehensive survey of all such changes.[107] The Department requests comments on the discussion of these developments and the Department's analysis of them, as well as comments on any other Federal legislative or judicial development relevant to whether the continued issuance of section 14(c) certificates is necessary to prevent curtailment of opportunities for employment of individuals with disabilities.

1. The Americans With Disabilities Act and the Supreme Court's Olmstead Decision

Perhaps the most foundational of these developments was the enactment of the Americans with Disabilities Act (ADA) in 1990.[108] The ADA, as amended by the ADAAA, among other things, prohibits discrimination on the basis of disability in the workplace and in the provision of public programs, services, and activities. Title I of the ADA, enforced by the U.S. Equal Employment Opportunity Commission (EEOC), applies to private employers and State or local governments and prohibits discrimination ''against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of

of 2024, over 7 million individuals 16 years and over with a disability were employed in the civilian labor force. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, ''Data Retrieval: Labor Force Statistics (CPS)'' *https://data.bls.gov/pdq/SurveyOutputServlet.* Additionally, cross-referencing these data points, the Department estimates that, nationwide, there are only approximately 4,000 individuals with disabilities other than I/DD who are paid subminimum wages.

[103] *See* section II.C.2, above, reflecting the decline in numbers of employees being paid subminimum wages from approximately 424,000 in 2001 to about 40,579 in 2024.

[104] *See* Agnieszka Zalewska, Jean Winsor & John Butterworth, ''Intellectual and Development Disabilities Agencies' Employment and Day Services,'' Data Note Plus, no. 87 (2023) (''2023 Thinkwork Report''), at 8–9, *https://www.thinkwork.org/sites/default/files/2024-01/DN_87_R_0.pdf.* This report, supported in part by the Administration on Disabilities, Administration for Community Living, U.S. Department of Health and Human Services, builds on annual and bi-annual surveys of State I/DD agencies spanning several decades and compiles data from all States (noting some States for which data is not available). Of particular relevance here, the report includes a chart depicting that, in 2021, approximately 130,000 clients of State agencies serving individuals with I/DD worked in integrated employment, while noting that in 2022, approximately 59,000 total individuals participated in subminimum wage jobs. While this report, which focuses on integration, does not directly compare the number of workers with I/DD being paid full wages to the number of workers paid subminimum wages (nor does it offer data sets about those populations from the same year), in publishing this specific data, it nevertheless supports the conclusion that more individuals with I/DD now are paid full wages, as the total number of individuals with I/DD who are reported as working in integrated settings is more than twice the estimated total number of all individuals working under section 14(c) certificates. As discussed in previous sections, the overwhelming majority of section 14(c) certificate holders are CRPs who typically provide work in non-integrated settings. Most of the approximately 130,000 reported workers with I/DD in integrated settings are likely paid at minimum wage or higher rates, compared to the report's estimates of approximately 59,000 reported workers paid subminimum wages who are primarily employed by non-integrated CRPs. Moreover, the ratio of individuals with I/DD working for full wages to individuals working for subminimum wages is likely far higher than the estimate reported here because the ThinkWork report only collects data about those individuals who are tracked by State I/DD agencies. The report thus does not capture individuals who have secured full-wage work without the assistance or knowledge of those agencies. Therefore, the report's identification of approximately 130,000 individuals with I/DD working in integrated settings likely undercounts the total actual number of individuals with I/DD working for full wages.

[105] *Id.*

[106] The Department requests comments reflecting any 2022, 2023, and 2024 updates on similar reporting from State I/DD agencies about the numbers of their clients working in integrated employment, as well as any other comments relating to the declining numbers of individuals working for subminimum wages in comparison to the growing numbers of individuals with I/DD working for full wages.

[107] This section provides only highlights of certain key laws; however, the Department notes there are numerous pieces of legislation over the last several decades that have incorporated ways to enhance career opportunities for workers with disabilities. For example, when Congress enacted the Rehabilitation Act of 1973, section 504 of that law required that programs receiving Federal financial assistance operate without discrimination on the basis of disability. 29 U.S.C. 794. Modeled after the language of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and subsequent amendments, also prohibited discrimination on the basis of disability by Federal agencies and contractors in their employment practices. In enacting and amending the Act, Congress enlisted all programs receiving Federal funds in an effort ''to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted.'' 123 Cong. Rec. 13,515 (1977) (statement of Senator Humphrey). The 1998 amendments made to the Rehabilitation Act stated that among other things, ''[i]t is the policy of the United States that all programs, projects, and activities receiving assistance under this Act shall be carried out in a manner consistent with . . . [the] pursuit of meaningful careers, based on informed choice, of individuals with disabilities.'' 29 U.S.C. 701(c) (1998). The amendments further stated that workers were to develop an individualized plan for employment that ''to the maximum extent appropriate, results in employment in an integrated setting.'' *Id.*

[108] *See* 42 U.S.C. 12101 (1990). In 2008, Congress passed the ADA Amendments Act (ADAAA) which made a number of changes to the ADA definition of ''disability'' to ensure broad coverage, making it easier for individuals seeking the protection of the ADA to establish that they have a disability that falls within the meaning of the statute. *See* ADA Amendments Act of 2008, Public Law 110–325 (S. 3406), September 25, 2008*; see also https://archive.ada.gov/nprm_adaaa/adaaa-nprm-qa.htm.* Under the Federal equal employment opportunity laws that the EEOC enforces, including the ADA, an employer cannot ask an employee to prospectively waive their rights to protection. *See, e.g., Lester* v. *O'Rourke,* No. 17–cv–1772, 2018 WL 3141796, at *4–6 (N.D. Ill. June 27, 2018). In addition, employers may not interfere with the protected right of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding. *See, e.g.,* EEOC, ''Enforcement Guidance on non-waivable employee rights under EEOC enforced statutes,'' *https://www.eeoc.gov/laws/guidance/enforcement-guidance-non-waivable-employee-rights-under-eeoc-enforced-statutes.*

employment.'' [109] Title I also requires employers to provide reasonable accommodations to qualified individuals—an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that they hold or desire.[110] Under the ADA, the term ''reasonable accommodation'' means: (1) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; (2) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or (3) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.[111] A reasonable accommodation may include, but is not limited to, making existing facilities used by employees readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, acquisition or modification of equipment, appropriate adjustment or modifications of examinations, training materials, or policies, and other similar accommodations for individuals with disabilities.[112] An employer is required to provide such reasonable accommodations, unless it ''can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.[113] Examples of reasonable accommodations may include modifying job tasks, improving accessibility in a work area, changing the presentation of tests or training materials, providing an aid or service to increase access (such as specialized computer software), providing alternative formats for feedback (such as verbally instead of in writing), or job restructuring (such as providing checklists to ensure task completion).[114]

Title II of the ADA, enforced by the U.S. Department of Justice (DOJ), prohibits discrimination on the basis of disability by State and local government entities.[115] It requires that State and local governments ensure equal access for individuals with disabilities (for example, in public education, employment, transportation, recreation, health care, social services, courts, voting, and town meetings). Additionally, DOJ's Title II regulations require public entities to ''administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.'' Appendix B to the regulation implementing Title II explains that ''the most integrated setting'' is one that ''enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.'' [116]

In 1999, in *Olmstead* v. *L.C.,* the Supreme Court issued a landmark decision that held that Title II of the ADA prohibits the unjustified segregation of individuals with disabilities.[117] The Court held that public entities are required to provide community-based services to persons with disabilities when (1) such services are appropriate; (2) the affected persons do not oppose community-based treatment; and (3) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity.[118] The Court explained that this holding reflected two judgments. First, ''institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.'' [119] Second, ''confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.'' [120]

Under Department of Justice regulations, a public entity may be found in violation of this integration mandate if it administers programs in a manner that results in unjustified segregation of persons with disabilities.[121] DOJ has explicitly recognized that a public entity may be found in violation of the ADA's integration mandate if it plans, administers, operates, funds, or implements employment services in a way that unjustifiably segregates individuals with disabilities.[122] As discussed below, DOJ has taken action to enforce the integration mandate, with broad impacts to employment opportunities for workers with disabilities.

Title III of the ADA, also enforced by DOJ, pertains to public accommodations. Under Title III, individuals with disabilities cannot be discriminated against on the basis of disability in the ''full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.'' [123] Places of public accommodation may include, for example, restaurants, retail stores, hotels, movie theaters, private schools, recreational facilities, and transportation services run by private entities.

As DOJ has explained, when workers with disabilities are given access to employment opportunities pursuant to the ADA and *Olmstead* ''in the most integrated setting appropriate to their needs, they have the opportunity to live fuller lives, be more integrated into the community, and gain financial independence to 'move proudly into the

[109] 42 U.S.C. 12112(a). An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is regarded as having such an impairment. *Id.* at Sec. 12102(1). To be ''regarded as'' having such an impairment, an individual must establish that they have been subjected to a discriminatory action because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity. *Id.* at Sec. 12102(3).

[110] *See* 42 U.S.C. 12111.

[111] 29 CFR 1630.2(o)(1).

[112] 42 U.S.C. 12111(9).

[113] The term ''undue hardship'' means an action requiring significant difficulty or expense when considered in light of several factors set forth in the ADA statute. 42 U.S.C. 12111(10), 12112(b)(5)(A).

[114] Many workplace accommodations are no-cost or low-cost, and resources exist to help individuals with disabilities and their employers identify accommodations. *See, e.g.,* ADA National Network Fact Sheet—Reasonable Accommodations in the Workplace (2018), *https://adata.org/factsheet/reasonable-accommodations-workplace;* Job Accommodation Network (JAN), *https://askjan.org/.*

[115] 42 U.S.C. 12131, 12132.

[116] 28 CFR part 35, app. B, 703 (2023) (addressing 28 CFR 35.130(d)).

[117] *See* 527 U.S. 581, 583, 597, 602 (1999).

[118] *Id.* at 607.

[119] *Id.* at 600.

[120] *Id.* at 601.

[121] *See* 28 CFR 35.130(b)(1) (prohibiting a public entity from discriminating ''directly or through contractual, licensing or other arrangements, on the basis of disability''); 28 CFR 35.130(b)(2) (''A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.'').

[122] *See* U.S. Dep't of Justice, Civil Rights Div., ''Questions and Answers on the Application of the ADA's Integration Mandate and *Olmstead* v. *L.C.* to Employment and Day Services for People with Disabilities,'' *https://www.ada.gov/assets/pdfs/olmstead-employment-qa.pdf (''DOJ ADA Integration Mandate Q&As'').*

[123] 42 U.S.C. 12182(a).

economic mainstream of American life.' '' [124] This access fulfills the goals of the ADA to ''assure equality of opportunity, full participation, independent living, and economic self-sufficiency.'' [125] Moreover, EEOC and DOJ have explained that the ADA is fully applicable to workers with disabilities regardless of the work site or how much they are paid. For example, ''Title I's coverage can include individual service provider entities or sheltered workshops in their capacity as private employers,'' prohibiting discrimination regarding various terms and conditions of employment.[126] Additionally, DOJ has explicitly recognized that a public entity may be found in violation of the ADA's Title II integration mandate if it plans, administers, operates, funds, or implements employment services in a way that unjustifiably segregates individuals with disabilities.[127] Finally, under Title III of the ADA, individuals with disabilities cannot be discriminated against on the basis of disability in a place of public accommodation, which can include an individual service provider entity or a sheltered workshop.[128]

The legal protections for individuals with disabilities arising out of the ADA and the Supreme Court's *Olmstead* decision have profoundly impacted the rights and employment opportunities available to individuals with disabilities. This has resulted in changes to workforce development and vocational rehabilitation systems to more fully support individuals with disabilities in achieving and maintaining CIE, as discussed below. The Department's regulations implementing section 14(c) were last updated prior to the enactment of the ADA and therefore do not take into account changes to the employment landscape for individuals with disabilities in light of the fundamental anti-discrimination and reasonable accommodation protections of the ADA, or those protections as later interpreted by *Olmstead.* Although many section 14(c) certificate holders are subject to both the FLSA and the ADA,[129] the Department's current regulation addressing the section 14(c) curtailment clause did not, and could not, have taken into account the changes in employment opportunities that would arise as a result of the ADA and the plethora of legal and policy developments that have occurred as a result of this landmark legislation. For instance, the Department did not consider (and could not have considered) when it last promulgated its section 14(c) regulations how the ADA's reasonable accommodation and workplace modification requirements may affect a worker's productivity, nor did the Department consider other ADA provisions that have expanded the employment opportunities available to individuals with disabilities. Today, the Department's assessment of whether section 14(c) certificates are necessary cannot ignore the dramatic expansion of employment opportunities for individuals with disabilities.

2. Additional Federal Legislation, Executive Orders, and Regulatory Changes Expanding Opportunities for Workers With Disabilities

A wide range of other significant legislative and executive actions have had a profound impact on employment opportunities and outcomes for individuals with disabilities, particularly over the last decade. These legal and policy developments have fundamentally altered the landscape in which individuals with disabilities learn and work, beginning from their earliest educational opportunities and settings.

i. Individuals With Disabilities Education Act

In 1975, Congress passed the Education for All Handicapped Children Act (EHA), which addressed the rights and educational needs of students with disabilities. In 1990 EHA was reauthorized and retitled to the Individuals with Disabilities Education Act (IDEA).[130] IDEA provides funding to States, which must provide early intervention services and a free appropriate public education to eligible infants, toddlers, and children with disabilities.[131] IDEA states that ''[a]lmost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible . . . .'' [132] IDEA further states that this focus on high expectations and inclusion is intended to meet developmental goals and challenging expectations, and, as particularly relevant here, that students with disabilities are ''prepared to lead productive and independent adult lives, to the maximum extent possible.'' [133] Notably, the 1990 reauthorization also mandated that as a part of a student's individualized education program (IEP), an individual transition plan must be developed to help each student transition to post-secondary life, including employment opportunities.[134] Subsequent guidance has been released about the benefits of inclusion, for example, in 2015, the U.S. Department of Health and Human Services (HHS) and U.S. Department of Education issued a joint policy statement about the importance of the inclusion of children with disabilities in early childhood programs. The Departments updated and reiterated the statement in 2023.[135] For nearly 50 years, children with disabilities have benefited from increased access to high-quality education from early childhood to high school, providing them with better

[124] *See* DOJ ADA Integration Mandate Q&As, *https://www.ada.gov/assets/pdfs/olmstead-employment-qa.pdf* (quoting President George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act, July 26, 1990, *https://perma.cc/VNU4-HR7P*).

[125] *See* 42 U.S.C. 12101(a)(7); *see also* DOJ ADA Integration Mandate Q&As.

[126] *Id.; see also* 42 U.S.C. 12112(a).

[127] *See* DOJ ADA Integration Mandate Q&As.

[128] *Id.; see also* 42 U.S.C. 12181(7)(K).

[129] The Department notes that holding a section 14(c) certificate does not protect an employer from charges pursuant to the ADA, *see* FOH 64a02(c).

[130] Educ. of the Handicapped Act Amendments of 1990, Public Law 101–476, 104 Stat. 1103 (1990) (codified at 20 U.S.C. 1400). Subsequent reauthorizations included reauthorizations in 1997 and 2004.

[131] *See* 20 U.S.C. 1400 *et seq.* and U.S. Department of Education, ''About IDEA,'' *https://sites.ed.gov/idea/about-idea* (recording that early intervention, special education, and related services were provided to more than 8 million eligible infants, toddlers, children, and youth with disabilities in school year 2022–2023).

[132] 20 U.S.C. 1400(c)(5). A multitude of studies and academic literature have concluded that students with disabilities make more progress when educated in integrated, rather than segregated, settings. *See, e.g.,* Meghan Cosier, Julie Causton-Theoharis, & George Theoharis, ''Does access matter? Time in general education and achievement for students with disabilities,'' Remedial and Special Educ. 34(6)(2013), at 323–332; Rachel Sermier Dessemontet, Gerard Bless, & D. Morin. ''Effects of inclusion on the academic achievement and adaptive behaviour of children with intellectual disabilities,'' Journal of Intellectual Disability Research 56(6) (2012) at 579–587.

[133] 20 U.S.C. 1400(c)(5)(A)(ii).

[134] The term ''individualized education program'' (IEP) means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with 20 U.S.C. 1414(d). *See* 20 U.S.C. 1401(14); *see also* 34 CFR 300.320.

[135] *See* U.S. Dep't of Health and Human Services and U.S. Dep't of Education, ''Policy Statement on Inclusion of Children with Disabilities in Early Childhood Programs,'' November 28, 2023, *https://sites.ed.gov/idea/idea-files/policy-statement-inclusion-of-children-with-disabilities-in-early-childhood-; see also Endrew F.* v. *Douglas County School Dist.,* 580 U.S. 386, 399 (2017) (affirming the promise of IDEA and holding that in order ''[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.'')

preparation for employment than past generations of students with disabilities.

As educational reforms took hold, competitive integrated employment became the goal of many youths with disabilities, including those with I/DD. The groundbreaking National Longitudinal Transition Study-2 (NLTS2), funded by the U.S. Department of Education and published in 2005, identified a strong desire among youth with disabilities to participate in competitive employment. Specifically, the NLTS2 found that among the 70 percent of secondary school students with disabilities who identified employment as a goal for the post-school years, 62 percent had a goal to work in competitive employment, while only 3 percent wished to work in ''sheltered'' employment.[136] As indicated in the NLTS2, students generally preferred competitive employment rather than employment at a sheltered workshop regardless of the type of disability experienced.[137]

ii. Workforce Innovation and Opportunity Act

In 2014, WIOA,[138] a comprehensive Federal law enacted to improve workforce development and training services for workers and jobseekers, including various groups such as youth and workers with disabilities, amended the Rehabilitation Act to add section 511.[139] Section 511 of the Rehabilitation Act limits the ability of employers to pay subminimum wages to workers with disabilities, even when the employer holds a section 14(c) certificate. Section 511 requires that individuals with disabilities who are age 24 or younger complete requirements designed to enable the individual to explore, discover, experience, and attain CIE, including receiving pre-employment transition services under the Vocational Rehabilitation program or transition services under IDEA (to the extent either of those services are available to the individual with a disability), applying for vocational rehabilitation services, and receiving career counseling and information and referral services, before they are employed at subminimum wages. Section 511 also requires that all workers with disabilities who are paid subminimum wages, of any age, receive regular career counseling, information and referrals, and information about self-advocacy, self-determination, and peer mentoring training opportunities in their local area once every 6 months for the first year of subminimum wage employment and annually thereafter.[140] Section 511 was intended to help stop the pipeline by which youth with disabilities were going straight from school to subminimum wage employment.[141] This provision was also enacted to ensure that workers with disabilities who are currently paid subminimum wages are regularly provided with counseling and information about supports and resources available to them in their locality that may support them in obtaining CIE.[142]

iii. Achieving a Better Life Experience Act

In further support of competitive employment for workers with disabilities, in 2014, Congress enacted the Achieving a Better Life Experience Act (ABLE Act), which allows individuals with disabilities to establish tax-advantaged savings accounts, subject to certain restrictions, without jeopardizing access to public benefits. ABLE accounts allow individuals with disabilities to maintain resources and save for expenses while maintaining eligibility for critical public benefits such as Medicaid and other means-tested programs. In 2020, the Internal Revenue Service (IRS) released final ABLE regulations.[143] The regulations noted that in enacting the ABLE Act, ''Congress recognized the special financial burdens borne by families raising children with disabilities and the fact that increased financial needs generally continue throughout the lifetime of an individual with a disability.'' [144] Legislation such as the ABLE Act facilitates workers' transitions from subminimum wage jobs to jobs paying competitive wages because workers now are able to save more without jeopardizing access to means-tested public benefits such as health care.[145]

iv. Executive Orders 13658 and 14026

In 2014 and 2021 respectively, Executive Orders 13658 and 14026 directed federal agencies to contract only with entities willing to pay an hourly minimum wage (raised by Executive Order 14026) for workers performing on or in connection with covered Federal construction and service contracts.[146] Workers covered by the Executive Orders, and due the full applicable Executive Order minimum wage rates, include workers with disabilities whose wages are calculated pursuant to section 14(c) certificates.[147] Executive Order 13658 stated that ''raising the pay of low-wage workers increases their morale and the productivity and quality of their work'' and explicitly stated that the Order applies to workers whose wages are calculated pursuant to section 14(c).[148]

[136] Mary Wagner, Lynn Newman, Renee Cameto, Nicolle Garza, & Phyllis Levine, ''After High School: A First Look at the Postschool Experiences of Youth with Disabilities. A Report from the National Longitudinal Transition Study–2 (NLTS2),'' SRI International, April 2005, pp. 5–3 to 5–4, *www.nlts2.org/reports/2005_04/nlts2_report_2005_04_complete.pdf.*

[137] *Id.*

[138] 29 U.S.C. 794g; *also see https://www.congress.gov/113/bills/hr803/BILLS-113hr803enr.pdf.*

[139] The Rehabilitation Act was the first Federal legislation to address access and equity for individuals with disabilities. This Act promoted successful employment outcomes by requiring that programs receiving Federal financial assistance operate without discrimination on the basis of disability. The Rehabilitation Act develops and implements comprehensive and coordinated programs of vocational rehabilitation for individuals with disabilities to maximize their employability, independence, and integration into the workplace. *See* 29 U.S.C. 701.

[140] 34 CFR part 397.

[141] Section 113 of the Rehabilitation Act described a specific set of services, Pre-employment transition services, that are intended to improve and expand vocational rehabilitation services for students with disabilities, facilitating their transition from educational services to postsecondary life. *See* 29 U.S.C. 733 and 34 CFR 361.65(a)(3). At least 15 percent of each State's federal funding allotment for vocational rehabilitation services must be reserved for Pre-employment transition services. *See* 29 U.S.C. 730(d)(1). Through these provisions, the Rehabilitation Act and its regulations emphasized the provision of Pre-employment transition services to students with disabilities, providing new opportunities for them to explore careers and receive the training and supports to increase the likelihood of achieving CIE. *See* 34 CFR 361.48.

[142] 29 U.S.C. 794g; 34 CFR part 397. Additionally, throughout WIOA, there are multiple references to ensuring that people with disabilities have access to the training providers and services and supports needed to succeed in CIE. Other sections of WIOA provide funding to States in order to develop programs that support workers with disabilities.

[143] *See* Guidance Under Section 529A: Qualified ABLE Programs, 85 FR 74010 (Nov. 19, 2020).

[144] 85 FR 74010.

[145] ''The ABLE Act states that funds in an ABLE account will not affect eligibility for federally-funded, means-tested benefits such as SSI and Medicaid.'' *See* ABLE National Resource Center, *https://www.ablenrc.org/what-is-able/debunking-able-myths/.*

[146] On April 27, 2021, President Joseph R. Biden, Jr. issued Executive Order 14026, ''Increasing the Minimum Wage for Federal Contractors.'' 86 FR 22835. The order builds on the foundation established by Executive Order 13658, ''Establishing a Minimum Wage for Contractors,'' signed by President Barack Obama on February 12, 2014. *See* 79 FR 9851. The Department notes that, at the time of the drafting of this NPRM, there are several pending lawsuits challenging the President's authority to have issued Executive Order 14026. Such cases are not discussed herein because they are beyond the scope of this proposed rule, which simply highlights the issuance of the Executive Order as an example of the profound legal and policy developments that have impacted individuals with disabilities in recent decades.

[147] *See* 86 FR at 22835; 79 FR at 9851.

[148] 79 FR 9851, Executive Order 13658, ''Establishing a Minimum Wage for Contractors,'' February 12, 2014, *https://*

Continued

Executive Order 14026 similarly extended the full Executive Order minimum wage to workers with disabilities performing on or in connection with covered Federal contracts, stating, among other benefits, that raising the minimum wage has the effects of ''boosting workers' health, morale, and effort.'' [149]

v. Home and Community-Based Services ''Settings Rule''

In addition to legislative and presidential action, other Federal agencies have also promulgated regulations consistent with expanding CIE opportunities for workers with disabilities. For example, in 2014, HHS's Centers for Medicare and Medicaid Services (CMS) issued the Home and Community Based Settings (HCBS) ''Settings Rule'' that focused on various aspects of residential and employment settings for individuals with disabilities. The rule emphasized that individuals have free choice of providers for services in their service plan, including employment services.[150] These regulations further stipulate that the ''setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings . . . to the same degree of access as individuals not receiving Medicaid HCBS.'' [151]

vi. U.S. AbilityOne Commission 2022 Final Rule

The AbilityOne Program provides the Federal Government with services and products procured through a nationwide network of approximately 450 non-profit entities that employ individuals who are blind or have significant disabilities.[152] In 2022, the U.S. AbilityOne Commission (Commission) issued a final rule prohibiting the payment of subminimum wages under section 14(c) to employees on contracts within the AbilityOne Program.[153] The 2022 AbilityOne final rule adds a new requirement for non-profit agencies that seek both initial and continuing qualification to participate in the AbilityOne Program: namely, such agencies must certify that, when paying workers on AbilityOne contracts, they will not use section 14(c) certificates. In its 2022 final rule, the Commission states that ''ending wage disparities between employees based solely on disability places the economic power of individuals with disabilities on par with their work colleagues who do not have disabilities and paying the same wage to individuals with disabilities and those without conveys a message of equality and a commitment to inclusion.'' [154] The Commission explained that ending the payment of subminimum or sub-prevailing wages on AbilityOne contracts was designed to help break cycles of poverty and dependence for workers with disabilities, and instead shift the focus on assisting workers with disabilities to move to careers of meaningful employment.[155] The Commission further explained that societal expectations of people with disabilities had changed and that the availability of reasonable accommodations and employment supports had significantly changed the employment landscape for workers with disabilities.[156] The final rule was published on July 21, 2022, and took effect 90 days later on October 19, 2022. Nonprofit agencies seeking qualification to participate in the AbilityOne program were allowed to apply for a single extension of up to 12 months if they provided required support for the need of the extension and a corrective action plan detailing how they planned to achieve compliance during the requested extension period.

As of September 30, 2023, no employee on an AbilityOne contract was being paid a subminimum wage.[157] AbilityOne's final rule prohibiting the payment of subminimum wages marked a noteworthy step away from the use of subminimum wage certificates.

In sum, legislation, judicial precedent, and regulatory initiatives have fundamentally and profoundly altered the rights, protections, access, and opportunities available to individuals with disabilities. These evolving changes to the employment landscape have dramatically altered access to employment opportunities and available supports for workers with disabilities.

vii. Strategies, Initiatives, and Resources Focused on Increasing Competitive Integrated Employment Opportunities

Alongside these legislative, executive, and judicial developments clarifying and expanding the rights and opportunities of individuals with disabilities, virtually all of which occurred after Congress last amended section 14(c) and the Department last substantively updated the section 14(c) regulations, a number of strategies focused on increasing CIE have also emerged. The proliferation of resources and strategies to increase CIE since 1989 demonstrates to the Department that there are numerous alternatives to subminimum wage employment, as well as many additional pathways to employment at or above the full Federal minimum wage for individuals with disabilities. The diversity of available supports, services, and strategies to facilitate the attainment of CIE for workers with disabilities indicates that subminimum wages are no longer a strategy that is necessary to prevent curtailment of opportunities for employment for these workers. One example is Employment First, which is a national framework centered on the premise that all individuals, including those individuals with the most significant disabilities, are capable of full participation in CIE and community life.[158] Under Employment First, public systems and States are urged to align policies, regulatory guidance, and reimbursement structures to commit to CIE as the priority option with respect to the use of publicly-financed day and employment services for youth and adults with significant disabilities.[159] Many States have formally committed to the Employment First framework through official executive proclamation or formal legislative action.[160] The Association of People Supporting Employment First (APSE) website reports that, to date, every State has taken some Employment First action, with 31 States having passed Employment First legislation, 16 States having issued Employment First executive orders, and 32 States having administrative policies and/or

obamawhitehouse.archives.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors.

[149] 86 FR at 22835.

[150] 79 FR 2948 (Jan. 16, 2014).

[151] 42 CFR 441.530(a)(1)(i).

[152] *See* AbilityOne Program, FAQs, *https://www.abilityone.gov/abilityone_program/faqs.html#1.*

[153] 87 FR 43427 (July 21, 2022).

[154] 87 FR 43428–43429.

[155] 87 FR 43428.

[156] 87 FR 43429.

[157] *See* U.S. AbilityOne Commission, ''Fiscal Year 2023 Performance and Accountability Report,'' at 95, *https://www.abilityone.gov/commission/performance.html.* In fiscal year 2022, approximately 36,000 people who are blind or have significant disabilities were employed through the AbilityOne program. *Id.* at 7.

[158] U.S. Dep't of Labor, Office of Disability Emp't Policy, ''Employment First,'' *https://www.dol.gov/agencies/odep/initiatives/employment-first.*

[159] *Id.* There are multiple additional initiatives that have developed from Employment First, including the National Expansion of Employment Opportunities Network (NEON) and the Advancing State Policy Integration for Recovery and Employment (ASPIRE) initiatives.

[160] *Id.*

regulations in place in support of the Employment First framework.[161]

The methods of assisting individuals to obtain and maintain competitive employment have evolved over the past several decades, further enhancing these CIE programs. For example, research shows that the development of supported employment, the Individual Placements and Supports (IPS) model, and customized employment methodologies have been used to successfully implement CIE for workers with disabilities.[162] Specifically, the IPS model is designed to assist individuals with serious mental health conditions and involves a multi-disciplinary team that employs eight strategies: competitive employment, systematic job development, rapid job search, integrated services, benefits planning, time-limited supports, worker preferences, and zero exclusion of participants.[163] This coordination of medical care and supported employment has been described as a standardization of evidence-based supported employment.[164]

The Department of Labor's Office of Disability Employment Policy (ODEP), established in 2001, led the research that built evidence for customized employment, ''a process for achieving competitive integrated employment or self-employment through a relationship between employee and employer that is personalized to meet the needs of both.'' [165] Customized employment tailors job tasks to fit the individual who will be performing the work, and this strategy has been shown to be particularly beneficial for people with disabilities who might not have been successful in CIE using other training and employment strategies. In 2014, customized employment was included in Title IV of the WIOA as a strategy under the definition of supported employment.

Finding these methodologies effective, various Federal agencies have adopted them, and funded their use, through their programs and initiatives. For example, supported employment was added to the Rehabilitation Act in 1986 to help more workers with disabilities obtain employment. Customized employment emerged first through grant programs beginning in 2001 and was added to WIOA in 2014. The development and implementation of these strategies for successful CIE align with the emergence of the social model of disability as well as with person-centered planning. Strategies consistent with the social model of disability that decrease barriers and increase access to opportunities and focus on the individual needs of each worker have created new pathways for workers with disabilities to find, and maintain, the right jobs for them.

ODEP has also led several initiatives focused on promoting CIE and aiding States and service providers in implementing CIE strategies. For example, the Campaign for Disability Employment, an ODEP-funded outreach effort, showcases supportive, inclusive workplaces for all workers and brings together several leading disability and business organizations convened by ODEP to work together to address disability employment, demonstrating the increased collaboration among employers to advance employment options for workers with disabilities.[166] The Disability Employment Initiative (DEI), funded by ODEP and the Department's Employment and Training Administration, awarded more than $123 million through the initiative to 49 projects in the public workforce system in 28 States to improve education, training, and employment outcomes of youth and adults with disabilities.[167]

In addition, through the Employment First State Leadership Mentoring Program, ODEP supported 24 States in their strategic efforts to increase CIE for individuals with disabilities, including those with significant disabilities.[168] ODEP has also established the National Expansion of Employment Opportunities Network (NEON) to collaborate with CRPs to extend CIE for the people they serve through provider transformation. ODEP explains that this process ''realigns'' disability service provider agencies' business models ''from providing work opportunities in segregated settings or at subminimum wages to providing CIE for people with disabilities.'' [169] This robust level of programming and State participation allows the refocusing of many State resources from programs relying on the payment of subminimum wages to workers with disabilities to programs that support CIE opportunities. In 2012, ODEP began and actively maintains an Employment First Community of Practice (COP) of nearly 3,000 State agency and service provider professionals, researchers, policy makers, workers and family members, and Federal officials. The COP shares CIE challenges and solutions, resources, events, and successes. In March 2024, ODEP launched an online CIE Transformation Hub of practical Federal resources that support CIE organized by target audience—individuals with disabilities and family members, employment service providers, State agencies, and employers.[170]

Since 2021, the U.S. Department of Education's Rehabilitation Services Administration (RSA),[171] has administered demonstration programs with discretionary grants through the Disability Innovation Fund (DIF) to support innovative activities aimed at increasing CIE.[172] In 2022, RSA made DIF awards to 14 vocational rehabilitation agencies to, as the Department of Education has explained, ''decrease the use of subminimum wages and increase access to competitive integrated employment for people with disabilities.'' [173] In recent

[161] *See https://apse.org/home-v2-2/employment-first/* for a state-by-state summary. As of June 2024, all 50 States (as well as the District of Columbia) are listed on this website, with Idaho having taken Employment First action other than legislation, executive order, or administrative policies/regulations. Many States ''have a combination of legislation, Executive action and/or State Agency policy in place.'' *Id.*

[162] *See, e.g.,* Joonas Poutanen, Matti Joensuu, Kirsi Unkila & Piurjo Juvonen-Posti, ''Sustainable employability in Supported Employment and IPS interventions in the context of the characteristics of work and perspectives of the employers: a scoping review protocol,'' BMJ Open 12(6) (June 17, 2022), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9207909/* (''The sustainable employment outcomes and cost-effectiveness of SE and IPS have been well reported.'').

[163] *See https://ipsworks.org/index.php/what-is-ips/.*

[164] *See* Gary R. Bond, Robert E. Drake & Deborah R. Becker, ''An update on randomized controlled trials of evidence-based supported employment.'' Psychiatric Rehabilitation Journal, 31(4) (April 2008), 280–290, *https://doi.org/10.2975/31.4.2008.280.290.*

[165] *See* U.S. Dep't of Labor, Office of Disability Emp't Policy, ''Customized Employment,'' *https://www.dol.gov/agencies/odep/program-areas/customized-employment.*

[166] U.S. Dep't of Labor, Office of Disability Emp't Policy *https://www.dol.gov/agencies/odep/initiatives/campaign-for-disability-employment.*

[167] U.S. Dep't of Labor, Office of Disability Emp't Policy *https://www.dol.gov/newsroom/releases/odep/odep20160914.*

[168] *See supra* note 159.

[169] *See* U.S. Dep't of Labor, Office of Disability Emp't Policy, ''National Expansion of Employment Opportunities Network (NEON),'' *https://www.dol.gov/agencies/odep/initiatives/neon.*

[170] U.S. Dep't of Labor, Office of Disability Emp't Policy, *https://www.dol.gov/agencies/odep/program-areas/cie/hub.*

[171] To assist individuals with disabilities in the pursuit of gainful employment, RSA administers and manages programs that assist individuals with disabilities to achieve employment outcomes. One of these programs, the State Vocational Rehabilitation Services Program, provides State formula grant programs to vocational rehabilitation (VR) agencies providing a wide variety of services to individuals with significant disabilities, including individuals with the most significant disabilities.

[172] *See* Consolidated Appropriations Act, Public Law 117–103, 136 Stat. 49, 479 (2022).

[173] U.S. Dep't of Educ., ''Education Department Awards $177 Million in New Grants to Increase Competitive Integrated Employment for People with Disabilities,'' *https://www.ed.gov/news/press-*

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years, DIF grant projects have focused on improving the outcomes of individuals with disabilities through, for example, (1) career advancement programs, (2) transition from subminimum wage to CIE programs, and (3) ''pathways to partnerships programs'' that seek to support projects that foster the establishment of close ties among agencies—such as State vocational rehabilitation agencies, State educational agencies, local educational agencies, and federally funded Centers for Independent Living—to actively collaborate to support coordinated transition processes for children and youth with disabilities.[174] These 5-year grants are awarded to States as cooperative agreements to support innovative activities aimed at increasing CIE for youth and other individuals with disabilities.[175]

A landmark agreement in Oregon, the *Lane* v. *Brown* settlement agreement, illustrates some of this legal, legislative, and policy progression. In 2012, a class action complaint was filed in district court on behalf of individuals with I/DD alleging that by unnecessarily segregating them and other similar individuals with I/DD in sheltered workshops receiving public funds, Oregon was in violation of Title II of the ADA and section 504 of the Rehabilitation Act.[176] DOJ intervened in the lawsuit as a plaintiff, and a statewide settlement agreement was signed in 2015 requiring, among other things, that Oregon decrease State support of sheltered workshops for individuals with I/DD and expand access to supported employment services that allow the opportunity to work in CIE settings. As a result, Oregon implemented a number of competitive and supported employment strategies to support individuals with disabilities in the State, including training for school districts and those providing support services, new grants, reallocation of funding and technical assistance to support CIE.[177] These strategies accelerated the transition for workers with disabilities from employment under the prior sheltered workshop model to a CIE model within the State, ultimately ending the payment of subminimum wages to workers with disabilities in Oregon. In 2016, the year that this settlement was reached and approved by the court, there were 1,405 people working in sheltered workshops in Oregon.[178] Through this transition, Oregon placed 1,138 individuals from the class who had previously worked for subminimum wages into CIE, exceeding the targets set by the consent judgment. Additionally, by September 2020, all sheltered workshops except one had converted to providing supported, full-wage employment opportunities.[179]

In sum, a wide range of resources and programs have emerged in recent years that are focused on increasing competitive integrated employment. These supports and services assist workers in obtaining and maintaining employment at or above the full Federal minimum wage and also assist employers in transitioning their business models to integrated workplaces where the minimum wage is paid to all workers. Today, subminimum wage employment under section 14(c) certificates is no longer the most common form of employment for individuals with disabilities, including individuals with I/DD. As the number of workers being paid subminimum wages under section 14(c) certificates continues to shrink, the numbers of workers with disabilities, including workers with I/DD, working in integrated settings for full wages continues to grow.[180]

C. Third Party Reports Regarding Section 14(c)

In the context of the changes that have taken place over the past several decades in opportunities for employment for individuals with disabilities, both public and private entities (including from the nonprofit, academic, and business sectors) have published relevant reports and statements regarding subminimum wage employment. Though, as discussed below, some organizations remain in strong support of the continuation of section 14(c) certificate issuance, many of these reports, from governmental and non-governmental organizations alike, have compiled substantial evidence that subminimum wages are no longer a necessary method of providing employment opportunities to individuals with disabilities. In this subsection, the Department reviews key aspects of these reports, which represent the culmination of years of findings and conclusions, most of which provide support for the Department's proposal to end the issuance of section 14(c) certificates.

1. Government Oversight Reports

In recent years,[181] a number of Federal government agencies and committees have studied the payment of subminimum wages to workers with disabilities and generated oversight reports. These agencies and committees brought together a wide range of individuals from across government and the non-profit and business sectors to share their expertise and experience regarding the payment of subminimum wages to workers with disabilities and corresponding models of employment. In general, these oversight entities have sharply criticized the continued payment of subminimum wages as an outdated method to support workers with disabilities and reflect a broad consensus that subminimum wages are not necessary to provide opportunities for employment of individuals with disabilities, including opportunities for individuals with I/DD Accordingly, many recommend that a phase out of section 14(c) certificates should begin immediately. The Department notes that

releases/education-department-awards-177-million-new-grants-increase-competitive-employment-people-disabilities.

[174] U.S. Dep't of Educ., Rehabilitation Services Administration (RSA), ''RSA Programs,'' *https://rsa.ed.gov/about/programs.*

[175] *See* 29 U.S.C. 705(5); *see also* Dep't of Educ., RSA, ''Disability Innovation Fund,'' *https://rsa.ed.gov/about/programs/disability-innovation-fund-pathways-to-partnerships.*

[176] The Department notes that, on May 9, 2024, HHS published a final rule which modernized and strengthened the implementing regulations for section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability in programs and activities that receive Federal financial assistance. *See* 89 FR 40066 (May 9, 2024). The rule, among other things, clarifies obligations to provide services in the most integrated setting, appropriate to the needs of individuals with disabilities, and updates existing requirements to make them consistent with the ADA. *See* HHS, Section 504 of the Rehabilitation Act of 1973 Part 84 Final Rule: Fact Sheet, *https://www.hhs.gov/civil-rights/for-individuals/disability/section-504-rehabilitation-act-of-1973/part-84-final-rule-fact-sheet/index.html.* Section 84.76 of HHS's updated section 504 regulations specifically requires all recipients of Federal financial assistance from HHS to administer their programs and activities in the most integrated setting appropriate to the needs of a qualified person with a disability. *See* 45 CFR 84.76; 89 FR 40066, 40117.

[177] Oregon Dep't of Human Services, ''*Lane* v. *Brown* Settlement Agreement Report,'' *https://www.oregon.gov/odhs/employment-first/Documents/lane-v-brown-settlement-message-2022-06-21.pdf.*

[178] *Id.*

[179] *See* Disability Employment TA Center, The Components of Integrated Employment Service Systems, p.11 (July 2022), *https://aoddisabilityemploymenttacenter.com/wp-content/uploads/2022/07/Components-of-Integrated-Employment-Part-II-FINAL-Final.pdf.* In addition to the Oregon settlement, in 2014, DOJ entered into a statewide settlement agreement in Rhode Island to resolve violations of the ADA for approximately 3,250 Rhode Islanders with I/DD. *See* U.S. Dep't of Justice, ''Department of Justice Reaches Landmark Americans With Disabilities Act Settlement Agreement With Rhode Island,'' April 8, 2014, *https://www.justice.gov/usao-ri/pr/department-justice-reaches-landmark-americans-disabilities-act-settlement-agreement-rhode.*

[180] *See* discussion in section III.A.

[181] This section is not an exhaustive listing of all such Federal government oversight reports relating to individuals with disabilities, but rather focuses on recent reports that specifically consider the role of section 14(c) and subminimum wages in the employment of those individuals.

there are no equivalent government oversight reports that favor the continued issuance of section 14(c) certificates (at least beyond a phaseout period). The Department welcomes comments on its analysis of the selected reports discussed in this proposed rule as well as comments on any other reports relevant to whether the continued issuance of section 14(c) certificates is necessary to prevent the curtailment of employment opportunities for individuals with disabilities.

i. U.S. Commission on Civil Rights Report on Subminimum Wages

The USCCR is an independent, bipartisan, fact-finding Federal agency established in part to study discrimination or denial of equal protection by reason of race, color, religion, sex, age, disability, or national origin. In 2020, the USCCR issued a comprehensive 349-page report entitled ''Subminimum Wages: Impacts on the Civil Rights of People with Disabilities'' (USCCR Report).[182] The USCCR concluded that payment of subminimum wages should be eliminated through a planned phaseout period that allows for the transition among service providers and individuals with disabilities.[183] In making this recommendation, the USCCR emphasized its finding that ''[p]eople with intellectual and developmental disabilities who are currently earning subminimum wages under the 14(c) program are not categorically different in level of disability from people with intellectual and developmental disabilities currently working in competitive integrated employment.'' [184] Especially given the comprehensive nature of the USCCR report, the Department gives weight to the report's key factual findings and recommendations in proposing to phase out issuance of section 14(c) certificates.

To generate the report, the USCCR collected data, reports, and testimony from ''Members of Congress, Labor and Justice Department officials, self-advocates and workers with disabilities, family members of people with disabilities, service providers, current and former public officials, and experts on disability employment and data analysis;'' received thousands of public comments both in favor of and in opposition to the use of section 14(c) certificates; held a public hearing; and conducted in-person visits to both full-wage and subminimum wage worksites.[185]

During the USCCR's hearings, they heard testimony from employers who provided insight into the impact of phasing out subminimum wages on their operations. For example, the USCCR heard from some employers who had transitioned away from the use of subminimum wages that, based on their experiences, section 14(c) certificates were no longer necessary to prevent curtailment of employment opportunities for individuals with disabilities. The Chief Executive Officer (CEO) of Melwood, a non-profit organization that transitioned their employees to at least the full minimum wage in 2013 and withdrew its section 14(c) certificate in 2016, testified that phasing out subminimum wages had positively impacted Melwood's operations, resulting in higher morale and productivity, and contributed to its ongoing successes.[186] Additionally, the CEO reflected on what she believed were the negative impacts of using section 14(c) certificates, testifying that ''time trials caused our employees to feel extremely anxious and stressed, as employees knew that their performance could reduce their wages and harm their ability to live happy independent lives,'' and that ''the average employee lost five hours of productive time as a result of each time trial, not including the loss of productivity due to the anxiety distraction.'' [187] The USCCR also spoke with employers who employed individuals with I/DD but who had never held a section 14(c) certificate, and those employers spoke positively of their experiences.[188]

The USCCR also collected extensive testimony from, among others, individuals with I/DD and their family members, current and former section 14(c) certificate holders, and employers of individuals with I/DD. The USCCR found that ''[p]ersons with disabilities who have transitioned out of 14(c) workshops were adamantly against the program.'' [189] For example, the USCCR interviewed a worker in Vermont who, after that State eliminated the payment of subminimum wages, had transitioned to working in integrated employment, where he received more than minimum wage and had opportunities for advancement.[190] Reflecting on his previous experiences working for subminimum wages pursuant to a section 14(c) certificate, the worker explained that he believed that his former employer had been ''using'' his disability ''against'' him, and that he would ''do more and get less than everyone else.'' [191]

As another key part of its review, the USCCR conducted intensive case studies of three States that, at the time of the report's publication, still permitted payment of subminimum wages (Virginia, Arizona, and Missouri), and compared those States to three States that had taken steps to eliminate subminimum wages (Vermont, Maine, and Oregon). In general, the USCCR's case studies detailed many successful transitions from subminimum wages to full wages. In terms of data regarding employment outcomes in those States, the USCCR noted both the complexity and insufficiency of available statistics. Summarizing its analysis of state-level employment data collected from those six States in 2016 and 2017, the USCCR explained that ''contrary to the popular belief that ending subminimum wages will lead to job losses, the eradication of subminimum wages correlates with increased employment for people with disabilities'' in certain States.[192] The USCCR expressly noted, however, that ''importing these data over a wider range of states shows even more complexity.'' [193] Recognizing that the results of the then-existing data regarding impact of state-level legislation prohibiting subminimum wages was ''mixed,'' the USCCR concluded that ''[t]he success of states like Oregon and Vermont show that there is a path forward[ ]; moreover, even concerned family members in those states eventually embraced a supported transition from 14(c) to competitive integrated employment.'' [194]

In addition to receiving comments urging the elimination of subminimum wages, however, the USCCR also noted that ''the majority of the public

[182] USCCR Report. The U.S. Commission on Civil Rights was established by Congress in 1957 and submits reports and recommendations to the President and Congress based upon their studies. Two members dissented from the conclusions of the 2020 report.

[183] *Id.* at 223.

[184] *Id.* at 221.

[185] *Id.* at i.

[186] USCCR Report at 50–51.

[187] *Id.* at 50.

[188] In a briefing to the USCCR, for example, Microsoft explained that, since 2013, its Supported Employment Program had placed over 280 individuals with I/DD in full-wage jobs at Microsoft. *Id.* at 48 (*citing* Brian Collins, briefing transcript at 272–73 and 274–75). Microsoft observed that employing workers with I/DD had added strength to the company because those workers tended to be longer-term employees (thus reducing recruitment, turnover, and onboarding costs) and tended to challenge the status quo and teach colleagues about ''communication, inclusion, and empathy.'' *Id.* at 49.

[189] *Id.* at xi.

[190] *Id.* at 198.

[191] *Id.*

[192] *Id.* at 143–45.

[193] *Id.*

[194] *Id.* at 217.

comments the Commission received were from parents who support the continued operation of 14(c) workshops unchanged.'' [195] These public comments included ''family members of persons with disabilities working in 14(c) workshops . . . who stated it was their 'CHOICE' to work there and that they were against elimination of the 14(c) program.'' As one family member of a person with a disability wrote to the USCCR, ''We are NOT concerned with lower pay. We ARE concerned that the rights of our family member to work in a fulfilling, safe, stable job where he enjoys being part of a community is at risk due to the wage debate'' (emphasis in original).[196]

The USCCR also found several other notable aspects of subminimum wage employment. In a chapter of its Report, the USCCR broadly reviewed the roles of different government agencies in relationship to section 14(c). The USCCR detailed the extensive use of public funds to support existing sheltered workshops. Among other key points, the USCCR found that some States have used HHS and Medicaid funding to fund worker supports necessary for those workers to access employment at the full minimum wage; this same funding is frequently used to fund non-profit employers who use section 14(c) certificates in other States.[197] In other words, in some instances, funds could be shifted from supporting subminimum wage employment to supporting full-wage employment. Of note, the USCCR stated that transition away from subminimum wages could be ''aided by the provision of accommodations such as a job coach, peer support, or specialized training or other supports that allow persons with disabilities to effectively work in integrated settings,'' and that funds once used to fund employment under section 14(c) certificates (such as at CRPs) could be redirected to these purposes.[198] The USCCR explained that ''[s]tate-level phase outs of the use of the 14(c) program have been developed and designed for State service providers and other stakeholders to ensure that a competitive integrated employment model does not result in a loss of critical services to individuals with disabilities including former 14(c) program participants.'' [199]

As part of its review, the USCCR collected and analyzed data about the use of section 14(c) certificates. Summarizing this analysis, the USCCR concluded that ''the Department of Labor's enforcement data as well as several key civil rights cases and testimony from experts show that with regard to wage disparities, the program is rife with abuse and difficult to administer without harming employees with disabilities, as reflected in over 80 percent of cases investigated.'' [200] The USCCR based this finding in part on WHD enforcement data that, as discussed above, shows that WHD investigations of section 14(c) certificate holders reveal high rates of FLSA violations. The USCCR made no analysis of or conclusions about the types or severity of violations found in WHD investigations. However, the USCCR highlighted a well-documented case involving egregious civil rights abuses connected to an employer who had formerly held a section 14(c) certificate, the *Hill Country Farms* case.[201] In that case, both the Department and the EEOC successfully recovered substantial damages for the workers based on, respectively, the employer's willful violations of the FLSA and the employer's severe abuse and discrimination in violation of the ADA.[202] In addition to highlighting the ''disability-based harassment, discrimination and abuse'' experienced by these workers, the USSCR commented that ''[t]his case does not directly address whether 14(c)'s permitting payment of subminimum wages violates the ADA, but it does illustrate that Title I ADA violations are possible under those circumstances.'' [203]

In sum, the USCCR's qualitative and quantitative study of the use and cessation of section 14(c) certificates—encompassing employer, worker, family, government, and expert perspectives—substantially aided the Department's review of whether section 14(c) certificates are still necessary to prevent curtailment of employment opportunities for workers with disabilities. Furthermore, given this body of evidence, the Department finds the USCCR's conclusion that subminimum wages are no longer necessary to be compelling.

ii. National Council on Disability Reports Relevant to Payments of Subminimum Wages

The National Council on Disability (NCD) is an independent Federal agency charged with advising Congress, the President, and other entities on policy related to people with disabilities. NCD has issued several reports related to section 14(c), including two reports that specifically favor the cessation of subminimum wages, finding that such practices are not necessary to prevent curtailment of opportunities for employment of individuals with disabilities. As with the USCCR report, the NCD's thorough analysis, spanning nearly a decade, undergirds the Department's finding that subminimum wages are no longer necessary to prevent curtailment of employment opportunities for individuals with disabilities.

In 2012, the NCD issued a report recommending that section 14(c) be phased out.[204] In this report, published prior to the passage of WIOA, NCD recommended many reforms similar to those that were subsequently enacted, including ''mandatory information sharing to workers,'' and expansion of supported education and postsecondary education and training for individuals

[195] *Id.* at xi.

[196] *Id.* at 175.

[197] *Id.* at xiv and 179–80.

[198] *Id.* at xi–xii. Similarly, recent non-governmental reports have also emphasized the role that States' and organizations' programmatic choices play in determining whether individuals with disabilities have opportunities for subminimum or full-wage employment. For example, in 2024, New America released a report analyzing States' efforts to end payment of subminimum wages. This report examined the usage of programs that New America deemed to support successful transitions from subminimum to full wages, including ''Medicaid expansion, benefits counseling, and tax-deferred savings accounts.'' The report analyzed States' efforts to put in place supportive employment policies and programs and noted a wide disparity of approaches among States in these areas. Among other conclusions in the report, New America observed that States that did not seek to limit or eliminate the use of subminimum wages often also did not engage in as many supportive employment or financial security initiatives. *See* New America, ''Pennies on the Dollar: The Use of Subminimum Wage for Disabled Workers across the United States: Momentum to Change the Subminimum Wage'' (2024), *https://www.newamerica.org/education-policy/reports/the-use-of-subminimum-wage-for-disabled-workers-across-the-us/.*

[199] 2020 USCCR Report at xvi.

[200] *Id.* at vi–vii.

[201] In that case, Hill Country Farms, doing business as Henry's Turkey Service, employed a group of men with intellectual disabilities for approximately 20 years at an Iowa turkey processing plant where the employer subjected the workers to ''abusive verbal and physical harassment; restricted their freedom of movement; and imposed other harsh terms and conditions of employment such as requiring them to live in deplorable and sub-standard living conditions, and failing to provide adequate medical care when needed.'' U.S. Equal Emp't Opportunity Comm'n, *https://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm* (May 1, 2013). The employer also paid only pennies per hour—$65 a month in cash wages even when company time sheets reflected that they worked more than 40 hours a week. U.S. Dep't of Labor, *https://www.dol.gov/newsroom/releases/whd/whd20110427* (April 27, 2011).

[202] *Solis* v. *Hill Country Farms,* 808 F. Supp. 2d 1105 (S.D. Iowa 2011), *aff'd,* 469 Fed. App'x 498 (8th Cir. 2012); *EEOC* v. *Hill Country Farms, Inc.,* 899 F. Supp. 2d 827 (S.D. Iowa 2012), *aff'd,* 564 Fed. App'x 868 (8th Cir. 2014).

[203] 2020 USCCR Report at 25.

[204] 2012 NCD Report.

with disabilities.[205] NCD recommended that section 14(c) ''should be phased out gradually to provide adequate time for transition to new alternatives.'' [206] To facilitate that proposed phaseout, NCD outlined in their 2012 report a ''comprehensive system of support that will result in greater opportunities for people with disabilities.'' [207]

Among its key findings, the 2012 NCD report noted that work in subminimum wage settings generally did not provide a stepping stone to full-wage work but was instead almost always an end-placement. As NCD observed citing back to a 2001 GAO report, ''Sheltered workshops are ineffective at transitioning people with disabilities to integrated employment. According to the 2001 investigation by [GAO] into the 14(c) program, only approximately 5 percent of sheltered workshop employees left to take a job in the community.'' [208]

In a follow-up 2018 report, NCD again focused on the issue of whether subminimum wages were necessary to secure employment opportunities for individuals with disabilities. NCD reiterated its recommendation to phase out the use of section 14(c) certificates, labelling continued certificate issuance as ''even more evidently outdated and ineffective than it was six years ago.'' [209] NCD termed the continued issuance of section 14(c) certificates a form of ''economic disenfranchisement'' of ''great significance to the overall health of our nation's economy and society.'' [210] The report found that the ''landscape of law and policy has been considerably expanded'' to allow transitions from sheltered workshops into competitive integrated employment. NCD found that, despite these advances, those working under section 14(c) certificates remain ''confined'' to ''sheltered workshops where they perform manual tasks that are often mismatched with their particular strengths and also with their preferences and interests as employees . . . even though new technologies, services, and supports exist that would allow them to succeed in competitive integrated employment.'' [211] The NCD report, echoing the Department's findings discussed above in its report to Congress nearly 50 years earlier, posited that the ''sheltered workshop business model, itself, rather than the impact of disability on productivity, incentivizes low wages and correspondingly disincentivizes reasonable accommodations, better job matches, and more integrated employment services.'' [212]

In its 2018 report, NCD described ''successful examples of transformation from six States [of organizations] where providers have transitioned services from sheltered workshops that paid 14(c) subminimum wages to rival models of individualized supported and customized employment services . . . .'' [213] In reviewing these examples, NCD analyzed ''key success factors'' in each of these organization case studies, including factors such as the presence of staff versed in ''employment first'' strategies, a strong organizational commitment to inclusion of individuals with disabilities in socially valued roles, collaboration with supported employment organizations, high expectations for outcomes, the fostering of an incentivizing link between an individual's work performance and ''a paycheck,'' a business-oriented emphasis on placing employees where they will meet employers' real needs, and fostering the self-advocacy skills of individuals with disabilities.[214]

NCD also made site visits and highlighted the stories of individuals. In one example, NCD wrote ''[a] person with I/DD who was accused of being a 'slow worker' in the sheltered workshop became 'a raging success' working competitively in a family restaurant. He was better matched, and therefore performed better, in a job where he could interact with customers.'' NCD also described, in specific detail, the methodologies of agencies in several States providing supportive employment services, such as individualized job matching and community networking strategies.[215] NCD noted that ''families' viewpoints often change from hesitance about working in the community to full support after they see how successful a family member can be in a typical work setting, and how that success can run to other domains of life.'' [216]

Based on its review, NCD made several recommendations in its 2018 report. For example, NCD recommended that disability policy should focus on ''increased capacity for sustained funding for integrated supported and customized employment,'' improving technical assistance, benefits counseling, business engagement strategies, and developing resources and innovations to allow people with disabilities to do current and future available jobs.[217] In conclusion, NCD recommended current certificate holders should be given time to phase out subminimum and sub-prevailing wages, while the Department's issuance of ''new'' certificates should immediately cease.[218]

In an additional 2018 report entitled ''National Disability Policy: A Progress Report,'' (2018 NCD Progress Report), NCD also extensively reviewed WHD's administration and enforcement efforts under section 14(c).[219] Among other findings, NCD noted that WHD had recognized the need to focus enforcement efforts on areas ''where large numbers of vulnerable workers are found,'' such as workers employed by holders of section 14(c) certificates.[220] As part of this effort, NCD reported that WHD conducted extensive investigations of such employers between 2008 and 2017. During that period, as also discussed in section II.D.1 (''Administration and Enforcement of Certificates''), NCD ''documented 'a high prevalence' of FLSA and other violations among the 14(c) certificate holders investigated. In many instances, employers were unaware of the requirements of Section 14(c) or did not implement the requirements appropriately.'' [221]

The 2018 NCD Progress Report also highlighted the intersection between section 14(c) and anti-discrimination civil rights protections. This report, among many other recommendations, called for more collaboration between WHD and civil rights enforcement agencies; as an example of this type of activity, NCD highlighted that as a result of a WHD investigation of a certificate holder in Rhode Island, WHD made a referral to DOJ's Civil Rights Division. DOJ then found ''unnecessary segregation of adults and serious risks of unnecessary segregation of students in violation of the ADA and the U.S. Supreme Court *Olmstead* decision,'' resulting in a court ordered settlement agreement with the State of Rhode Island and the city of Providence.[222]

[205] *Id.* at 10.

[206] *Id.* at 18.

[207] *Id.*

[208] *Id.* at 10.

[209] Nat'l Council on Disability, ''National Disability Employment Policy from the New Deal to the Real Deal: Joining the Industries of the Future,'' Letter of Transmittal, 2018, *https://www.ncd.gov/report/national-disability-employment-policy-from-the-new-deal-to-the-real-deal-joining-the-industries-of-the-future/* (2018 New Deal NCD Report).

[210] *Id.* at 12.

[211] *Id.* at 13–14.

[212] *Id.* at 53.

[213] *Id.* at Transmittal Letter.

[214] *Id.* at 66, 70, 73–74, 78, 83.

[215] *Id.*

[216] *Id.* at 76.

[217] *Id.* at 14.

[218] *Id.* at 99–100.

[219] 2018 NCD Progress Report.

[220] *Id.* at 68–69.

[221] *Id.* at 69–70.

[222] *Id.* at 74.

The Department considers the NCD reports insightful in analyzing changed employment opportunities for individuals with disabilities, especially as the NCD documented the impact of these changes in reports spanning several years. Furthermore, it is relevant that NCD not only found that subminimum wage employment is unnecessary given the alternatives, but also put forward evidence that many employees working under section 14(c) certificates may, despite positive intentions, experience negative outcomes.

iii. Report of the Advisory Committee on Increasing Competitive Integrated Employment for Individuals With Disabilities

In 2014, the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities (Advisory Committee) was established under section 609 of the Rehabilitation Act, as amended by section 461 of the WIOA.[223] The Advisory Committee was created to advise the Secretary and Congress in three areas: (1) ways to increase competitive integrated employment opportunities for individuals with intellectual or developmental disabilities or other individuals with significant disabilities; (2) the use of the section 14(c) certificate program for the employment of individuals with I/DD or other individuals with significant disabilities; and (3) ways to improve oversight of the use of such certificates.[224] The Advisory Committee was established according to the provisions of the Federal Advisory Committee Act, which helps ensure the independent nature of the Advisory Committee in providing advice and recommendations to the Secretary. Especially as Congress specifically created the Advisory Committee to independently study questions closely related to the Department's charge to determine whether continued issuance of certificates is necessary, the Department gives weight to the Committee's relevant findings.

Members of the Advisory Committee included Federal members,[225] self-advocates for individuals with I/DD, providers of employment services, representatives of national disability advocacy organizations for adults with I/DD, academic experts, representatives from the employer community or national employer organizations, and other individuals or representatives with expertise on increase opportunities for CIE for individuals with disabilities. The Advisory Committee worked for 2 years on its study of the topics mentioned above. In evaluating these issues, the Advisory Committee held 10 public meetings during which individuals and organizations provided testimony and public comments. The Advisory Committee also received ''more than 2,000 letters, emails and personal video messages from people with disabilities, and other citizens and organizations across the nation that helped inform the work of the committee and its final recommendations.'' [226]

As the culmination of these efforts, in September 2016, the Advisory Committee issued a detailed report (Committee Report) that included six chapters discussing that increasing CIE will require substantial capacity building, including for youth, in the marketplace, and within the Federal government itself.[227] The Advisory Committee, among other conclusions, recommended that Congress repeal section 14(c) through a multi-year phaseout.[228] The Advisory Committee further recommended that WHD ''engage in stronger enforcement'' of section 14(c) certificates and require both States and individual applicants to submit more information (including information about States' and applicants' efforts to work towards alternatives to the payment of subminimum wages) to show that the issuance of certificates would be necessary to prevent the curtailment of employment opportunities for individuals with disabilities.[229]

The Advisory Committee observed that ''one by-product of subminimum wage employment is a culture with a low expectation for competitive integrated employment.'' [230] The Committee further concluded that the ''current widespread practice of paying workers subminimum wages, based on assumptions that individuals with disabilities cannot work in typical jobs, or on assumptions about the unavailability of alternative work opportunities, is antithetical to the intent of modern federal policy and law.'' [231] The Advisory Committee explained that modern Federal policy and laws are ''based on the assumption that all individuals with disabilities are capable of, and have a right to, CIE.'' [232]

The Advisory Committee further recommended that vocational rehabilitation services for individuals with disabilities focus more on practices demonstrated to produce positive outcomes in full-wage employment. For example, the Advisory Committee explained that research shows providing experience in community-based workplaces performing actual work tasks is a superior training strategy compared with providing ''work readiness training'' in sheltered workshops.[233] Similarly, the Advisory Committee made recommendations regarding supportive employment practices based on its finding of the importance of factors such as ''work experience and [competitive integrated employment] during secondary school years'' and family expectations about employment.[234]

As with the other government oversight reports discussed above, the Department finds the thorough conclusions of the Advisory Committee to be highly relevant to the Department's analysis, and, in particular, the Department notes the import of the Committee's congressional mandate. Specifically, the Advisory Committee's conclusions regarding the availability of alternatives to section 14(c) certificates informed the development of this proposed rule; the Committee Report provides a picture of the employment landscape for workers with disabilities that does not rely upon subminimum wages.

[223] 29 U.S.C. 795n.

[224] *Id.*

[225] The Advisory Committee's Federal membership consisted of the following agency leaders or their designee: Department of Labor's Assistant Secretary of ODEP, the Assistant Secretary for Employment and Training Administration (ETA), and the WHD Administrator; the HHS Commissioner of the Administration on Intellectual and Developmental Disabilities; CMS Director; the Commissioner of the Social Security Administration (SSA) and the Department of Education's RSA Commissioner.

[226] Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, ''Final Report,'' 2016, at p. iv, *https://www.dol.gov/sites/dolgov/files/odep/topics/pdf/acicieid_final_report_9-8-16.pdf.*

[227] *Id.* at 1–4.

[228] *Id.* at 2.

[229] *Id.* at 30.

[230] *Id.* at 28.

[231] *Id.* at 29.

[232] *Id.*

[233] *Id.* at 10.

[234] *Id.* at 21. The Department notes that in addition to the agency reports discussed herein, in 2018, the minority staff of the U.S. Senate Committee on Health, Education, Labor, and Pensions reached a similar conclusion that the evidence does not support the continued payment of subminimum wages and the Department should no longer issue new section 14(c) certificates. Minority Staff of S. Comm. on Health, Educ., Labor, and Pensions, ''Disability Employment: Outdated Laws Leave People with Disabilities Behind in Today's Economy,'' Comm. Print 2018, *https://web.archive.org/web/20181224100838/https://www.murray.senate.gov/public/_cache/files/84084732-e011-470a-b246-1cdab87755c3/staff-report-on-employment-for-people-with-disabilities-10-29-2018-pm-.pdf.*

iv. U.S. Government Accountability Office Reports

Unlike the government agency reports detailed above, GAO has not directly addressed the question of whether it is still necessary to permit payment of subminimum wages to promote employment opportunities for individuals with disabilities. However, GAO has issued multiple reports addressing various aspects of the use and operation of section 14(c) certificates, and in doing so, has generated significant data and analysis relevant to this proposed rule.[235] The Department found this data and analysis to be helpful in its review of section 14(c) and development of this NPRM.

In 2023, GAO issued a report addressing the Department's oversight of employers using section 14(c) certificates. In this report, in addition to its primary recommendations regarding section 14(c) certificate processing, GAO emphasized that participation of employers using section 14(c) certificates has markedly decreased, tracking a steady decline over the decade from 2010 to 2019.[236] GAO attributed this decline to changing Federal laws and policies, changing State policies (such as state-level phaseouts of the use of subminimum wages), and shifts in employer and worker views.[237]

In the 2023 report, GAO also published important demographic and statistical data about employers holding section 14(c) certificates and the employees they were paying subminimum wages. GAO confirmed that, currently, CRPs are the ''vast majority of 14(c) employers,'' and that ''almost all 14(c) workers had an intellectual or developmental disability.'' [238] GAO estimated that approximately 70 percent of section 14(c) workers were 25–54 years old, with approximately 26 percent 55 years or older, and only approximately 4 percent 18–24 years old.[239] As already noted above, GAO found that the majority of workers paid under section 14(c) certificates in the data they analyzed were paid less than $3.50 per hour, approximately 14 percent were paid less than one dollar per hour, and approximately 5 percent were paid less than 25 cents per hour.[240] GAO also found that ''few 14(c) workers'' engaged in competitive employment, including being paid at least minimum wage in an integrated work setting.[241]

Additionally, in 2021, GAO issued a report on ''Factors Influencing the Transition of Individuals with Disabilities to Competitive Integrated Employment.'' [242] GAO identified 32 factors that may influence transitions away from subminimum wages to competitive integrated employment.[243] GAO did not find a consensus across the individuals it interviewed about the most significant factors influencing ''14(c)–to–CIE transition.'' [244] Instead, ''each of the 32 factors was identified by at least one interviewee to be among the most important in influencing an individual's transition to CIE.'' [245] Additionally, many interviewees emphasized that the factors were heavily inter-related. GAO also emphasized the potential impact of the COVID–19 pandemic, noting uncertainty about such impacts at the time of the report's publication.[246] As a backdrop to its study of factors that might influence individuals' transition to CIE, GAO noted legislative changes—such as WIOA—that promote access to employment at full wages.[247] Additionally, GAO highlighted a ''shift in federal and state priorities'' away from reliance on section 14(c), and noted that ''at least 40 states have adopted legislation or state policy stating that integrated employment in the community is the first and preferred option for people with disabilities . . . . '' [248]

GAO's interviews with employees identified several factors that inhibited transitions to CIE, including the individuals' age, concern for maintaining benefits, desire for a social community, concern for safety of non-sheltered working environment, and ''views'' about an individuals' skills.[249] Observing that family members' judgments were often decisive even when differing from the preferences of employees themselves, GAO recounted that ''one participant told us that family members may not see the individual's potential for accomplishing work because they remember times when the person struggled.'' [250] Interviewees also noted that ''people who have been exposed to CIE, including through real-world, authentic experiences, almost always choose CIE . . . because they have a more accurate perception of what it entails.'' [251]

Regarding the views of employers, GAO listed factors that might influence a section 14(c) certificate holder's decision to transition away from subminimum wages, a process GAO referred to as ''provider transformation.'' [252] GAO found that the factors most relevant to whether section 14(c) holders transitioned from subminimum wages to CIE were, in addition to resource-related factors, ''14(c) certificate holder leadership views, 14(c) certificate holder's use of person-centered approach to employment planning, 14(c) certificate holder's mission or business model, 14(c) certificate holder's access to training and technical assistance, and 14(c) certificate holder's provision of ongoing supports for CIE.'' [253]

Finally, GAO noted several policy and economic factors that could influence transition away from subminimum wages. Among these factors, GAO identified State resources supporting CIE, State policies ''allowing public benefits to continue while working,'' ''federal support for 14(c) employment versus CIE,'' the overall unemployment rate, available transportation, and available employment services.[254]

In sum, while GAO's reports did not directly address whether section 14(c) certificates were necessary to prevent curtailment of opportunities for employment, the Department found them relevant in several ways, as reflected by the information discussed above. In particular, GAO's 2023 report provided additional insight into the demographics of the workers with disabilities currently working under section 14(c) certificates while GAO's 2021 report provided a better understanding of many of the challenges potentially faced by employers in transitioning from section 14(c) subminimum wage employment to an alternative model. The Department's proposed phaseout approach, discussed in greater detail below, is intended to

[235] Additional GAO reports include GAO–81–116519, ''Stronger Fed. Efforts Needed for Providing Emp't Opportunities and Enforcing Labor Standards in Sheltered Workshops'' (1981), *https://www.gao.gov/products/hrd-81-99;* GAO–01–886, ''Special Minimum Wage Program: Centers Offer Emp't and Support Servs. to Workers with Disabilities, But Labor Should Improve Oversight'' (2001), *https://www.gao.gov/products/gao-01-886;* and GAO–12–594, ''Students with Disabilities: Better Fed. Coordination Could Lessen Challenges in the Transition from High School'' (2012), *https://www.gao.gov/products/gao-12-594*.

[236] *See* 2023 GAO Report.

[237] *Id.* at 14–15.

[238] *Id.* at 2.

[239] *Id.* at 26.

[240] *Id* at 17.

[241] *Id.*

[242] 2021 GAO Report.

[243] *Id.* at 13.

[244] *Id.* at 13.

[245] *Id.*

[246] *Id.* at 2.

[247] *Id.* at 1.

[248] *Id.* at 1–2.

[249] *Id.* at 14.

[250] *Id.* at 19.

[251] *Id.*

[252] *Id.*

[253] *Id.* at 20.

[254] *Id.* at 25–27.

mitigate against such potential transition difficulties.

2. Non-Governmental Assessments of Certificate Issuance Under Section 14(c)

In recent years, not-for-profit, academic, and advocacy organizations have also issued many reports and shared public comments on the payment of subminimum wages to individuals with disabilities.[255] This proposed rule does not include a complete survey of these reports and viewpoints. Rather, the reports noted here are a sampling of non-governmental views on subminimum wage payments under section 14(c). The Department notes that these reports reflect a wide range of the views on the use of section 14(c) certificates and subminimum wage employment of workers with disabilities.

In general, most (but not all) organizations that advocate on behalf of individuals with disabilities strongly oppose reliance on the payment of subminimum wages to generate employment opportunities for individuals with disabilities. For example, in 2011, the National Disability Rights Network (NDRN),[256] a non-profit membership organization for the federally mandated State Protection and Advocacy Systems and Client Assistance Programs for individuals with disabilities, issued a report detailing their review of ''segregated work, sheltered environments, and the sub-minimum wage to determine whether they meet the needs of people with disabilities and whether they comply with federal law.'' [257] NDRN found that workers with disabilities in ''sheltered workshops'' using section 14(c) certificates are often ''stuck'' indefinitely, without a meaningful option of other employment, because workers under section 14(c) certificates are not provided with effective, transferable skills training in such settings.[258] Among many recommendations to Congress, States, and Federal agencies, NDRN called for the cessation of section 14(c) certificate issuance.[259] NDRN explained that ''[i]n the best of situations, sheltered environments, segregated work, and the sub-minimum wage does not truly provide a meaningful experience for workers with disabilities. Workshop tasks are often menial and repetitive, the environment can be isolating, and the pay is often well below the Federal minimum wage. In the worst situations, the segregated and sheltered nature of the lives of workers with disabilities leaves them vulnerable to severe abuse and neglect.'' [260]

Conversely, some organizations and individuals vigorously support the continued issuance of section 14(c) certificates. For example, the non-profit organization A Voice of Reason (VOR), which is a grassroots advocacy organization that consists primarily of families of individuals with I/DD, posted a public letter in 2021 opposing the elimination of section 14(c) certificates. In the letter, VOR stated that it is important to preserve ''opportunities for those who can succeed in competitive integrated employment as well as those who cannot.'' [261] VOR elaborated that section 14(c) gives ''thousands of individuals with I/DD the opportunity to work in a specialized environment that nurtures them and fits their abilities.'' [262] VOR asserted that for these individuals ''[w]ithout 14(c) certificates, they would lose any opportunity to work.'' [263] The Department received similar feedback in its listening sessions from parents and other proponents of section 14(c).

While acknowledging dissenting views, the Department relies on the significant quantitative and qualitative evidence discussed throughout these third-party reports that supports the preliminary conclusion that section 14(c) certificates are no longer necessary to prevent curtailment of opportunities for employment for workers with disabilities. The Department welcomes comments on its review and analysis of the reports mentioned in this section or other recent reports that consider the role of section 14(c) certificates and subminimum wages in the employment of workers with disabilities.

D. State Elimination of Subminimum Wages and Other Relevant Data

1. State Elimination of Payments of Subminimum Wages to Individuals With Disabilities

An increasing number of States and localities [264] have prohibited, limited, or plan to phase out the payment of subminimum wages to workers with disabilities, suggesting that these States and localities have reached the conclusion that such certificates are no longer necessary or appropriate in their jurisdictions.[265]

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[255] *See, e.g.,* Nat'l Fed'n of the Blind, Letter to the Secretary of Labor, *https://nfb.org/sites/nfb.org/files/2021-06/Letter%20to%20Secretary%20Walsh%20regarding%2014c.pdf* (June 21, 2021) (''We believe Section 14(c) of the FLSA is a discriminatory practice and we have long been fighting to end it . . . 14(c) certificates have been a source of systemic abuse and corruption . . . [and] can no longer be justified, even under the FLSA's own terms . . .''); Minn. Disability Law Ctr., ''Ending the Subminimum Wage in Minnesota: A Report from the Minnesota Disability Law Center,'' *https://mylegalaid.org/wp-content/uploads/2024/03/Ending-the-Subminimum-Wage-in-Minnesota_October-2022_Text-Version.pdf* (October 2022) (among other findings, recommending the State government ''[pa]ss legislation to phase out the payment of subminimum wages in Minnesota by a specific date with funding to implement the phase out.''); Association of People Supporting Employment First (APSE), ''Trends and Current Status of 14(c),'' *https://apse.org/wp-content/uploads/2021/10/10_20_21-APSE-14c-Update-REV.pdf* (October 2021) (presenting data in support of APSE's call for complete phase out of the use of 14(c) certificates); Jean Winsor, Cady Landa, Cady, Andrew Perumal, and John Butterworth, ''The Power of Disability Employment: The Impact to Arizona's Economy,'' ThinkWork!, *https://www.thinkwork.org/sites/default/files/files/Arizona_whole%20report_Final.pdf* (October 2019) (finding that increasing the number of workers with disabilities will positively impact Arizona's economy).

[256] On December 13, 2021, the Department's WHD and NDRN renewed a memorandum of understanding (MOU) establishing a collaborative relationship to promote compliance with laws of common concern. *See https://www.dol.gov/agencies/whd/workers-with-disabilities/national-disability-rights-network-mou.* This MOU built upon the foundation established by a prior MOU entered into between WHD and NDRN in December 2015. Although WHD and NDRN collaborate on certain enforcement and training-related matters, the Department did not independently consult with NDRN about the development of this proposed rule.

[257] Nat'l Disability Rights Network, ''Segregated and Exploited: The Failure of the Disability Service System to Provide Quality Work,'' 2011, A Letter from the Executive Director, *https://www.ndrn.org/wp-content/uploads/2019/03/Segregated-and-Exploited.pdf* at 7.

[258] *Id.* at 32–33.

[259] *Id.* at 46.

[260] *Id.* at 7.

[261] A Voice of Reason, ''In Support of Protecting Vocational Centers and 14(c) Wage Certificates,'' *https://vor.net/images/stories/2020-2021/VOR_-_In_Support_of_Protecting_Vocational_Centers_and_14c_Wage_Certificates_2-4-21.pdf; see also* Coalition for Preserving 14(c) White Paper (2022), *https://employmentchoice.org/protecting-employment-for-individuals-with-i-dd-coalition-white-paper-2022/.*

[262] *Id.*

[263] *Id.*

[264] At the local level, Chicago, Seattle, Denver, and Reno are among the localities that have passed city-specific bans on the payment of subminimum wages. *See* APSE ''Trends and Current Status of 14(c)'' at 8 (July 2023), *https://apse.org/wp-content/uploads/2023/09/APSE-14c-Update-REV-0723.pdf.*

[265] It bears mentioning that there have also been litigation and consent decrees aimed at the enforcement of *Olmstead's* integration mandates that have resulted in States eliminating the payment of subminimum wages. For example, as discussed in greater detail in section III above, following a settlement agreement (*see* Settlement Agreement, *Lane* v. *Brown,,* No. 3:12–cv–00138, *https://www.justice.gov/media/1237561/dl*), Oregon transitioned many workers from sheltered workshops to CIE. An important part of Oregon's progress was investing in the employment support agencies to learn how to properly implement CIE programs. ''Oregon's efforts have resulted in the state being recognized in 2020 by the U.S. Commission on Civil Rights as a leader in eliminating subminimum wage and in transitioning to integrated employment.'' Or. Dep't Hum. Servs., ''*Lane* v. *Brown* Settlement Agreement Report,'' at 2 (Jan. 2022), *https://www.oregon.gov/odhs/employment-first/Documents/lane-v-brown-settlement-message-2022-06-21.pdf.*

i. Legal Developments at the State Level Eliminating or Curtailing Subminimum Wage Payments

A number of States have statutes, regulations, or other guidance regarding the payment of subminimum wages to workers with disabilities, further narrowing the universe of workers being paid below the Federal minimum wage. Significantly, nearly one-third of States have already passed laws entirely prohibiting (or planning to prohibit through a phase out) the payment of subminimum wages to workers with disabilities. To date, Alaska,[266] California,[267] Colorado,[268] Delaware,[269] Hawaii,[270] Maine,[271] Maryland,[272] Nevada,[273] New Hampshire,[274] Oregon,[275] Rhode Island,[276] South Carolina,[277] Tennessee,[278] Virginia,[279] and Washington [280] have all passed legislation or executive orders prohibiting (or planning to prohibit through a phase out) the payment of subminimum wages to at least some workers with disabilities in their State. These bills were often passed with bipartisan support and with the support of broad coalitions of stakeholders. Several additional States are considering similar legislation.[281] Other States have limited or restrained the payment of subminimum wages in various ways, such as Texas (prohibiting payment of subminimum wages by CRPs participating in State use contracts, with limited exceptions),[282] Illinois (executive order prohibiting payment of subminimum wages for work performed by employees of State not-for-profit vendors, including subcontractors),[283] Kansas (limiting payment of subminimum wages to no less than 85 percent of the State minimum wage),[284] Minnesota (limiting payments to no less than 50 percent of the State minimum wage, with some exceptions) and New Mexico (limiting payment of subminimum wages to no less than 50 percent of the State minimum wage),[285] West Virginia, Nebraska, and New York (subminimum wages only permissible in certain

[266] As of December 2022, no employer in Alaska is permitted to pay an individual with a disability less than the State minimum wage, due to the repeal of the State statute which previously allowed for the use of subminimum wage certificates. *See* Alaska Stat. Ann. sec. 23.10.070 (2022).

[267] In 2021, California enacted Senate Bill 639, implementing a multi-year phaseout of the use of licenses authorizing a subminimum wage. *See* Cal. Lab. Code. sec. 1191 (2022).

[268] On June 29, 2021, Colorado enacted Senate Bill 21–039, which was designed to phase out the use of subminimum wages for employees with disabilities by 2025. *See* Colo. Rev. Stat. Ann. sec. 8–6–108.7 (2021). As of July 2023, 2 years sooner than initially contemplated by the legislation, employers in Colorado are prohibited from paying an individual with a disability less than the State minimum wage. *See* Press Release, Polis-Primavera Administration Eliminates Subminimum Wages for People with Disabilities Two Years Ahead of Schedule (Oct. 31, 2023), *https://www.colorado.gov/governor/news/10901-polis-primavera-administration-eliminates-subminimum-wages-people-disabilities-two-years.*

[269] In 2021, Delaware enacted the Jamie Wolfe Employment Act, which repealed the State statutory provision permitting the payment of subminimum wages and prohibited the payment of subminimum wages after January 31, 2024. *See* Del. Code. Ann. tit. 19 sec. 905 (2024); Del. Code. Ann. tit. 19 sec. 752 (2024).

[270] In 2021, Hawaii enacted Senate Bill 793, which immediately repealed the authority of the Director of Labor and Industrial Relations to permit the employment of individuals with disabilities at a subminimum wage. *See* Hawaii Rev. Stat. Ann. sec. 387–9 (2021).

[271] In 2020, Maine enacted Legislative Document 1874, which, effective June 16, 2020, amended its minimum wage law to state that the Director of Labor Standards ''may not'' issue a certificate authorizing an employer to pay a subminimum wage to an employee with a disability. *See* Me. Rev. Stat. Ann. tit. 26, sec. 666 (2020).

[272] In 2016, Maryland enacted the Ken Capone Equal Employment Act, which amended its minimum wage law to abolish the payment of subminimum wages to persons with disabilities after October 1, 2020. *See* Md. Code Ann., Lab. & Empl. sec. 3–414 (2016).

[273] In 2023, Nevada enacted Assembly Bill 259, which phases out the use subminimum wages in Nevada by January 1, 2028, *see* Assemb. 259, 82d Sess. sec. 12 (Nev. 2023), and prohibits providers of jobs and training services from entering into new contracts that included the payment of subminimum wages on or after January 1, 2025. *See id.,* sec. 8 (amending Nev. Rev. Stat. secs. 608.250 and 435.305).

[274] In 2015, New Hampshire enacted Senate Bill 47, which generally prohibited the payment of subminimum wages to workers with disabilities as of July 6, 2015. *See* N.H. Rev. Stat. Ann. sec. 279:22 (2024).

[275] In 2019, Oregon enacted Senate Bill 494, which banned the payment of subminimum wages to workers with disabilities after June 30, 2023. *See* Or. Rev. Stat. Ann. sec. 653.033 (2019).

[276] In 2022, Rhode Island enacted Senate Bill 2242, which banned the payment of subminimum wages to workers with disabilities after June 15, 2022. *See* R.I. Gen. Laws Ann. sec. 28–12–9 (2022).

[277] In 2022, South Carolina enacted Senate Bill 533, which phases out the use of section 14(c) certificates which allow the payment of subminimum wages in the State by August 1, 2024. *See* S.C. Code Ann. sec. 41–6–10 (2022); 2022 S.C. Act No. 209, sec. 3(C)(1).

[278] In 2022, Tennessee enacted the Tennessee Integrated and Meaningful Employment Act, which states that, effective July 1, 2022, Tennessee employers must pay at least the Federal minimum wage to all workers with disabilities. *See* Tenn. Code Ann. sec. 50–2–114 (a).

[279] In 2023, Virginia enacted House Bill 1924 to phase out the use of the subminimum wages by 2030. As part of the phase out, no new authorizations were permitted after July 1, 2023; however, any employer that was certified prior to July 1, 2023, is permitted to continue paying employees pursuant to section 14(c) until 2030. *See* Va. Code Ann. sec. 40.1–28.9(A)(9) (2023)

[280] In 2021, Washington enacted Senate Bill 5284 which phases out the use of subminimum wage certificates for private employers. *See* Wash. Rev. Code Ann. sec. 49.46.170(2) (2021). For private employers, no new certificates were issued after July 31, 2023, and the last potential date a certificate can remain valid under the law is July 30, 2026. *See id.* sec 49.46.170(2)–(3); *see also* Wash. Dep't of Labor & Indus. & Wash. Dep't of Social & Health Servs., ''Subminimum Wage Certificates'' at 2 (2023), *https://www.lni.wa.gov/agency/_docs/2023SubMinimumWageCertificatesReport.pdf.* As to State employers, ''no state agency'' is permitted to ''employ an individual to work under a special certificate . . . for the employment of individuals with disabilities at less than the minimum wage'' as of July 1, 2020. *Id.* sec. 49.46.170(1) (2021). Any certificate issued to a State agency expired on June 30, 2020. *Id.*

[281] For example, House Bill 793 in Illinois, which would ban the payment of subminimum wages to workers with disabilities by 2030, passed the Illinois House in May 2024 and is currently pending in the Illinois Senate. *See* Illinois General Assembly-Bill Status, *https://ilga.gov/legislation/billstatus.asp?DocNum=793&GAID=17&GA=103&DocTypeID=HB&LegID=142668&SessionID=112.*

[282] In 2019, Texas enacted Senate Bill 753, which ended the use of subminimum wages in its State Use Program. *See* Tex. Hum. Res. Code Ann. sec. 122.0076(a) (2019). A community rehabilitation program may not participate in the program administered under this chapter ''unless each worker with a disability employed by the program is paid at least the federal minimum wage . . .''; the provision, however, contains an exceptions clause. *See id.* sec. 122.0076(a), (b).

[283] On October 4, 2021, Illinois Governor JB Pritzker issued Executive Order 2021–26, which required that contracts and sub-contracts with State agencies that participate in the State Use Program must pay ''no less than the applicable local, if higher, or Illinois minimum wage for all employees performing work on the contract, notwithstanding any provision that would permit payment of a lower wage rate.'' *See* Ill. Exec. Order 2021–26, *https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-26.2021.html.*

[284] *See* Kan. Admin. Regs. 49–31–5(b) (2024). Additionally, on February 8, 2024, Kansas enacted the Disability Employment Act, which incentivizes employers to pay employees with disabilities the State minimum wage. The Act established the ''sheltered workshop transition fund,'' in order to ''facilitate[ ] transitions by Kansas sheltered workshop employers away from employing individuals with disabilities under a certificate issued by the United States Secretary of Labor under 29 U.S.C. [ ] 214(c) and toward paying all such employees at least the minimum wage,'' by providing matching grants to sheltered workshops that commit to paying at least the minimum wage. *See* 2024 Kan. Sess. Laws Ch. 1, sec. 2(a). The Act also provides a tax incentive for purchases of goods and services from ''qualified vendors,'' which include vendors that do ''not employ individuals under a certificate issued by the United States Secretary of Labor under 29 U.S.C. [ ] 214(c).'' Kan. Stat. Ann sec. 79–32,273(b) & (e)(1)(A)(iv) (2024).

[285] *See* Minn. Stat. Ann. sec. 177.28, subd. 5 (2007); Minn. R. 5200.0030 (2008); N.M. Stat. Ann. sec. 50–4–23. Additionally, from 2021–24 Minnesota established a task force ''to develop a plan and make recommendations to phase out payment of subminimum wages to people with disabilities on or before August 1, 2025.'' *See* 2021 Minn. Laws, First Spec. Sess., ch. 7, art. 17, sec. 14.

settings or by certain employers),[286] and Arizona (pursuant to a policy statement, an employer must pay an ''employee'' with a disability at least the State minimum wage; however under Arizona's guidance, a worker in a CRP, vocational training program or service recipient program may not be an employee in certain circumstances under Arizona state law).[287]

Additionally, although Vermont does not have any formal legislation [288] specifically to disallow the payment of subminimum wages to workers with disabilities, the Vermont Division of Disability and Aging Services does ''not support center-based or group supported employment services'' and there have been no active section 14(c) certificate holders in Vermont for many years.[289] USCCR notes in its 2020 Report that ''Vermont achieved an end to subminimum wage and segregated employment by ending funding for new entrants into sheltered workshops in 2000, which also began a three year phase-out of all subminimum wage, sheltered employment.'' In sum, 15 states have laws that prohibit or are in the process of prohibiting subminimum wage payments, and an additional nine states have limited or restrained the payment of subminimum wages, resulting in nearly half of the States eliminating or restricting such payments. As discussed below, the Department's analysis yields no statistical evidence that employment or the labor force participation rate of individuals with cognitive disabilities, such as I/DD, differed in states that have adopted laws, policies, or regulations that end the payment of subminimum wages relative to states that do allow subminimum wages.[290]

ii. Data From Vermont Regarding Long-Term Impacts of Elimination of Subminimum Wage Payments

While many States have moved away from subminimum wage payments relatively recently, data and studies regarding Vermont's decision to end funding for sheltered workshops and phase out all subminimum wage employment offer insight into how elimination of the payment of subminimum wages to individuals with disabilities impacted the long-term employment opportunities of those workers. Despite this longstanding absence of the payment of subminimum wages under section 14(c) certificates in Vermont, that absence does not appear to have negatively impacted employment rates of workers with I/DD when compared with national employment rates. Instead, as observed by the USCCR in its 2020 report, from 2008 to 2016–2017, the rate of employment for workers with I/DD in Vermont rose from 35.8 percent to 42 percent, more than double the national average employment rate in 2016–2017 for this group.[291]

Additionally, academic research from Vermont also shows that workers' transitions away from a sheltered workshop, subminimum wage model are often positive, despite those workers' (and their families') initial opposition to such changes. For example, years after Vermont eliminated subminimum wage employment, a researcher at the University of Vermont published a case study based on extensive interviews with individuals with I/DD and their family members.[292] Some of the individuals had previously worked for subminimum wages, and their interviews speak to deep anxieties about the elimination of subminimum wages.[293] At the beginning of the transition in Vermont, parents of workers with disabilities expressed fear of the future, with particular emphasis on issues of safety where an adult child was leaving a sheltered workshop setting.[294] However, parents reported that as their children with disabilities ''spent more time in the community, the fears of abuse and ridicule did not materialize[.]'' [295] Moreover, the workers with disabilities generally reported positive feelings about their new jobs.[296] As discussed above, the USCCR made similar findings based on its case studies in Vermont.[297]

E. Summary of Analysis and Conclusion

Congress gave the Secretary the authority to issue certificates allowing employers to pay subminimum wages to individuals with disabilities but not without restriction and not in perpetuity. Instead, Congress included a significant statutory limitation on the Department's authority, allowing the issuance of certificates only to the extent ''necessary to prevent curtailment of opportunities for employment,'' and conferred authority upon the Department to determine whether that standard has been met.

Given the expanded legal protections and opportunities for employment of individuals with disabilities available today, to comply with the terms of the statute, the Department must determine whether the FLSA's standard continues to be met. When Congress first enacted the subminimum wage provision of the FLSA in what is now known as section 14(c), the employment opportunities available to individuals with disabilities were a fraction of what they are today. Through the Department's comprehensive review culminating with this rulemaking, the Department has reflected on the substantial progress, resources, and supports for workers with disabilities that have emerged over the last several decades. After extensively reviewing and analyzing the issues, developments, and reports discussed in this proposed rule, holding listening sessions, and partnering closely with agencies within and outside of the Department, as well as the Department's extensive experience administering and enforcing section 14(c) certificates, the Department preliminarily finds that subminimum

[286] W. Va. Code Ann. sec. 21–5C–1(f)(8) (limited to non-profit sheltered workshops); Neb. Rev. Stat. Ann. sec. 48–1202(3)(i) (limited to rehabilitation programs receiving public funding); N.Y. Lab. Law secs. 651(5)(i); 655(5)(c)(2) (limited to charitable, educational, or religious employers).

[287] Indus. Comm'n of Ariz., ''Substantive Policy Statement Regarding Application of Arizona Minimum Wage Act to Work Activities Performed by Individuals with Disabilities,'' (Mar. 29 2007), *https://www.azica.gov/sites/default/files/migrated_pdf/Labor_MinWag_SubstantivePolicyDisabilities_32907-2.pdf.* State laws do not affect whether an individual is an employee under the FLSA.

[288] 2020 USCCR Report at 181 (noting that Vermont eliminated the payment of subminimum wages in practice in 2002 but did not pass legislation banning subminimum wages at that time). The District of Columbia and Wyoming similarly do not have any formal legislation in place, yet do not report any workers receiving subminimum wages under section 14(c) certificates. *See https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders.*

[289] *See id.*

[290] *See e.g.,* preliminary regulatory impact analysis discussion in section VII.E (''Transfers''). The Department further notes that nationwide and for decades, there has been growth in the number of individuals with disabilities who participate in State-funded non-work supportive rehabilitation programming (such programs, which offer both enrichment to individuals with disabilities and respite to caregivers, often consist of activities such as taking adult education classes, support for daily activities, and participating in social activities). *See* 2023 Thinkwork Report at 3. This broader trend appears to be unrelated to State action related to the cessation of subminimum wage employment under section 14(c) certificates. As discussed above, in Oregon, the overwhelming majority of former sheltered workshop employees transitioned to full-wage jobs, exceeding the goal for the numbers of individuals entering into CIE placement set forth in the settlement agreement. *See* Oregon Dep't of Human Servs., ''*Lane* v. *Brown* Settlement Agreement Report,'' *https://www.oregon.gov/odhs/employment-first/Documents/lane-v-brown-settlement-message-2022-06-21.pdf.*

[291] *Id.* at 180–81 (*citing* Univ. Mass. Boston, Inst. for Community Inclusion, StateData.info, ''State Employment Snapshot: Vermont,'' *https://www.statedata.info/statepages/Vermont*).

[292] Bryan Dague, ''Sheltered Employment, Sheltered Lives: Family Perspectives of Conversion to Community-Based Employment,'' 37 J. of Vocational Rehab. 1 (Jan. 2012).

[293] *Id.* at 4–5.

[294] *Id.* at 5–7.

[295] *Id.* at 7.

[296] *Id.* at 8.

[297] *See, e.g.,* 2020 USCCR Report at 198.

wages are no longer necessary to prevent curtailment of employment opportunities for individuals with disabilities. Accordingly, the Department proposes to amend 29 CFR part 525 to phase out the issuance of section 14(c) certificates.

Under the Department's current regulation at 29 CFR 525.9, ''in order to determine that special minimum wage rates are necessary in order to prevent the curtailment of opportunities for employment,'' the Administrator considers whether a certificate applicant has satisfied the standards set forth in other regulatory provisions governing the proper computation and payment of subminimum wages. The current regulations thus focus on whether a certificate applicant has properly evaluated and calculated productivity-based wage rates for workers with disabilities at specific jobs (and under the specific conditions) offered by the employer. The statute does not require the framework currently in place, however and this regulatory methodology, now 35 years old, could not have taken into account today's more structural, comprehensive strategies for preventing curtailment of employment opportunities for individuals with disabilities. However, the Secretary now has the benefit of being able to take such strategies and developments into account. Thus, to comply with the terms of the statute, the Department must determine whether the statute's prerequisite—that payment of subminimum wages be necessary to prevent the curtailment of employment opportunities—can be met given the current demonstrated systemic and nationwide advances in employment opportunities for individuals with disabilities.

In the introductory section of the ADA Amendments Act of 2008, Congress states that ''in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.'' [298] With this context in mind, the Department takes note of the historical evolution of the use of section 14(c) certificates. When first enacted, Congress focused significantly on private industry and small businesses,[299] and a far broader swath of U.S. workers were being paid subminimum wages based on age, disability, or injury.[300] Over time, the use of section 14(c) certificates has narrowed to almost exclusively one setting—CRPs rather than private sector opportunities—and has constricted to consist almost exclusively of workers with I/DD. As other groups experiencing different disabilities (*e.g.,* age-related, addiction-related, those experiencing blindness) have already generally moved away from working for subminimum wages to employment at or above the full minimum wage, so too now are workers with I/DD. Specifically, as to these workers, reports show, among the general population of workers with I/DD, working in integrated settings for at least the minimum wage is now far more common than working for subminimum wages.[301] At the same time, the number of section 14(c) certificates has dwindled, with a decades-long downward trend and with the vast majority of certificates now being renewals, with only a few new applications.

Today, the issuance of section 14(c) certificates may be self-reinforcing, with the continued use of certificates facilitating workers continuing to only receive subminimum wages despite the potential to engage in other full-wage employment opportunities, which is contrary to the statute's intent of providing for certificates only when necessary.[302] As noted by NDRN, workers with disabilities in sheltered workshops using section 14(c) certificates are often ''stuck'' indefinitely, without a meaningful option of other employment, because workshop tasks are often menial and repetitive, the environment can be isolating, and workers under section 14(c) certificates are not provided with effective, transferable skills training in such settings.[303] DOJ has similarly observed that workers with disabilities in community rehabilitation programs typically have ''no opportunity for advancement'' and ''often earn extremely low wages when compared to people with disabilities in integrated employment, resulting in stigmatization and a lack of economic independence.'' [304] Given this, the Department is cognizant that today, the issuance of section 14(c) certificates may, inadvertently and counterintuitively, even contravene the statute's intent of promoting opportunities for gainful employment.[305]

In light of these realities, as well as the legal and policy developments discussed above, the Department preliminarily finds that today, the issuance of subminimum wage certificates is no longer necessary to prevent the curtailment of employment opportunities. Moreover, the evidence indicates such certificates themselves may, in fact, sometimes contribute to the curtailment of employment opportunities at or above the full Federal minimum wage for some workers with disabilities.

The disability rights movement, led by a broad coalition of stakeholders including self-advocates, has forged a path toward increased equity, self-determination, and inclusion, thereby expanding access to and opportunities available for employment. As discussed above, this movement has resulted in a very different—and improved—legal and policy landscape than existed in 1938 or even 1989 when section 14(c) regulations were last substantively updated, reflecting the 1986 amendments to the FLSA.

An array of Federal legislation has substantially broadened opportunities

[298] 42 U.S.C. 12101 note (2008).

[299] Congressional Record, Vol. 82, Part I, 75th Cong. 2d Sess., p. 88.

[300] For example, in the 1967 report to Congress, the Department noted that there were sheltered workshops paying subminimum wages for older workers, workers who were blind, workers with tuberculosis, workers who were epileptic, workers with alcoholism, workers who were paraplegic, and workers experiencing mental illness, among others. *See generally* U.S. Dep't of Labor, ''Sheltered Workshop Report of the Secretary of Labor and Technical Report on Wage Payments to Handicapped Clients in Sheltered Workshops,'' September 1967.

[301] *See, e.g.,* Agnieszka Zalewska, Jean Winsor, & John Butterworth, ''Intellectual and Developmental Disabilities Agencies' Employment and Day Services (1988–2021),'' *ThinkWork, Data Note Plus,* Issue 87 (2023), at 8, *https://www.thinkwork.org/sites/default/files/2024-01/DN_87_R_0.pdf. See also* NLTS2, Exhibit 5–2, noting the vast majority of youths with I/DD having a transition goal of competitive or supported employment (79 percent) compared to sheltered employment (14 percent).

[302] *See, e.g.,* ''Legal Foundations for Protection and Advocacy Entities,'' Part 1 (July 15, 2021) 5, n.22, *https://aoddisabilityemploymenttacenter.com/wp-content/uploads/2021/07/DETAC_BY_Resource_PA_Legal_Foundations_Pt_1_Final_508.pdf* (explaining that research demonstrates that a very low percentage of workers—less than 5 percent—transition from sheltered workshops being paid subminimum wages to integrated or community-based employment at full wages) (citations omitted); *see also* U.S. Dep't of Justice Civil Rights. Div., ''Questions and Answers on the Application of the ADA's Integration Mandate and *Olmstead* v. *L.C.* to Employment and Day Services for People with Disabilities,'' p.1 (''The work of individuals with disabilities in segregated settings is often highly regimented and typically offers no opportunity for advancement.'').

[303] Nat'l Disability Rights Network, ''Segregated and Exploited: The Failure of the Disability Service System to Provide Quality Work,'' 2011, A Letter from the Executive Director, *https://www.ndrn.org/wp-content/uploads/2019/03/Segregated-and-Exploited.pdf* at 32–33.

[304] *See* DOJ ADA Integration Mandate Q&As.

[305] *See Portland Terminal,* 330 U.S. at 151.

and access, while legal precedent has bolstered these nationwide laws. Most significantly, over the past several decades, the ADA and the Supreme Court's *Olmstead* decision have profoundly impacted the rights and employment opportunities available to individuals with disabilities. These legal developments have resulted in changes to workforce development and vocational rehabilitation systems that provide more support to individuals with disabilities in achieving and maintaining employment at or above the full minimum wage, as discussed above. While the ADA has been the catalyst for substantial change and progress in the legal landscape affecting workers with disabilities, the section 14(c) regulations could not have contemplated this progress or incorporated the fundamental anti-discrimination and reasonable accommodation protections of the ADA. Additionally, the ADA's broad legal protections (made more broadly applicable through the ADAA [306]), coupled with *Olmstead's* integration mandate and the array of employment-related programs, and supports for workers with disabilities discussed in this proposed rule, fundamentally alters the assessment as to whether subminimum wages are necessary to prevent curtailment of employment opportunities. The Department is also cognizant of the Department of Justice's conclusion that public entities (*i.e.,* state and local governments) may be in violation of the ADA's integration and equal employment opportunity mandates if they plan, administer, operate, fund, or implement any services—including employment or day services—in a way that unjustifiably segregates individuals with disabilities.

The Department also takes notice of the multitude of Federal and State programs encouraging CIE that do not rely on the payment of subminimum wages to workers. There is now an extensive and continually growing network of supports for workers with disabilities to access full-wage employment opportunities in a variety of ways, as evidenced by the fact that all States and the District of Columbia have taken Employment First actions. The opportunities available to workers with intellectual or developmental disabilities have been fundamentally changed by these laws, regulations, executive orders, and policy initiatives. As a result, more than ever before, these workers have the chance to ''move proudly into the economic mainstream of American life.'' [307]

The Department is further persuaded by the overwhelming evidence and arguments put forward by the majority of disability-focused government, academic, and advocacy organizations illustrating that section 14(c) certificates are no longer necessary. Non-partisan Federal agencies that have studied the issue in depth, such as the USCCR and NCD, have published detailed reports concluding that the payment of subminimum wages is unnecessary to create employment opportunities for individuals with disabilities, including individuals with I/DD, and that section 14(c) certificates may actually be detrimental to the population they are intended to help. Indeed, as noted above, the USCCR found there is little distinction among characteristics of the I/DD workforce that receives at least the full Federal minimum wage and the characteristics of the I/DD workforce that receives subminimum wages. The Department finds it particularly noteworthy that, as evidenced in the USCCR findings, workers with disabilities being paid at least the full minimum wage experience similar disabilities and have similar support needs as workers with disabilities being paid subminimum wages, and finds this compelling evidence to preliminarily conclude that section 14(c) certificates are no longer necessary to prevent the curtailment of employment opportunities. Indeed, individual experiences of workers in States where subminimum wages have been phased out also demonstrate that there are not insurmountable barriers to transitioning to employment at or above the full Federal minimum wage, as evidenced by the experience of the lead plaintiff in *Lane* v. *Brown.* Prior to filing her suit, Paula Lane worked on an assembly line packaging gloves for 66 cents an hour.[308] Subsequently, Lane found work at full wages in a community setting.[309]

Nearly half of U.S. States have now prohibited or limited the payment of subminimum wages. Additionally, as further discussed in section VII, although the unemployment rate for individuals with disabilities remains relatively high compared to the entire population (though it is trending in a favorable direction), the available data demonstrates that there is a strong demand for CIE opportunities, that subminimum wage employment does not typically lead to competitive integrated employment, and that the States that have abolished subminimum wages have not, in general, seen a comparative decrease in employment opportunities for individuals with disabilities. The Department finds that Oregon's experiences—and the amount of data available due to the *Lane* v. *Brown* settlement agreement, discussed above—are especially instructive in considering why subminimum wages are no longer necessary. In a relatively short time period, Oregon was able to meet or exceed the numerical metrics of the *Lane* v. *Brown* settlement agreement regarding, among other things, the reduction in sheltered workshop hours, the provision of supported employment services, and achieving competitive integrated employment for the numbers of individuals specified in the settlement agreement.[310] The Department notes that the Oregon example sheds light on the fact that current employers of workers receiving subminimum wages are usually publicly funded, and that States which have stopped the payment of subminimum wages can achieve positive outcomes in part by redirecting these funds away from sheltered workshops or other jobs where subminimum wages are being paid toward full wage employment opportunities.[311] Similarly, nearly 25 years ago, Vermont achieved an end to subminimum wage by, in part, ending funding for new entrants into sheltered workshops.[312] These examples also highlight the shift in employer demographics for certificate holders—from the ''industry,'' ''manufacturers,'' and ''small businessmen'' who were the potential section 14(c) employers discussed during the floor debate in 1937 to the vast majority of certificate holders today being CRPs, many of whom receive some type of public funding. While most of the employers envisioned in 1937 were market-driven private sector employers, today's section 14(c) employers are commonly enmeshed with public funding streams

[306] *Supra* note 110.

[307] President George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act (July 26, 1990), *https://perma.cc/VNU4-HR7P.*

[308] Disability Rights Oregon, ''Lawsuit: State Required to Limit Use of Sheltered Workshops,'' *https://www.droregon.org/litigation-resources/lane-v-brown.*

[309] *Id.*

[310] Final Report to the Court of the Independent Reviewer, *Lane* v. *Brown,* Civil Action No. 3:12–cv–00138–ST (D. Or.), *https://www.centerforpublicrep.org/wp-content/uploads/FINALLaneIRFinalReporttotheCourt6.30.22.pdf.*

[311] *Id.* Specifically, Oregon ceased funding and closed all sheltered workshops within a matter of a few years, and instead increased access to supported employment services and CIE for workers with I/DD, expanded evidence-based transition practices, developed an agency infrastructure across State agencies, and, critically, enhanced Federal and State funding to support access to CIE.

[312] USCCR Report at 180.

that may be able to be redirected, as several States such as Oregon and Vermont have already demonstrated.

The Department finds that the evidence from Oregon and Vermont's experiences further supports its preliminary conclusion that payment of subminimum wages is no longer necessary to prevent the curtailment of employment opportunities for workers with disabilities. As described in Section VII, the Department's analysis yields no statistical evidence that employment or the labor force participation rate of individuals with cognitive disabilities differed in States that have adopted laws, policies, or regulations that do not allow the payment of subminimum wages. However, the Department's analysis did show a statistically significant increase in average hourly wage rates of such individuals. The Department believes the results of this analysis, while not dispositive, further support its preliminary conclusion that employment opportunities exist for workers with disabilities that are independent from section 14(c) certificates. The Department welcomes comments on States' experiences in prohibiting or limiting the payment of subminimum wages to workers with disabilities.

The Department recognizes and deeply values the lived experiences of workers as well as families who may have a loved one working under a section 14(c) certificate and who may wish to continue in their current positions under which they are paid subminimum wages. The Department welcomes public comment on this proposed rule. The Department also emphasizes that nothing in this proposal would require existing section 14(c) certificate holders to amend the services they currently provide, including employment services, other than by paying all workers the full required minimum wage for all covered work, as of the phaseout effective date, as explained below. The Department notes that, as a general matter, the empirical evidence reviewed does not indicate that workers transitioning from subminimum wage employment have had negative outcomes. As outlined above and discussed in a number of reports referenced herein, many more workers with disabilities are working in competitive integrated employment and workers and their families have expressed positive feelings about new opportunities and spending more time in the community, as noted, for example, by families in Vermont who have experienced this transition. Congress has directed that employment of workers with disabilities at subminimum wages may occur only if the Secretary determines it is necessary to prevent the curtailment of employment opportunities for workers with disabilities. Thus, in considering its obligations under the section 14(c) provisions to evaluate opportunities for employment for workers with disabilities, it is appropriate for the Department to consider how the evolution described above impacts whether the payment of subminimum wages to workers with disabilities is necessary to prevent the curtailment of employment opportunities for workers with disabilities. The Department must also enforce this statutory mandate in the broader context of the FLSA generally, including the fundamental principle that FLSA rights cannot be waived by workers or employers, and consider whether, even if workers would agree to work for subminimum wages, it is necessary to continue granting certificate authority permitting payment of wages below the current Federal minimum wage of $7.25 per hour.

The Department's analysis as set forth in this proposed rule preliminarily indicates workers with disabilities—including workers with I/DD—no longer need subminimum wages for employment opportunities. With expanded opportunities and legal protections, both compared to the enactment of section 14(c) in 1938 and the last substantive update to the section 14(c) regulations in 1989, and with opportunities for full-wage employment now substantially more common than subminimum wage employment, the Department proposes to phase out issuance of section 14(c) certificates based on its tentative conclusion that these certificates are no longer necessary to prevent the curtailment of employment opportunities for workers with disabilities.

IV. Discussion of Proposed Regulatory Changes

The Department proposes to revise 29 CFR 525.1 to explain that, as evidenced by the analysis set forth above in the Need for Rulemaking section, the Secretary has preliminarily determined that section 14(c) certificates are no longer necessary to prevent the curtailment of opportunities for employment of individuals with disabilities. The Department further proposes to revise that regulation to explain, in light of this determination, that the Secretary will cease issuing new certificates immediately as of the effective date of a final rule and that certificates will only be available to renewing applicants for a limited phaseout period ending 3 years after the effective date of a final rule. The Department further proposes to revise 29 CFR 525.1 to clarify that this part remains in effect during the phaseout period. The contours of the Department's proposed certificate phaseout are explained below in greater detail. The Department seeks comments on the structure of the proposed phaseout, including the proposed length of the phaseout period and any potential extensions to the defined phaseout period, factors affecting the sufficiency of any phaseout period, and states' and organizations' experience with phasing out the use of subminimum wages.

A. Phaseout

The Department proposes that WHD would no longer issue new section 14(c) certificates in response to initial applications postmarked or submitted online on or after the effective date of the final rule because the Department preliminarily finds such certificates are no longer necessary to prevent the curtailment of employment opportunities for individuals with disabilities. Employers that do not hold a valid section 14(c) certificate or that have not timely and properly filed a renewal application as of the effective date of the final rule would not have authority to pay subminimum wages and neither they nor the workers whom they employ would be actively utilizing a section 14(c) certificate for their respective operations or jobs. Accordingly, proposed 29 CFR 525.7 states that only applicants who are seeking to renew a certificate pursuant to proposed 29 CFR 525.13, but not initial applicants, may apply for certificates. The Department also proposes to amend 29 CFR 525.7 to provide minor clarifying edits regarding the certificate application process.

For employers who hold a valid section 14(c) certificate at the time of the effective date of a final rule and seek to renew that certificate, the Department proposes, at 29 CFR 525.13, that it would continue to process renewal applications for such existing certificate holders for a 3-year period beginning on the effective date of a final rule, with all renewals granted within that period expiring no later than the date that is 3 years after the effective date of a final rule. The Department proposes that a phaseout period would allow those employers to prepare and transition to the payment of minimum wages required under the law. Based on the Department's experience, the Department preliminarily finds this

multi-year phaseout period would provide time for employers who are paying subminimum wages pursuant to section 14(c) certificates, if needed, to make necessary adjustments to their operation and funding models. Likewise, affected workers with disabilities who would be due higher wages under the Department's proposed rule may, for example, use the phaseout period to explore new workplace accommodations, participate in additional job training or vocational services, or receive counseling about public benefits and income. Finally, the proposed phaseout period would also provide time for States and other entities to adjust budget allocations, staffing, and disability service delivery programs, as needed, to continue to support workers with disabilities and service providers after the phaseout period ends and the payment of subminimum wages is prohibited for workers with disabilities. As discussed below in section V., State statutes containing multi-year phaseouts have phaseout periods that range from 2 years to 7 years, with many states opting for a 2- or 3-year phaseout. The Department proposes that 3 years should be sufficient to allow for transitions away from subminimum wage employment but seeks comments on the need for, length of, and factors affecting any phaseout period. As specified at proposed 29 CFR 525.13(b), all section 14(c) certificates renewed on or after a final rule's effective date would expire at or before the end of that phaseout period, and under the proposed rule, if finalized, the Department would no longer issue any section 14(c) certificates after the last day of that phaseout period. The Department proposes to make conforming edits to 29 CFR 525.2, 525.9, and 525.11(c) to ensure that stakeholders understand the proposed phaseout.

The Department also notes that, as discussed above, many oversight and advocacy reports that recommend an end of the payment of subminimum wages concluded that such plans should include a phaseout period but varied in providing recommendations concerning the length of the phaseout period. For example, NCD recommended a gradual phaseout of the use of subminimum wages to allow time for modernization of employment service systems that would promote successful transitions for people currently working under section 14(c) certificates.[313] In another example, the USCCR also recommended a multi-year phaseout ''to allow transition among service providers and people with disabilities to alternative service models . . . .'' but did not specify a length for the phaseout period.[314] The Department further notes that many such reports recommend that a gradual end of subminimum wages should be accompanied by simultaneous movement of workers with disabilities into integrated employment. However, the Department's authority and its proposed rule do not require any change to employment settings during the phaseout period or anytime thereafter.

In accordance with this phaseout proposal, the Department proposes to modify 29 CFR 525.7 to reflect that the Department would no longer accept initial applications for a section 14(c) certificate as of the effective date of a final rule. Moreover, the Department proposes in 29 CFR 525.11 that section 14(c) certificate holders, assuming all legal requirements are met, may continue to operate under section 14(c) certificate authority for up to 3 years after the effective date of a final rule. Because the Department proposes that this phaseout would lead to a cessation of all certificate issuance, the Department does not propose any changes to the operational requirements of the section 14(c) regulations, such as the procedures for determining a commensurate wage, for employers who hold a valid certificate during the phaseout period.

The Department requests comments on the length and structure of the proposed phaseout period and any evidence that supports those comments, including data, case studies, explanations of program or funding structures, and the personal experiences of employers and employees. The Department's proposal to phase out section 14(c) over several years is intended to avoid disruptions to services, supports, and funding streams needed to transition workers from being paid subminimum wages while still timely phasing out subminimum wage payments to individuals with disabilities. The Department specifically invites comment on how it may implement any proposed phaseout in a manner that further reduces potential disruptions. The Department also invites comment on how State and publicly funded entities may be impacted by a phase out of section 14(c), including comments relevant to the length of the phase-out period.

Finally, the Department proposes to revise 29 CFR 525.18, which sets forth an administrative appeal process for any person aggrieved by any action of the Administrator taken pursuant to the regulations, to explain that any administrative review granted cannot result in section 14(c) certificate authority being extended beyond the phaseout period.

B. Request for Comments Related to Potential Extensions

In reviewing phaseouts of subminimum wages, the Department observes that the State of Washington allowed for a one-time extension period of up to 12 months in its phaseout of subminimum wages.[315] Similarly, the AbilityOne Commission granted limited extensions no longer than 12 months when it phased out subminimum wages.[316] The Department has not proposed such an extension framework in this proposed rule. As discussed above, the Department proposes that a 3-year phaseout period should be sufficient for most, if not all, employers that currently hold section 14(c) certificates to adjust their operations and funding structures such that they can transition away from subminimum wages by the end of that period. However, if the Department finalizes the proposal herein that current section 14(c) certificate holders may renew their certificates to allow payment of subminimum wages until 3 years from the effective date of a final rule, the Department anticipates considering whether any potential extension framework should be added to the final rule, and seeks comments accordingly.

The Department requests comments on all aspects of a possible limited

[313] 2018 NCD Report at 99–100.

[314] USCCR Report at 223.

[315] Wash. Rev. Code Sec. 49.46.170, [Washington Minimum Wage Act; Minimum Wage and Labor Standards; State Agencies Prohibited From Employing Individuals With Disabilities At Less Than Minimum Wage Beginning July 1, 2020; No New Special Certificates May Be Issued After July 31, 2023], Wages & Hours P 50–41016; *see also* Washington Department of Labor and Industries, 2023 Annual Report to the Legislature, p.2, *https://www.lni.wa.gov/agency/_docs/2023SubMinimumWageCertificatesReport.pdf* (Most private certificate holders were subject to a two-year phaseout, with a possible one-time, one-year extension for a total of three years).

[316] Prohibition on the Payment of Subminimum Wages Under 14(c) Certificates as a Qualification for Participation as a Nonprofit Agency Under the Javits Wagner O'Day Act, 87 FR 43427, 43428 (July 21, 2022) (codified at 41 CFR part 51) (''However, an [non-profit agency] may apply for an extension for up to 12-months in order to come into compliance if it can provide evidence for why it cannot make the wage adjustments by the effective date (due to budgetary limitations, because doing so will necessarily harm employees, or for other good cause) and if it provides a corrective action plan describing the steps it intends to take to achieve compliance within the approved extension period.''). The Commission noted, in implementing a 90-day effective period for its rule, that its position on phasing out use of section 14(c) had been announced in a 2019 notification and resources supporting transition were invested even prior to the rulemaking.

extension provision beyond the end of the proposed 3-year phaseout period, including whether an extension provision would be appropriate, the duration of any such extension(s), the showing (including any documentation) an employer must make to receive an extension, the criteria by which requests for extension should be reviewed, and the procedures by which employers apply for extension(s).

For example, the Department requests comments as to the length of time any extension might extend (including whether any potential extension should be limited to a maximum of 3, 6, 12, or 18 months, or some other period). The Department further requests comment as to whether any employer should be able to receive more than one extension, and if multiple extensions are allowed, whether there should be a maximum limit on the total number of extensions granted to a certificate holder (*e.g.,* each certificate holder would only be entitled to two time-limited extensions). Similarly, the Department requests comments on whether there should be a maximum time limit on the total number of extensions granted to a certificate holder (*e.g.,* each certificate holder would be eligible for multiple extensions, but not to exceed a total extension period of 12 months). Likewise, the Department also seeks comments on whether, if extensions were to be available, certificate holders should be required to demonstrate good cause for any extension request. The Department welcomes public comment on what a certificate holder might need to present to demonstrate such good cause as well as the specific documentation needed to support such cause. For example, the Department welcomes comment on whether, if an extension were to be available, it should be granted only when there are unique factual circumstances outside of an employer's control, a need for additional time for the employer to complete an orderly transition from the payment of subminimum wages, and a need to avoid undue disruptions impacting workers with disabilities currently employed at subminimum wages.

C. Severability

The Department proposes that the regulatory text include a severability provision in part 525 so that if one or more of the provisions in part 525 is held invalid or stayed pending further agency action, the remaining provisions would remain effective and operative. The Department proposes to add this provision as § 525.25. The proposed provision explains that each provision is capable of operating independently from one another, and that if any provision of part 525 is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from the regulation and shall not affect the remainder thereof.

V. Alternatives to the Proposed Rule

In developing this proposed rule, the Department considered a wide range of alternative regulatory approaches. For example, the Department considered whether to allow workers with disabilities who are currently paid subminimum wages to ''opt out'' of the proposed phaseout of section 14(c) certificates set forth in this proposed rule. In other words, the Department evaluated whether to permit such workers to choose to continue receiving subminimum wage payments where they believe such continuity would be beneficial. However, after consideration and analysis, the Department has determined that such a regulatory alternative would not be legally permissible or advisable as a policy matter.

In this proposed rule, the Department has preliminarily concluded that payment of subminimum wages is not necessary to prevent curtailment of opportunities for employment. In the absence of such need, an opt-out provision would be akin to allowing a waiver of the FLSA's requirement to pay minimum wages. As discussed in section II.D. above, it is well-established that the right to the full Federal minimum wage cannot be waived by individual workers or employers. The Supreme Court has consistently and explicitly held that ''FLSA rights cannot be . . . waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.'' [317] The Department is foreclosed, as a legal matter, from allowing workers with disabilities, or their families or guardians, to ''opt out'' of receiving the full Federal minimum wage on an individual basis. Rather, the FLSA is clear that an employer may only pay subminimum wages to workers with disabilities after obtaining a certificate from the Department and that such certificates can only be issued when the Department decides that they are necessary to prevent the curtailment of employment opportunities. Congress did not grant the Department unconditional authority to issue subminimum wage certificates, or to permit subminimum wage payments based on such workers' preferences.

Finally, the Department rejected this alternative because it would likely result in formidable administrative challenges for both WHD and employers, as well as confusion on the part of workers.

The Department also considered alternative regulatory approaches to the proposed phaseout of section 14(c) certificates. As detailed above, the Department proposes to: (1) cease issuance of new section 14(c) certificates to employers submitting an initial application on or after the effective date of a final rule and (2) permit existing section 14(c) certificate holders, assuming all legal requirements are met, to continue to operate under section 14(c) certificate authority for up to 3 years after the effective date of a final rule.

Among the alternative approaches that were considered the Department also considered whether to use a different phaseout period. The Department declined to propose a shorter phaseout period (or no phaseout period) because, as explained in this proposed rule, individuals with disabilities who have been working for employers holding a section 14(c) certificate, employers who have held a section 14(c) certificate, and government entities may need time to transition to the payment of the full minimum wage in order to mitigate disruptions that might potentially otherwise cause curtailment of employment opportunities. At the same time, the Department also declined to propose a longer phaseout period. As discussed in section III.D.1.i., many States have already passed laws prohibiting (or planning to prohibit) the payment of subminimum wages through a phase out.[318] State statutes containing multi-year phaseouts range from 2 years to 7 years, with many states opting for a 2- or 3-year phaseout. In view of this, the Department thus believes that 3 years should be sufficient to allow for transitions away from subminimum wage employment. Furthermore, the Department is concerned that a longer period might incentivize delay of effective transition measures.

[317] *Barrentine,* 450 U.S. at 740 (quoting *Brooklyn Sav.,* 324 U.S. at 707).

[318] *See* section III.D.1.i. for a fuller discussion of State phaseout periods.

The Department also considered revising its existing regulations to change the process and evidence employers would need to provide in order to demonstrate that the payment of a subminimum wage is necessary to prevent the curtailment of employment opportunities. The Department did not propose such changes because, as explained elsewhere in this proposal, given the statutory legal authority requiring the Department to determine the necessity of certificates (to the extent necessary to prevent the curtailment of opportunities for employment), the best approach is to examine the standard based on a comprehensive consideration of how employment opportunities are both currently curtailed and created across the employment market rather than on the framework set out in the 1989 regulations reflecting the presumption that subminimum wages are necessary where productivity measures are satisfied. As this proposal explains, the Department's preliminary findings are that employment opportunities exist sufficiently apart from section 14(c) certificates to justify the proposed determination to stop issuing certificates through a multi-year phaseout. Given this belief and the Department's proposed determination, a change to only alter the requirements of holding a certificate may not fully meet the Department's statutory obligation under the curtailment clause given the changed opportunities for employment currently.

The Department also considered proposing an additional extension period beyond the 3-year phaseout period. However, as stated above, the Department proposes that a 3-year phaseout period should be sufficient for most, if not all, employers that currently hold section 14(c) certificates, to adjust their operations and funding structures such that they can transition away from subminimum wages by the end of that period. Furthermore, any extension option increases the risk of use of certificates beyond an actual period of demonstrated need for orderly transition, and might undercut the incentive for those employers to make efficient and timely plans to move away from subminimum wages. However, as noted above, the Department seeks comments about a potential extension option.

VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

This rulemaking would revise the burdens for the existing information collection previously approved under Office of Management and Budget (OMB) control number 1235–0001, Fair Labor Standards Act Special Employment Provisions. The 1235–0001 information collection encompasses information collected pursuant to FLSA sections 11(d), 14(a), and 14(b), as well as section 14(c). As required by the PRA, the Department has submitted information collections as revisions to existing collections to OMB for review to reflect changes to existing burdens that will result from and are limited to the implementation of this section 14(c) rulemaking.

Summary: FLSA section 14(c) authorizes the Department to issue certificates permitting employers to pay workers whose disabilities impair their earning or productive capacity at wage rates below the Federal minimum wage. The Department has promulgated regulations at 29 CFR 525 to administer and enforce section 14(c) of the FLSA. This NPRM, if finalized, would impose new information requirements revising an existing information collection.

Purpose and use: This proposed rule, which would revise 29 CFR part 525, would result in the Department no longer issuing new section 14(c) certificates in response to initial applications postmarked or submitted online on or after the effective date of a final rule. Pursuant to the proposed rule, the Department would permit existing section 14(c) certificate holders, assuming all legal requirements are met, to continue to operate under section 14(c) certificate authority and re-apply for continued certificate authority for up to 3 years after the effective date of a final rule. In addition, as discussed above, the Department proposes that a 3-year phaseout period should be sufficient for most, if not all, employers that currently hold section 14(c) certificates to adjust their operations and funding structures such that they can transition away from subminimum wages by the end of that period. However, the Department also requests comments on all aspects of a possible limited extension provision beyond the end of the proposed 3-year phaseout period.

This proposed rule, if finalized, would impact the collection by reducing the number of employers that hold section 14(c) certificates throughout the phaseout period, and thereby also reduce employees employed under section 14(c) certificates. However, ultimately, 3 years from the effective date of a final rule, there would be no section 14(c) certificates and no employees employed under section 14(c) certificates, which would eliminate the burden associated with this collection.

WHD obtains PRA clearance under OMB control number 1235–0001 for an information collection with respect to subminimum wage employment. An Information Collection Request (ICR) has been submitted to revise the approval and adjust the burdens for this collection.

Information and technology: There is no particular order or form of records prescribed in the current regulations or in the proposed rule. An employer may meet the requirements of this proposed rule using paper or electronic means. The Department has enhanced the section 14(c) certificate application process by implementing an online electronic application platform to submit Forms WH–226 and WH–226A; this platform can be found on the Department's website at: *https://section14c.dol.gov/.* The Department also makes Forms WH–226 and WH–226A and instructions for completing them available in a fillable Adobe PDF format for downloading and printing from the Department's website at: *https://www.dol.gov/agencies/whd/forms/wh226.* Respondents currently have the option of either mailing the form(s) or completing and submitting an application using the section 14(c) online application system.

Minimizing Small Entity Burden: While information collections, *i.e.,* WH–226 and WH–226A, may involve a substantial number of small businesses or non-profit agencies, the collections do not have a significant impact on those small entities. Forms WH–226 and WH–226A collect information necessary for the Department to determine if an employer qualifies for a certificate. The data collection gathers additional information on individual workers to better assist the agency in preventing abuse of a vulnerable worker population. The Department has provided detailed item-by-item instructions and online tools such as wage calculators to assist all employers, including small entities, in completing these forms and complying with the statutory and regulatory requirements. The Department also has an online

electronic platform for submission of the information.

Public comments: As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the PRA. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

The Department seeks comments on this NPRM and its potential impact to public burdens associated with ICR 1235–0001, Fair Labor Standards Act Special Employment Provisions. Detailed calculations indicating respondents, responses, burden hours, and burden costs are contained in the supporting statement found at *www.reginfo.gov.*

Commenters may send their views on the Department's PRA analysis in the same way they send comments in response to the NPRM as a whole (*e.g.,* through the *www.regulations.gov* website), including as part of a comment responding to the broader NPRM. Alternatively, commenters may submit a comment specific to this PRA analysis by sending an email to *WHDPRAComments@dol.gov.* While much of the information provided to OMB in support of the information collection request appears in the preamble, interested parties may obtain a copy of the supporting statements for the affected ICR by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble. Alternatively, a copy of the ICR with applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden, may be obtained free of charge from the *RegInfo.gov* website by visiting *http://www.reginfo.gov/public/do/PRAMain.*

OMB and the Department are particularly interested in comments that:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Total burden for the affected information collection, including the burdens that will be affected by this proposed rule and any changes are summarized as follows:

Type of review: Revision to currently approved information collections.

Agency: Wage and Hour Division, Department of Labor.

Title: Fair Labor Standards Act Special Employment Provisions.

OMB Control Number: 1235–0001.

Affected public: Private sector, not-for-profits, businesses or other for-profits, and Individuals or Households.

Estimated number of respondents: 335,167 (0 from this rulemaking).

Estimated number of responses: 1,338,561 (0 from this rulemaking).

Frequency of response: On occasion.

Estimated annual burden hours: 671,464 (0 from this rulemaking).

Estimated annual burden costs (capital/startup): $0 ($0 from this rulemaking).

Estimated annual burden costs (*operations/maintenance*): $2,284 ($0 from this rulemaking).

Estimated annual burden costs: $32,404,730 ($0 from this rulemaking).

VII. Analysis Conducted in Accordance With Executive Order 12866, Regulatory Planning and Review, Executive Order 13563, Improving Regulation and Regulatory Review, and Executive Order 14094

Under Executive Order 12866 (as amended by Executive Order 14094), OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive order and OMB review. As amended by Executive Order 14094, section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more; or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order. OIRA has determined that this proposed rule is a ''significant regulatory action'' under section 3(f)(1) of Executive Order 12866, as amended.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this proposed rule and was prepared pursuant to the above-mentioned executive orders.

A. Background and Need for Rulemaking

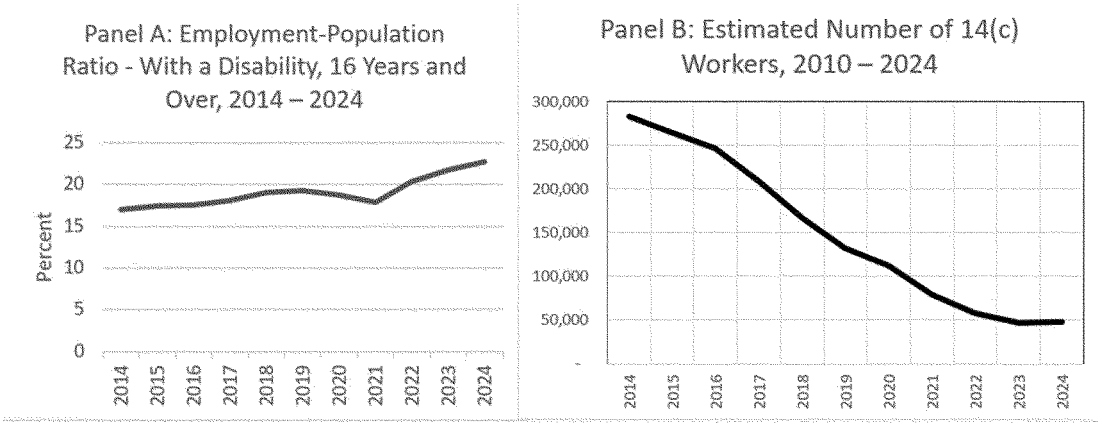
The FLSA generally requires that employees be paid at least the Federal minimum wage, currently $7.25 per hour, for every hour worked and at least one and one-half times their regular rate of pay for each hour worked over 40 in a single workweek.[319] Since its enactment in 1938 through today, section 14 of the FLSA has included a provision authorizing the Department to issue certificates permitting employers to pay workers whose disabilities impair their earning or productive capacity at wage rates below the Federal minimum wage. That statutory provision, however, has always provided a significant condition precedent: such certificates may only be issued to the extent ''necessary to prevent curtailment of opportunities for employment.'' [320]

[319] 29 U.S.C. 206(a), 207(a).

[320] 29 U.S.C. 214(c)(1).

Since the Department first promulgated regulations governing the issuance of section 14(c) certificates in 1938, and even since the Department last substantively updated those regulations more than 35 years ago, opportunities for employment have dramatically changed for individuals with disabilities. In recent years, the employment rate for individuals with disabilities has generally climbed (Figure 1, Panel A). During the same time period, the estimated number of individuals working under section 14(c) certificates has declined (Figure 1, Panel B).

Figure 1. Employment and Section 14(c) Workers 2014 – 2024



Notes: Employment-population ratios calculated using the average monthly ratios for the year ending in May of each year to align with Panel B. Ratios are based on data from the Current Population Survey (CPS), which is the primary source for labor force statistics. CPS tends to estimate a lower number of disabled workers compared to other nationally representative surveys, such as the American Community Survey (ACS), which is more commonly used for population estimates. However, the changes in trends over time are similar across both surveys.

Sources: Panel A: U.S. Bureau of Labor Statistics, Employment-Population Ratio—With a Disability, 16 Years and over [LNU02374597], retrieved from *https://data.bls.gov/timeseries/LNU02374597,* September 30, 2024; Panel B: WH–226A form data of issued and pending certificates, May 1 (2014 through 2024).

Fueled by the disability rights movement, societal and cultural assumptions, beliefs, and expectations regarding the employment of individuals with disabilities have evolved, and opportunities for individuals with disabilities have dramatically expanded. Federal legislation and judicial precedent have established and enshrined fundamental legal protections requiring equal access, opportunities, and respect for individuals with disabilities in both education and employment. Of these legislative and judicial developments, the landmark Americans with Disabilities Act (ADA), enacted in 1990, the year after the section 14(c) regulations were last substantively updated, has had a profound impact on employment opportunities for individuals with disabilities. In addition, the President and executive agencies have taken steps to end the payment of subminimum wages to workers with disabilities on certain government contracts. Numerous States and localities have prohibited or limited the payment of subminimum wages to workers with disabilities within their jurisdictions.

Although it is widely acknowledged that individuals with disabilities continue to face challenges in obtaining equal opportunity and treatment, the extent of legal protections, opportunities, resources, training, technological advancements, and supports has dramatically expanded since regulations were first promulgated over 85 years ago, and since 1989, when the Department's regulations were last substantively updated, to assist individuals with disabilities both in obtaining and maintaining employment at or above the full Federal minimum wage. Employers similarly have substantially more resources and training available to recruit, hire, and retain workers with disabilities in employment at or above the full Federal minimum wage. Recognizing the expansion of full-wage employment options for individuals with disabilities, an increasing number of oversight and advisory reports have vigorously called for a ''phase out'' of section 14(c) certificates. As another indication that subminimum wages are not necessary to prevent the curtailment of employment opportunities, an increasing number of States and localities, including many jurisdictions with higher minimum wages than the FLSA minimum wage, have prohibited or limited the payment of subminimum wages in their respective jurisdictions. Furthermore, an increasing number of employers themselves are voluntarily opting out of paying subminimum wages, as is reflected in the rate at which the number of section 14(c) certificate holders has substantially declined in recent years, while at the same time the employment rate for people with disabilities has generally climbed. Due to expanded opportunities both compared to the enactment of the section 14 provisions and promulgation of initial regulations in 1938 and the last substantive update to the section 14(c) regulations in 1989, with opportunities for full-wage employment now substantially more common than subminimum wage employment, the Department preliminarily concludes that the issuance of section 14(c) certificates is no longer necessary to prevent the curtailment of employment opportunities for individuals with disabilities.

Accordingly, the Department proposes to phase out the issuance of section 14(c) certificates. The Department specifically proposes to: (1) cease issuance of new section 14(c)

certificates to employers submitting an initial application on or after the effective date of a final rule and (2) permit existing section 14(c) certificate holders, assuming all legal requirements are met, to continue to operate under section 14(c) certificate authority for up to 3 years after the effective date of a final rule. The Department requests comments on all aspects of a possible limited extension provision beyond the end of the proposed 3-year phaseout period, including whether an extension provision would be appropriate, the duration of any such extension(s), the showing (including any documentation) an employer must make to receive an extension, the criteria by which requests for extension should be reviewed, and the procedures by which employers apply for extension(s).

B. Number of Affected Workers and Employers

The entities that will be directly affected by this proposed rule are section 14(c) certificate holders and workers with disabilities being paid a subminimum wage by a certificate holder. According to WHD's data on section 14(c) certificate holders as of May 1, 2024, there were 801 employers who had certificates that were either issued or pending.[321] Employers holding issued certificates reported paying approximately 40,579 workers at subminimum wages in their previously completed fiscal quarter.[322]

The Department has provided additional data below about the hours, earnings, and primary disability of workers reported by employers on applications for section 14(c) certificates. In addition to these workers, there may be other categories of workers affected by this proposed rule, such as youth with disabilities looking to enter employment, or non-working individuals with disabilities who may choose to enter the labor force if there is an increase in full-wage employment options (see section VII.D.4. for an additional discussion on this population). The Department welcomes comments regarding other types of workers who may be affected by the proposed rule.

1. Form WH–226A—Information Collected

When applying for a section 14(c) certificate to employ workers with disabilities at subminimum wages, employers must fill out form WH–226A, which asks for information about workers who were paid subminimum wages at each job site, including the type of work being performed, average hourly earnings, average weekly hours worked, and the primary disability that affects the worker's productivity for the job most performed.[323] The data discussed here reflects what employers have entered on their application forms.[324] Data is for May 1, 2024, and reflects the applicant's most recently completed fiscal quarter at the time they applied.[325]

According to this data, the mean ''average hourly earnings'' for workers on section 14(c) certificates is $4.08, and the median ''average hourly earnings'' is $3.46. These workers work a mean of 11.45 hours per week. Form WH–226A also asks certificate holders about the primary disability that affects each subminimum wage worker's productivity for the job at which they have worked the most number of hours over the most recently completed fiscal quarter. As shown in Table 1, the vast majority (about 91 percent) of workers being paid subminimum wages under section 14(c) certificates have I/DD reported as their primary disability.

TABLE 1—WORKERS ON SECTION 14(c) CERTIFICATES BY PRIMARY DISABILITY

Primary disability	Share of workers on section 14(c) certificates
Age Related Disability	0.09%
Hearing Impairment	0.14
Intellectual/Developmental Disability	90.96
Neuromuscular Disability	0.68
Psychiatric Disability	4.34
Substance Abuse	0.02
Visual Impairment	0.21
Other	3.41

2. Section 14(c) Workers Demographics—Race, Age, and Ethnicity

The WHD section 14(c) application form does not ask for any other demographic data on section 14(c) certificate workers. For their 2023 report, GAO surveyed community rehabilitation program (CRP) employers to estimate the percentage of section 14(c) workers employed by CRPs in August 2021 by race and ethnicity and by age. As shown in Table 2, GAO estimated that a large share of these workers are White and fall between the ages of 25 and 54, which aligns with demographic breakdowns found in the overall employed population.[326]

[321] WHD, 14(c) Certificate Holders, May 1, 2024, *https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders.* Note that some of these entities (34 employers) report having zero workers paid a subminimum wage, so this may be an overestimate of the actual number of affected entities. Based on this list, employers operate in the following 38 States: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Wisconsin, and West Virginia. The remaining 12 States, plus the District of Columbia, had no section 14(c) employers on the list.

[322] *Id.* Note that the number of workers paid subminimum wages are only reported for entities that have issued certificates and does not represent workers that may be employed by employers with subminimum wage payment authority listed as pending.

[323] The information collected from the form WH–226A is submitted by applicants and may include inaccuracies, such as instances when an employer reports a piece rate instead of an hourly wage rate or miscalculates the wage. Inaccuracies may also be the result of data entry errors. The Department presents this information to provide context for the general status of workers on section 14(c) certificates. The summary data presented here does not reflect any changes an employer made after submission of its application, including those based upon the Department's oversight of section 14(c) through its application processes and enforcement actions.

[324] WHD collects this data for the purpose of processing applications to provide employers with certificates authorizing the payment of subminimum wages to workers with disabilities under section 14(c). Although the data from the application forms is not collected for comprehensive statistical analysis, it is the best data that the Department has on the population of workers paid subminimum wages under section 14(c) certificates and is useful to provide context for purposes of this analysis.

[325] In this data set, the effective dates for the certificates range from July 2022 to the present.

[326] For example, in the overall employed population in the U.S., White workers represent 76.5 percent of all employed persons, and workers ages 25 to 54 represent 64 percent of all employed persons. U.S. Dep't of Labor, Bureau of Labor Statistics, BLS Current Population Survey, Employment Status of the Civilian Population by Age, Sex, and Race, 2023, *https://www.bls.gov/cps/cpsaat03.htm.*

TABLE 2—ESTIMATED PERCENTAGE OF SECTION 14(c) WORKERS REPORTED TO BE EMPLOYED BY COMMUNITY REHABILITATION PROGRAMS IN AUGUST 2021, BY RACE/ETHNICITY AND AGE

	Estimated share of workers on section 14(c) certificates (%)
Racial/ethnicity Category:	
White (Not Hispanic or Latino)	78
Black or African American (Not Hispanic or Latino)	14
Asian (Not Hispanic or Latino)	1
Native American or Alaska Native (Not Hispanic or Latino)	1
Hispanic or Latino	5
All other race/ethnicity categories	2
Age:	
18–24 years old	4
25–54 years old	70
55 years old or older	26

Source: GAO Survey of Community Rehabilitation Program employers, 2023 GAO Report

Aside from the information discussed in this section, the Department is unaware of any data source that regularly publishes additional up-to-date demographic information specifically on workers employed by section 14(c) certificate holders. The Department's Bureau of Labor Statistics (BLS) publishes data on all workers with a disability, including sex, race, age, and educational attainment.[327] However, workers who are currently employed under section 14(c) certificates are only a small subset of all workers with a disability. The Department welcomes comments and data on the demographics of workers with disabilities employed under section 14(c) certificates.

3. Affected Employers

As discussed in section II.C.2., WHD issues section 14(c) certificates to business establishments, community rehabilitation programs (CRPs), hospitals/patient worker facilities, and school-work experience programs (SWEPs). The overwhelming majority of current certificate holders are CRPs, representing approximately 93 percent of current certificate holders as of May 1, 2024. In the context of section 14(c), WHD defines CRPs as ''not-for-profit agencies that provide rehabilitation and employment for people with disabilities.'' [328] Such establishments are sometimes referred to as ''sheltered workshops'' as they typically are facility-based and often serve workers with disabilities in sheltered or segregated settings. At the time of drafting, only 30 private-sector, for-profit businesses hold certificates for the payment of subminimum wages, representing 4 percent of total certificate holders. Apart from CRPs and business establishments, the remaining certificates are held by hospitals or residential care facilities that employ patients, representing 3 percent of total certificate holders, and ''school work experience programs'' that represent less than half of one percent of total certificate holders.

In the WHD data reviewed, the expiration dates for certificates fall between May 2024 and early 2026. The Department assumes that a share of the certificate holders with certificates expiring before the publication of the final rule would reapply and be granted new certificates with later expiration dates (no later than 3 years after the effective date of a final rule). The Department does not have information to estimate exactly how many certificate holders will choose to reapply. As of May 1, 2024, 779 of the 801 employers holding or seeking a certificate (97 percent) were renewals, but the overall trend of certificate holders has been in a steady decline over the past decade (the number of pending and issued certificate holders was 2,820 in April 2015 and has declined every year since). If this trend continues, fewer certificate holders may choose to reapply in the future even absent any regulatory action. Furthermore, the publication of the proposed rule may impact certificate holders' choices if they anticipate that certificates are going to be phased out if the rule is finalized as proposed. There may also be changes to State or local laws during this time period that may affect whether certificate holders operating in those states or localities reapply for a certificate. Similarly, employers in States that have already begun a phaseout of subminimum wages may choose not to reapply before expiration of the phaseout period. As of May 1, 2024, there are 53 certificate holders located in States that are in the process of phasing out the payment of subminimum wages.[329]

The number of certificate holders has declined over recent years, and the Department expects that trend to continue. In 2001, the GAO estimated that approximately 424,000 workers with disabilities were paid subminimum wages while working for 5,612 employers holding section 14(c) certificates.[330] As mentioned above, as of May 1, 2024, that number dropped to approximately 40,579 workers with disabilities being paid subminimum wages to employers with issued certificates, while 801 employers held or were seeking section 14(c) certificates, representing a decline in certificate holders of almost 86 percent.[331] All impacts discussed in this

[327] U.S. Dep't of Labor, Bureau of Labor Statistics, BLS Current Population Survey, ''Employment status of the civilian noninstitutional population by disability status and selected characteristics, 2023 annual averages,'' *https://www.bls.gov/news.release/disabl.t01.htm.*

[328] WHD Field Operations Handbook (FOH) 64k00, *https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-64.*

[329] California (38), Colorado (1), Nevada (4), and South Carolina (10). WHD, 14(c) Certificate Holders, May 1, 2024, *https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders.*

[330] U.S. Gov't Accountability Office, GAO–01–886, ''Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers with Disabilities, But Labor Should Improve Oversight'' (2001) (2001 GAO Report) at 10, 18.

[331] The Department notes that data collected by the Department from section 14(c) applications is not census data. Data is derived from information received by WHD during the certificate application process, which is used for the purposes of determining whether to issue a certificate. The application requires the employer to provide a snapshot of its operations and workforce that is paid a subminimum wage during its most recently completed fiscal quarter at the time of its renewal application, and the submission date varies per applicant. Because certificates are issued to the employer, not individuals employed at

regulatory impact analysis use the current number of certificate holders at the time of drafting, but the Department expects this may be an overestimate, as the number of certificate holders could likely decline by the time of publication of the final rule given the overall trends in the number of certificate holders. For example, as of May 1, 2023, the number of employers holding or seeking a section 14(c) certificate was 931, meaning that the number of certificate holders declined by almost 14 percent over the year. If a similar decline were to occur over the forthcoming year, the number of certificate holders could be below 700 by May 2025. Additionally, the data includes certificate holders in states that have plans to phase out the payment of subminimum wages for workers with disabilities in the near future, which could also result in a lower number of certificate holders at the time of the final rule.

C. Costs

1. Regulatory Familiarization Costs

This proposed rule would impose direct costs on section 14(c) certificate holders by requiring them to review the regulation. To estimate these ''regulatory familiarization costs,'' three pieces of information must be estimated: (1) the number of affected certificate holders; (2) a wage level for the employees reviewing the rule; and (3) the amount of time spent reviewing the rule. As discussed above, WHD data shows that there are 801 employers who had certificates that were either issued or pending as of May 1, 2024.[332] The Department assumes that each of these entities would incur some regulatory familiarization costs, and that each certificate holder would spend an average of 2 hours reviewing this proposed rule. The Department assumes that each reviewer will spend 1 minute per page reviewing the regulatory text,[333] which is equivalent to 5 double-spaced pages at the time of publication. They will also review sections of the preamble and any compliance assistance materials as appropriate, so the Department has added significant additional time for that review.

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) with a median hourly wage of $35.83 will review the rulemaking.[334] The Department also assumes that benefits are paid at a rate of 45 percent of the base wage [335] and overhead costs are paid at a rate of 17 percent of the base wage, resulting in an hourly rate of $58.04 in 2023 dollars. Therefore, the total regulatory familiarization cost to employers is $92,980 (801 entities × 2 hours × $58.04). Although the issuance of section 14(c) certificates would be phased out over multiple years under this proposal, the Department assumes that most affected entities will review the rule when it is published.[336] Therefore, all regulatory familiarization costs are assumed to occur in Year 1 following publication of the rule. Total annualized rule familiarization costs over the first 10 years are estimated to be $12,373, assuming a 7 percent discount rate.

2. Adjustment Costs

As discussed further in Section VII.D., if the issuance of section 14(c) certificates is phased out, employers who are certificate holders might choose to respond in a few different ways. If certificate holders only serve workers with disabilities who are paid the subminimum wage, they might choose to continue operations as they are but pay at least the full Federal minimum wage to those workers. These certificate holders may instead choose to close their organization.[337] Certificate holders who employ other workers (at or above minimum wage) might choose to replace affected workers with disabilities with the other workers; or they might choose to no longer employ workers with disabilities who had been paid subminimum wages under section 14(c), spread the work of those workers to other employees, and not hire any new workers. If certificate holders are already providing rehabilitation or other non-work services to individuals with disabilities, they may alternatively decide to discontinue the employment of these workers while still providing them with those services. Certificate holders will likely incur some adjustment costs under each of these scenarios. If they choose to transition all workers with disabilities to at least the full minimum wage, the increased wage cost would be considered a transfer (discussed below), but they could still incur some adjustment costs associated with updating payroll systems, etc. If entities choose to hire new workers or spread work to existing workers, they may incur hiring costs or adjustment costs associated with these activities. The Department assumes that these costs would likely be incurred by each certificate holder at different points in time prior to when their current certificate expires, so the total costs would be spread out over multiple years.

Because there are many uncertainties in exactly how each certificate holder would respond to this proposed rule, and how the costs would be spread over the proposed phaseout period, the Department has not provided a definitive estimate of adjustment costs. However, as an example, if all certificate holders incurred an average of 1 hour of adjustment costs, the total cost would be $46,490 (801 entities × 1 hour × $58.04). These costs would be spread over multiple years as employers transition their pay practices or change their operation models. The Department welcomes comments and data from certificate holders that would help inform an estimate of adjustment costs.

3. Costs to Workers Employed Under Section 14(c) Certificates

The Department acknowledges that this rule may also result in some costs to workers currently paid subminimum wages under section 14(c) certificates. Although any changes in the wages they receive, the hours they work, or their employment status would be considered a transfer and are discussed below, there could be follow-on effects that would lead to costs for these workers. For example, if a certificate holder does not retain its section 14(c) workers at the full minimum wage, the worker may need to spend time looking for employment at or above the full Federal minimum wage or may need to obtain

subminimum wages, the specific number of employees may change over the duration of the certificate. The certificate application data is self-reported by employers and does not reflect any changes made by the employer after its submission. Additionally, the data provided reflects active certificates as of the date that the Department's website list was revised and does not include the number of employees on ''pending'' section 14(c) certificates.

[332] As discussed above, this may be an overestimate of the number of employers who will review the final rule, as some of these certificate holders operate in States that are phasing out the payment of subminimum wages to workers with disabilities in the near future.

[333] Brysbaert, Marc (April 12, 2019), ''How many words do we read per minute? A review and meta-analysis of reading rate,'' *https://doi.org/10.31234/osf.io/xynwg.*

[334] U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment and Wage Statistics survey (OEWS), May 2023, *https://www.bls.gov/news.release/ocwage.t01.htm.*

[335] The benefits-earnings ratio is derived from BLS's Employer Costs for Employee Compensation (ECEC) data using variables CMU1020000000000D and CMU1030000000000D. The Department averaged the four quarters of 2023 to get a full-year 2023 ratio.

[336] There may be some certificate holders who re-review the regulations if/when they decide to re-apply for their certificate during a phaseout period. However, the Department has not estimated rule familiarization costs in future years. The Department welcomes comments that would help inform this estimate.

[337] The Department does not have data to estimate how many certificate holders would close their organization following the changes proposed in this rule but welcomes comments from certificate holders to help inform this estimate.

additional support services or other meaningful non-work activities to replace the time previously spent in subminimum wage employment. They could incur transition and job search costs associated with these activities. These transition costs include the cost of time spent learning about available resources, time for eligibility determinations, time spent on waitlists, training costs, etc. There may be some employers who will choose not to retain the workers working under section 14(c) certificates; a subset of those workers may be unable to find replacement employment or support services. For this group of workers, they may incur costs associated with reduced well-being from no longer being employed or due to a reduction in hours worked. Some of their families may also incur increased care costs, if they need to find or provide care for their family member for the time that was previously spent working at subminimum wages. However, as discussed throughout this rulemaking, the Department believes that a wide range of strategies, opportunities, and supports exist that can minimize this outcome. Although there may be time required for workers to transition from subminimum wage jobs, the Department believes that the phaseout approach proposed in this rule would help ensure that workers will ultimately be able to make this transition.

Additionally, the Department acknowledges workers may also have concerns about potential limitations on their disability benefits due to an increase in their wages. In response to such concerns, some workers with disabilities may choose to leave the workforce or limit the number of hours they work. The Department is unable to specifically quantify these potential cost impacts but notes workers receiving Supplemental Security Income or Disability Insurance have access to free employment support resources, such as the Social Security Administration's ''Ticket to Work'' program, that allows enrolled workers with disabilities to improve their earning potential. Likewise, as addressed in the preamble, the availability of resources such as ABLE accounts, allow workers with disabilities to accumulate savings without jeopardizing access to certain public benefits, thus minimizing this concern.

The Department does not have data to quantify costs to workers currently employed under section 14(c) certificates but welcomes comments and input to help inform this estimate, including comments on available resources that address the impacts that earnings may have on disability benefits.

D. Cost Savings

Any increased costs for certificate holders could be balanced out, in part, by the cost savings of no longer applying for section 14(c) certificates and no longer participating in the activities required to maintain their certificate and determine appropriate commensurate subminimum wage rates for workers. Currently, employers who wish to apply for a section 14(c) certificate may submit their application to WHD in one of two ways: completing their application online or submitting completed forms WH–226 and WH–226A. When applying for a certificate, applicants are responsible for providing information related to their employment operations and the subminimum wage workers employed during the applicant's most recently completed fiscal quarter, including details on hours, wages, job descriptions, and primary disability. Any affected entity that would have renewed their application in absence of this rule could likely experience some cost savings following this rule, since they no longer would be filling out an application for and maintaining a section 14(c) certificate. As an example, in the Paperwork Reduction Act Supporting Statement for these regulations, the Department estimates that for employers who are renewing their application for a section 14(c) certificate, it will take them 75 minutes to fill out form WH–226 and 2 hours to fill out form WH–226A, for a total of 3.25 hours. If these forms are filled out by a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) with a full-loaded wage of $58.04, each employer who was planning to renew their section 14(c) certificate application would save $188.63 per application cycle. In order to calculate an illustrative estimate of the potential total maximum cost savings, the Department assumes all 447 certificate holders with certificates expiring in the next year (between the dates of May 1, 2024, and May 1, 2025) would decide to renew their application for a section 14(c) certificate in absence of this proposed rulemaking. If these certificate holders no longer have to fill out the application following the rule, the total potential annual cost savings would be $84,318 ($188.63 × 447). The true cost savings is likely somewhat lower, because all certificate holders may not choose to re-apply when their certificate expires, due to both overall downward trends in the number of certificate holders and potential expectations of a phasing out of section 14(c) certificates based on the publication of this proposed rule.

Employers who no longer hold a section 14(c) certificate to pay subminimum wages would also be relieved of several operations costs required to remain in compliance with the section 14(c) provisions. For example, employers would no longer conduct prevailing wage surveys used to determine worker commensurate wage rates for each type of work paid at a subminimum wage. This would relieve the employer of their at least annual task of ascertaining the wage rates paid to the experienced nondisabled workers of other employers in the vicinity, usually obtained by surveying comparable firms in the area that employ primarily nondisabled workers doing similar work. The appropriate size of such a survey sample depends on the number of firms doing similar work but generally would include at least three firms. Employers would also be relieved of conducting time studies of both hourly paid workers as well as staff that do not have disabilities for the work being performed (''standard setters''). To maintain compliance with section 14(c), employers must review the wages of all subminimum wage employees at least once every 6 months. The work measurement or time study process involves a review with respect to the quantity and quality of work of each hourly-rated worker with a disability as compared to that of workers engaged in similar work or work requiring similar skills that do not have a disability for the work performed. With the prevailing wage rate for each job and the productivity measurement of each individual worker, the employer must calculate the commensurate wage rate for each worker and implement that wage rate no later than the first complete pay period following the evaluation. These steps would have to be repeated more frequently if an employee changes jobs or the job's structure is changed. Section 14(c) certificate holders also have compliance responsibilities under section 511 of the Rehabilitation Act that require them to obtain, review, and maintain certain documentation of services provided to youth employees prior to subminimum wage employment as well as services required for all subminimum wage employees every 6 months for the first year of employment and annually thereafter. Also, employers must inform each worker paid subminimum wages of local training opportunities for self-advocacy, self-determination, and peer mentoring. (See section III.B.2.ii. for an overview of these requirements.)

Therefore, section 14(c) certificate holders would no longer be conducting many hours of work for each worker that was previously employed under their certificate.

While the Department does not require a specific method for employers to conduct time studies and therefore does not have definitive data on how long it takes employers to complete all these activities, a common method for performing time studies is for the employer to conduct at least 3 separate 25-minute time studies for both the standard setter and hourly paid worker with a disability, which would be at least 75 minutes per typical time study per job worked for each worker.[338] Because time studies of workers with disabilities must occur at least every 6 months, this cost could be 2.5 hours per year per worker. If we were to attribute this cost savings to all current employers with pending or issued certificates (801), and assuming even only 1 employee per each employer, the total cost savings could be at least $116,225 (801 employers × 2.5 hours × $58.04), spread over multiple years as certificates expire. Given that, at the time of drafting, WHD data shows employers with issued certificates employed approximately 40,579 workers under section 14(c) certificates,[339] the Department anticipates the cost savings would be significantly greater.

The Department welcomes comments and data to help inform an estimate of cost savings to certificate holders, including data specific to section 511 compliance responsibilities.

E. Transfers and Other Aspects of Changing Employment Arrangements

The Department expects that if the issuance of section 14(c) certificates is phased out as discussed in this proposed rule, workers currently paid subminimum wages under these certificates would be impacted in various ways. Some of these workers will transition to employment at the full minimum wage while others may lose their subminimum wage employment but will be able to transition to other vocational rehabilitation services and supports available to them. Workers may observe impacts on their earnings, employment status, or hours worked. In this section, the Department discusses a full range of potential transfer impacts associated with this proposed rule and presents evidence to help narrow that potential range. Because of the many uncertainties discussed throughout this section, the Department has not provided quantitative estimates but has instead provided information to help illustrate the potential impact. The Department welcomes comments providing additional data that would help inform an estimate of transfers or other effects not already quantified.

1. Potential Range of Effects

The Department acknowledges that workers employed under section 14(c) certificates may be affected differently by this proposed rule and, therefore, has presented a range of effects here to provide context on potential transfers. The highest potential transfers to workers would be if 100 percent of current workers employed under section 14(c) certificates transition to full-wage employment for the same number of hours they are currently working following the phaseout of section 14(c) certificates, resulting in all affected workers receiving wage increases to the full minimum wage.[340] The other end of the range of possible impacts would occur if only a fraction of workers currently employed under section 14(c) certificates transition to full-wage employment, resulting in a significant loss of earnings (some portion of which would be lost surplus, or the value of the earnings above and beyond the value of leisure). To provide points of reference, the Department has conducted a sensitivity analysis using the following assumptions of the percentage of section 14(c) workers who transition to full-wage employment: 100 percent, 75 percent, 50 percent, and 25 percent.

In order to calculate the upper bound of transfers for the sensitivity analysis, the Department calculated the difference between each worker's reported average hourly earnings and the greater of the Federal minimum wage or State minimum wage for the State in which their employer operates.[341] If all workers on section 14(c) certificates receive wage increases to minimum wage (either as a result of wage increases from their current employer or if they find new employment at the minimum wage) while maintaining their current hours, the total gain in annual earnings would be $174.8 million.[342] This annual estimate would likely take multiple years to phase in as employers make changes leading up to the expiration of their certificate.

For additional potential transfer estimates (*i.e.,* total increased earnings to workers who keep their job at a higher wage, accompanied by loss in earnings to those workers who lose their job), the Department assumed that a percentage (75 percent, 50 percent, and 25 percent) of randomly selected workers would remain employed and be paid the minimum wage. *See* Table 3. If 75 percent of current workers under section 14(c) certificates remain employed and are paid the minimum wage, the Department estimates that transfers from employers to workers would be $131.7 million (additional wages to the workers remaining employed), and the changes from workers to employers would be $27.1 million in wages no longer being paid to the quarter of workers who are no longer employed. With 50 percent or 25 percent of workers remaining employed, transfers (*i.e.,* decrease in wage costs to still-employed workers) and changes (*i.e.,* wages lost by newly-unemployed workers) would be as shown in Table 3, below.

[338] Guidance based on WHD Section 14(c) Online Calculators User Guide, *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/calculatorGuide.pdf.*

[339] WHD, 14(c) Certificate Holders, May 1, 2024, *https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders.*

[340] Workers receiving wage increases as a result of the proposed rule would be subject to both Federal and State minimum wage requirements. Estimates of transfers in States with minimum wage rates higher than the Federal minimum wage incorporated the cost increase to the higher State minimum wage rate.

[341] Due to difficulties in assessing each certificate holder's local area, the analysis did not take into account that some localities may have minimum wages that are higher than the State minimum wage. The differences between a worker's average hourly earnings and local minimum wage could be greater than the difference calculated here, leading to an underestimate of transfers. Additionally, some workers may find new employment at a wage rate above their State or local minimum wage, which could also lead to an underestimate of transfers.

[342] The average of the difference between the applicable minimum wage and the section 14(c) wage is $6.49 and the average of the reported average number of hours worked per week is 11.45. Multiplying the increase in weekly earnings when section 14(c) workers earn the applicable minimum wage by the number of workers by 52 weeks ($76.86 × 43,748 × 52) equals $174.8 million per year.

Percentage of workers in minimum wage employment (%)	Percentage of workers who lose employment (%)	Total transfers from employers to workers (in millions)	Newly-unemployed workers' lost wages (in millions)
100	0	$174.8	$0
75	25	131.7	27.1
50	50	87.7	54.7
25	75	43.8	81.7

The Department requests comments providing quality empirical research on the effects of phasing out the payment of wages below the Federal minimum wage on employment, earnings, or other outcomes for workers with disabilities.

2. Illustrative Analysis To Help Inform Estimates

In order to help narrow the range of potential effects, the Department has performed an illustrative analysis to help assess the impact of phasing out section 14(c) certificates on labor force outcomes for workers with disabilities. As discussed above in section III.D., in recent years, an increasing number of States and localities have prohibited, limited or planned to phase out the payment of subminimum wages to workers with disabilities. The Department conducted an analysis looking at employment and earnings outcomes for individuals with I/DD in states that have phased out the issuance of section 14(c) certificates compared to the states that continue to allow the payment of subminimum wages to workers with disabilities. If, as the Department has stated, the cessation of section 14(c) certificates does not lead to adverse labor market outcomes for workers currently employed under these certificates, then one would expect to find no statistically significant difference between the employment and labor force participation outcomes for workers with disabilities in states that have phased out the payment of subminimum wages for workers with disabilities compared to those that have not. Thus, the Department used data from the American Community Survey (ACS) from 2013 to 2023 in regression analyses to look at employment and labor force status for workers with cognitive difficulties in states that have banned the payment of subminimum wages for workers with disabilities versus those that have not.[343]

The Department notes that there may be some uncertainties in the data that prevent the conclusions of the analysis from being applied to a definitive transfer estimate. First, phaseouts of the payment of subminimum wages were implemented gradually in many states and in some instances are still ongoing. This phased elimination complicates the measurement of the timing of the effect of disallowing subminimum wages because it is unclear how much of the impact will occur immediately versus what will occur over time as current certificates expire. Second, multiple states have prohibited the payment of subminimum wages to individuals with disabilities in recent years; thus, state data representing their prohibition are not yet fully represented in the ACS.[344] Third, complete ACS data on disability status and other variables is not available for the year 2020 due to data collection issues during the COVID–19 pandemic. Lastly, the overall population of workers with cognitive difficulties in the ACS is not a perfect representation of the specific population of workers employed under section 14(c) certificates.[345]

The Department conducted an analysis comparing the change in labor force outcomes for workers with disabilities in states that stopped the payment of subminimum wages with the changes in outcomes for workers with disabilities in states that did not. Specifically, the Department looked for differences in employment status (measured by the variable asking if an individual worked last week) and labor force status (whether an individual was in the labor force).[346] In the regression model, the Department used year fixed effects to control for any common factors that affected all states equally in each year, such as the business cycle or the COVID–19 pandemic. The Department used state fixed effects to control for any unobserved characteristics that are specific to each State and do not vary over time, such as the relative size of the population of individuals with disabilities or the availability of social services. The Department also controlled for observable factors that vary by State and year and could affect the outcomes of interest, such as the labor market outcomes for workers with no cognitive disabilities, since that could reflect overall labor market conditions.

Despite including year fixed effects to account for common yearly shocks, analyzing workforce trends by State and year highlights a potential pitfall in using 2020 data. The differences-in-differences approach assumes that State-specific trends in the relevant labor force measures prior to the change in subminimum wage laws are similar across all States, known as the ''parallel trends'' assumption. The pandemic caused significant disruptions in each State's labor markets, which are reflected in the outcomes for that year. As a result, the assumption of parallel trends is less likely to hold as systemic changes such as the pandemic may have disproportionately affected different

[343] ACS identifies other groups of individuals with disabilities, such as hearing and visual disabilities, independent living difficulties, self-care difficulties, and ambulatory disabilities. This analysis focuses on individuals with cognitive difficulties, as this group would be more directly affected by the proposed rule due to its larger participation in section 14(c) certificate employment. For purposes of this analysis, the Department assumes that the ACS category of cognitive difficulties is most similar to the population of interest, workers with I/DD. As noted above, based on WHD section 14(c) certificate data as of May 1, 2024, individuals with I/DD comprised about 91 percent of the workers with disabilities being paid subminimum wage.

[344] For a fuller discussion of the States that have enacted legislation prohibiting or limiting the payment of subminimum wages, see section III.D. of this proposal.

[345] As noted in section VII.B.1., most workers employed under 14(c) certificates have I/DD listed as their primary disability. The disability questions in the ACS are much more general than the specific requirements of an I/DD diagnosis. Thus, it is likely that respondents with cognitive difficulties in the ACS include individuals who do not meet the definition for having I/DD. It is uncertain how well the ACS respondents with cognitive difficulties represent the labor market behaviors of individuals working under section 14(c) certificates, but the Department believes that there is no clearly better data available. For a more detailed discussion, *see* Havercamp, S.M., Krahn, G., Larson, S., Weeks, J.D. and the National Health Surveillance for IDD Workgroup (2019), ''Working Through the IDD Data Conundrum: Identifying People with Intellectual Disability and Developmental Disabilities in National Population Surveys,'' Washington, DC: Administration on Intellectual and Developmental Disabilities, *https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/National_Data_Paper_AIDD-ACL_09.25.2019%20508%20compliant.pdf.*

[346] The Department used a differences-in-differences approach to compare changes in these measures before and after payments were stopped to States that did not stop payment of subminimum wages.

groups in each State's labor force. Moreover, the ACS was also heavily affected in 2020, leading the data to fail the Statistical Data Quality Standard from the Census Bureau for that year.[347] Given these concerns, the 2020 data were excluded from the analysis. To check the validity of the parallel trend assumption, the Department visually inspected these States' trends from 2010 to 2022, which indicated that the pre-treatment trends were largely parallel despite variation around each State's average that makes the visual interpretation less clear. These findings remain consistent when controlling for State- and year-fixed effects.[348] While it is impossible to completely ascertain the validity of the parallel trend assumption because it relates to a counterfactual world where the policy change did not occur, this evidence suggests that the estimation assumption is reasonable in this context.

The Department performed two different analyses, one focusing on the States that enacted an immediate transition away from the payment of subminimum wages, and one including states that gradually phased out the policy. The Department did not find significant differences in the results of these two analyses on employment or labor force participation.

The Department's analysis yields no statistical evidence that employment or the labor force participation rate of individuals with cognitive disabilities differed in States that stopped the payment of subminimum wages.[349] The findings of this analysis do not support that the changes in this proposed rule would lead to statistically detectable adverse labor force outcomes for workers employed under section 14(c) certificates. Due to the uncertainties discussed above, the Department has not applied the results of this analysis to a definitive transfers estimate. However, these results can help to narrow the range of potential transfer effects, suggesting that the lower loss of employment estimate of transfers may be more likely to be realized than the higher loss of employment.[350]

3. Additional Evidence

In 2015, in response to a class action complaint that was filed on behalf of individuals with I/DD, the State of Oregon entered into a statewide settlement agreement that required, among other things, that Oregon decrease State support of sheltered workshops for individuals with I/DD and expand access to supported employment services that allow the opportunity to work in CIE settings. Oregon implemented competitive and supported employment strategies, ultimately ending the payment of subminimum wages to workers with disabilities in Oregon. A 2022 report on the changes made following the settlement agreement reported that in 2016—the year the settlement was reached and approved by the court, there were 1,405 people working in sheltered workshops in Oregon, and by 2021, that number had declined to zero.[351] This report also noted that Oregon placed 1,138 individuals from the class who had previously worked for subminimum wages into CIE.[352] This data shows that it is possible, with the right supports, for large numbers of workers with disabilities earning the subminimum wage to transition to full-wage employment opportunities. Although the evidence comes from just one State, the Department believes that the results could be scalable, and that it further serves to narrow our estimated impacts in the direction of more affected workers finding employment at the full Federal minimum wage. *See* discussion in section VII.B.; Figure 1, Panel A (Employment-Population Ratio—With a Disability, 16 Years and Over, 2014—2024).

As discussed in section III, legislative, policy, and programmatic changes have broadly influenced available options for workers with disabilities today. Because of these changes, and the evidence discussed above, the Department believes that this proposed rule would not result in widespread negative labor force outcomes for individuals with disabilities.

4. Other Transfers or Behavior-Change Effects

The Department also considered additional impacts that may occur as a result of this proposed rule. For example, it could be possible for some affected workers to see a reduction in hours worked. If the certificate holder chooses to retain the section 14(c) workers and pay them the full Federal minimum wage, they may also choose to offset increased labor costs by providing fewer hours of work for these workers. The Department has not estimated a change in hours that may result from this rule but believes that the change could be minimal given that the current average number of hours worked by workers on section 14(c) certificates is very low (as discussed in section VII.B., the mean number of hours worked by this population is 11.45 hours per week.) Nevertheless, the Department welcomes comments on the extent to which this could occur.

Following the changes proposed in this rule, some workers who were previously employed under section 14(c) certificates could also experience a change in eligibility for certain entitlement programs, and therefore a change in the public benefits that they receive. Any change in benefits would depend on a number of factors, including whether each individual finds employment at or above the full minimum wage following the phaseout of section 14(c) certificates, the number of hours they work, and other factors. The Department has not quantified this change in benefits, because there is no data available on all of the benefits currently received by workers under section 14(c) certificates, and any change in benefits depends heavily on the situation of each individual. However, the Department welcomes comments or data to better understand this potential transfer.

Additionally, there may be some impacts that go beyond the affected workers employed under section 14(c) certificates. For example, some certificate holders employ support staff to assist the workers with disabilities

[347] According to Census documentation, ''[B]ecause of the underlying quality concerns, the Census Bureau urges caution in using the experimental estimates as a replacement for standard 2020 ACS 1-year estimates. Users should evaluate the estimates and alternatives to determine if they are suited for their needs.'' *https://www.census.gov/newsroom/press-releases/2021/experimental-2020-acs-1-year-data.html.* Specifically, ''the Census Bureau does not recommend comparing the 2020 ACS 1-year experimental estimates with our standard ACS estimates or the decennial census, or comparing the 2020 1-year PUMS data with standard pre-tabulated products or PUMS-based estimates from previous years.'' *https://www.census.gov/newsroom/press-releases/2021/changes-2020-acs-1-year.html.*

[348] A formal statistical analysis to confirm parallel trends in the pre-treatment period would need to test the divergence in the outcomes before the policy change. However, there are difficulties to applying the test in this context. First, subminimum wage bans were implemented at different times across States, resulting in a staggered treatment period. Second, the partial introduction of the policy in some States introduces further complexity. This makes it challenging to select a single year as the benchmark that applies uniformly to all States, rendering a formal statistical test impractical.

[349] The Department notes that, given the nuanced and evolving nature of these State laws, the classification of these States, laws, and relevant enactment dates is complex. The Department welcomes comment and data from the public on this analysis and the Department's preliminary conclusion that there is no statistical evidence that employment or the labor force participation rate of individuals with cognitive disabilities differed in States that stopped the payment of subminimum wages.

[351] Oregon Department of Human Services, ''*Lane* v. *Brown* Settlement Agreement Report,'' *https://www.oregon.gov/odhs/employment-first/Documents/lane-v-brown-settlement-message-2022-06-21.pdf.*

[352] *Id.*

being paid subminimum wages. These support staff generally provide job coaching, assist the worker with their tasks, and may perform portions of the job, if necessary. They may also assist in communicating on behalf of the employee or providing necessary training including job-related and soft skills. If a certificate holder chooses to no longer employ workers with disabilities, they may also no longer require the services of the support staff, potentially leading to a reduction in employment for the support staff workers. Conversely, if a certificate holder chooses to transition by providing non-work rehabilitation services to individuals with disabilities, they may need to increase their support staff to help with these activities. Even if an employer chooses to transition workers with disabilities to full-wage employment, they may also choose to retain existing support staff, increase these staff, or hire other support staff to assist workers.

The Department welcomes comments and data on additional impacts that could occur following this rule.

F. Benefits

As discussed above, the Department expects that, following the changes proposed in this rule, many current workers with disabilities paid subminimum wages under a section 14(c) certificate will transition to full-wage employment opportunities. The increased wages could improve the financial strength and personal well-being of these workers, while also enhancing the overall equity and inclusion of workers with disabilities in the workplace. For example, in a review of 17 studies on the impacts of CIE on economic, psychological, and physical health outcomes for individuals with intellectual and developmental disabilities, researchers found that workers in CIE are paid higher wages and have better career prospects than individuals in sheltered workshops or non-work activities.[353] They also found a positive relationship between CIE and health outcomes such as quality of life, self-determination, personal independence, locus of control, autonomy, and reduced support needs. On the other hand, the Department has heard from some individuals with disabilities and their families about the benefits that they have experienced in section 14(c) employment. For example, some individuals have explained that they feel safe in their current jobs, view their jobs as providing a secure and stable work community, and feel proud to earn wages, regardless of the amount of those wages. The Department welcomes comments from the public, including individuals with disabilities, their family members, and entities employing workers on section 14(c) certificates, on the benefits of section 14(c) employment. Working in concert with the broader societal shifts in opportunities for workers with disabilities, this proposed rule could also lead to spillover effects for the overall population of individuals with disabilities. In 2023, the labor force participation rate for persons with a disability was 24.2 percent, compared to 68.1 percent for persons with no disability.[354] The changes in this proposed rule could help reduce this gap in labor force participation. If individuals with a disability view subminimum wage employment as the only option for them, they may choose to remain out of the workforce. They may be more likely to look for a job if they know that they would be paid at least the full minimum wage. For example, the National Longitudinal Transition Study-2 (NLTS2) found that there was a strong desire among youth with disabilities to participate in competitive employment. Specifically, the NLTS2 found that among the 70 percent of secondary school students with disabilities who identified employment as a goal for the post-school years, 62 percent had a goal to work in competitive employment, while only 3 percent wished to work in ''sheltered'' employment.[355] By phasing out the issuance of section 14(c) certificates and ending subminimum wage employment for workers with disabilities, this rule could lead to an increase in labor force participation among individuals with disabilities more broadly.

Businesses may also find it beneficial to integrate workers with disabilities into their workplace. For example, employers working with job coaches can identify work solutions that will resolve company needs and result in mutually beneficial employment relationships for employers and employees with disabilities. Additional potential benefits to employers are expansion of their talent pool, creation of more inclusive workplaces, and promotion of compliance with EEOC law.[356] The Department also welcomes comments providing additional information on the impacts of increasing labor force participation of people with disabilities.

As explained throughout this notice of proposed rulemaking, the Department has proposed to phase out section 14(c) certificates because the Department's preliminary conclusion is that such certificates do not continue to be necessary in order to prevent the curtailment of employment opportunities for individuals with disabilities. The Department also predicts, as evidenced in the transfers analysis above, that a significant share of workers currently employed under section 14(c) certificates will be able to transition to full-wage employment. The Department would welcome additional data to quantify the various benefits of this proposed rule.

VIII. Initial Regulatory Flexibility Analysis (IRFA)

The Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires that an agency prepare an initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, regulations that will have a significant economic impact on a substantial number of small entities.

A. Reasons Why Action by the Agency Is Being Considered and Statement of Objectives and Legal Basis for the Proposed Rule

The FLSA generally requires that employees be paid at least the Federal minimum wage, currently $7.25 per hour, for every hour worked and at least one and one-half times their regular rate of pay for each hour worked over 40 in a single workweek. 29 U.S.C. 206(a), 207(a). Since its enactment in 1938 through today, section 14 of the FLSA has included a provision authorizing the Department to issue certificates permitting employers to pay workers whose disabilities impair their earning

[353] Taylor, Joshua et al., ''The Impact of Competitive Integrated Employment on Economic, Psychological, And Physical Health Outcomes for Individuals With Intellectual and Developmental Disabilities,'' Journal of Applied Research in Intellectual Disabilities: JARID vol. 35,2 (2022): pp. 448–459, *https://doi.org/10.1111/jar.12974.*

[354] U.S. Dep't of Labor, Bureau of Labor Statistics Bureau of Labor Statistics, Current Population Survey, Table A–6. Employment status of the civilian population by sex, age, and disability status, not seasonally adjusted, *https://www.bls.gov/webapps/legacy/cpsatab6.htm.*

[355] Mary Wagner, Lynn Newman, Renee Cameto, Nicolle Garza, and Phyllis Levine, ''After High School: A First Look at the Postschool Experiences of Youth with Disabilities. A Report from the National Longitudinal Transition Study-2 (NLTS2),'' SRI International, April 2005, pp. 5–3 to 5–4, *https://www.nlts2.org/reports/2005_04/nlts2_report_2005_04_complete.pdf.*

[356] Virginia Commonwealth University, ''Supporting Individuals with Significant Disabilities: The Roles of a Job Coach,'' *https://dors.maryland.gov/crps/Documents/RSM2_0800-4.pdf.*

or productive capacity at wage rates below the Federal minimum wage. That statutory provision, however, has always imposed an important prerequisite: such certificates may only be issued to the extent ''necessary to prevent curtailment of opportunities for employment.'' [357] Given the profound legal and policy developments that have vastly expanded employment opportunities and rights for individuals with disabilities since the Department last substantively updated regulations governing section 14(c) in 1989, and even more so since the Department first promulgated regulations upon enactment in 1938, the Department preliminarily concludes that subminimum wages are no longer necessary to prevent the curtailment of employment opportunities for individuals with disabilities.

The Department specifically proposes to cease issuance of new section 14(c) certificates to employers submitting an initial application on or after the effective date of a final rule and permit existing section 14(c) certificate holders, assuming all legal requirements are met, to continue to operate under section 14(c) certificate authority for up to 3 years after the effective date of a final rule.

B. Description of the Number of Small Entities to Which the Proposed Rule Will Apply

The proposed rule will impact entities who currently hold a section 14(c) certificate at the time of publication of the final rule. While it could, in theory, also impact those who were previously interested in applying for a section 14(c) certificate, the percentage of applications that WHD receives from initial applicants (*i.e.,* applicants who have not previously applied for a section 14(c) certificate) is very small. From the May 1, 2024, WHD data, only 3 percent of applicants indicated that they were filing an initial application. Both the number of total certificate holders and initial applicants has been trending downward over time and the Department expects that the trend would continue even in absence of this proposed rule. Therefore, the Department does not expect the net number of affected entities to be higher than the number of current certificate holders.

The overwhelming majority of current certificate holders are Community Rehabilitation Programs (CRPs), representing approximately 93 percent of current certificate holders as of May 2024. In the context of section 14(c), WHD defines CRPs as ''not-for-profit agencies that provide rehabilitation and employment for people with disabilities.'' Only a small percentage of current certificate holders are private-sector, for-profit businesses, as discussed in section VII.B.

To estimate the impact of eliminating section 14(c) certificates on small entities, the Department first determined whether current section 14(c) certificate holders were ''small'' as defined by the SBA. SBA broadly defines an entity (whether a ''business'' or a nonprofit ''organization'') as ''small'' if it is ''independently owned and operated'' and is ''not dominant in its field of operation.'' More concretely, SBA defines an entity as small if its employees or annual revenues are less than the threshold published in its Table of Size Standards.[358] Although affected entities fall under different NAICS, for the vast majority of section 14(c) certificate holders, the applicable size standard is $20 million in revenues. To perform this task, the Department began with the list of entities currently holding a valid section 14(c) certificate, then used the entity's name, IRS Employer Identification Number (EIN), and address to ascertain the primary NAICS code, sales/revenue, and number of employees in business databases and other online searches.[359] The Department determined that 636 of these firms, which consists of both non-profit and for-profit entities, are small using the SBA size standard based on the primary NAICS code of each entity, which represent the Department's best estimate given inherent uncertainties in publicly available data, especially for for-profit organizations. Table 4 contains the number of and percentage of small entities by major industry NAICS code. Table 5 contains the distribution of these small entities by NAICS code and entity type, as reported on form WH–226.

TABLE 4—NUMBER AND PERCENTAGE OF SMALL ENTITIES BY NAICS

6-digit NAICS	NAICS description	Number of small entities	Percentage of small entity certificate holders (%)
623220	Residential Mental Health and Substance Abuse Facilities	29	4.6
624120	Services for the Elderly and Persons with Disabilities	39	6.1
624190	Other Individual and Family Services	68	10.7
624310	Vocational Rehabilitation Services	277	43.6
813319	Other Social Advocacy Organizations	20	3.1
Other NAICS [a]		203	31.9
All		636	100

Note:
[a] The five most frequent NAICS codes within the ''Other NAICS'' category are 611110 (Elementary and Secondary Schools), 621420 (Outpatient Mental Health and Substance Abuse Centers), 623990 (Other Residential Care Facilities), 621498 (All Other Outpatient Care Centers), and 623110 (Nursing Care Facilities (Skilled Nursing Facilities)). Of the 203 entities in the ''Other NAICS'' category, 66 entities are in one of these five NAICS codes.

[357] 29 U.S.C. 214(c).

[358] SBA size standards by NAICS code are available at *https://www.sba.gov/document/support-table-size-standards.* SBA guidance defines both small businesses and small non-profit organizations as entities that are ''independently owned and operated and not dominant in its field, with no indication that the size standards for businesses are not applicable to organizations.'' See ''How to Comply with the Regulatory Flexibility Act,'' *https://advocacy.sba.gov/wp-content/uploads/2019/07/How-to-Comply-with-the-RFA-WEB.pdf.* SBA defines a governmental jurisdiction as ''small'' if it has a population of less than 50,000 residents.

[359] The IRS Tax Exempt Organization Search Tool, *https://apps.irs.gov/app/eos/,* was used to obtain revenue from tax-exempt filings, which includes all public support. DemographicsNow and AtoZdatabases were also used to obtain more recent revenue than available on the IRS Tax Exempt Organization Search Tool, to collect information on the number of employees, and for revenues of for-profit entities.

TABLE 5—DISTRIBUTION OF SMALL ENTITIES, BY ENTITY TYPE AND NAICS CODE

6-Digit NAICS	NAICS description	Businesses	CRPs	Hospitals or residential care facilities that employ patients	SWEPs	Total
623220	Residential Mental Health and Substance Abuse Facilities.	2	27	0	0	29
624120	Services for the Elderly and Persons with Disabilities	0	39	0	0	39
624190	Other Individual and Family Services	2	66	0	0	68
624310	Vocational Rehabilitation Services	8	267	0	1	276
813319	Other Social Advocacy Organizations	0	19	1	0	20
Other NAICS[b]		15	180	6	2	203
All[a]		27	589	7	3	635

Note: "Entity Type" is as designated based on the "Certificate Type" listed in the current section 14(c) certificate holders list, available at *https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders/archive.* If an entity lists more than one certificate type, and one of those types is Community Rehabilitation Program, the entity is categorized as a CRP. Entities with certificate types of "Business Establishment" only are categorized as Businesses and entities with certificate types of "Hospital/Patient Worker Facility" only are categorized as Hospitals or Residential Care Facilities that Employ Patients.

[a] One entity has a Certificate Type of "Unknown" in NAICS code 624310 (Vocational Rehabilitation Services) and is excluded from this table.

[b] The five most frequent NAICS codes within the "Other NAICS" category are 611110 (Elementary and Secondary Schools), 621420 (Outpatient Mental Health and Substance Abuse Centers), 623990 (Other Residential Care Facilities), 621498 (All Other Outpatient Care Centers), and 623110 (Nursing Care Facilities (Skilled Nursing Facilities)). Of the 203 entities in the "Other NAICS" category, 66 entities are in one of these five NAICS codes.

C. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

There are no reporting or recordkeeping requirements associated with this proposed rule. Thus, the direct costs to affected entities would be rule familiarization costs, adjustment costs, and potential payroll increases if they choose to retain their workers currently employed under section 14(c) certificates and pay the full minimum wage. As discussed in section VII.C.1, total rule familiarization costs are $92,980 (801 employers × 2 hours × $58.04), and the per entity cost is $116 ($58.04 × 2 hours) in Year 1. As discussed in section VII.C.2., the Department did not provide a definitive estimate of adjustment costs, because of the uncertainties of how and when each certificate holder would respond to the rule. However, as an example, if certificate holders incurred an average of 1 hour of adjustment costs, their per entity cost would be $58.04.[360]

Using aggregate data on workers employed under section 14(c) certificates as submitted by employers on form WH–226A, the Department calculated the mean increase in wage cost per employee and the total number of section 14(c) workers by State. These additional wage costs represent the maximum transfers from employers to workers because they are calculated based on each section 14(c) worker being paid the applicable minimum wage (*i.e.,* the greater of the State or Federal minimum wage) and working for the same number of hours as they currently work. The Department calculated total wage cost by multiplying the mean increase in wage cost per employee in each State by the sum of the number of section 14(c) workers for all certificate holders in the state. The Department added the upper bound of wage costs, regulatory familiarization cost, and adjustment costs to estimate the total cost of the rule for small entities.

The Department calculated the sum of the revenue of the small entities holding section 14(c) certificates by state using the revenues associated with each small entity identified in the business databases as described in the previous section.[361] The Department then divided total cost to small section 14(c) certificate holders by aggregated revenues to yield the estimated cost to revenue ratios by NAICS code as shown in Table 6. Many of these ratios of cost to revenue are greater than the generally accepted threshold of one percent that indicates a significant impact. The results presented in this table assume that public funding streams to nonprofit CRPs remain constant. To the extent that public funding streams change as a result of implementation of this proposal, nonprofit revenues from that source will directly increase or decrease.

[360] For additional discussion of adjustment costs, see section VII.C.2.

[361] The Department imputed revenue using the number of employees for five entities for which revenue was not found.

TABLE 6—ESTIMATED RATIOS OF COMPLIANCE COST TO REVENUE FOR SMALL ENTITIES CURRENTLY HOLDING VALID SECTION 14(c) CERTIFICATES, BY NAICS CODE

6-Digit NAICS [a]	Proportion of revenue impacted														Total
	<1%		1%–2%		2%–3%		3%–4%		4%–5%		5%–10%		≥10%		
623220	15	51.7%	4	13.8%	2	6.9%	5	17.2%	1	3.4%	2	6.9%	0	.....	29
624120	10	25.6%	4	10.3%	7	17.9%	3	7.7%	2	5.1%	6	15.4%	7	17.9%	39
624190	13	19.1%	13	19.1%	10	14.7%	5	7.4%	2	2.9%	12	17.6%	13	19.1%	68
624310	51	18.4%	30	10.8%	28	10.1%	30	10.8%	16	5.8%	45	16.2%	77	27.8%	277
813319	7	35.0%	1	5.0%	5	25.0%	1	5.0%	1	5.0%	1	5.0%	4	20.0%	20
Other NAICS [b]	68	33.5%	21	10.3%	18	8.9%	14	6.9%	14	6.9%	24	11.8%	44	21.7%	203
Total	164	25.8%	73	11.5%	70	11.0%	58	9.1%	36	5.7%	90	14.2%	145	22.8%	636

Note:
[a] NAICS descriptions are 623220 (Residential Mental Health and Substance Abuse Facilities), 624120 (Services for the Elderly and Persons with Disabilities), 624190 (Other Individual and Family Services), 624310 (Vocational Rehabilitation Services), and 813319 (Other Social Advocacy Organizations).
[b] The five most frequent NAICS codes within the ''Other NAICS'' category are 611110 (Elementary and Secondary Schools), 621420 (Outpatient Mental Health and Substance Abuse Centers), 623990 (Other Residential Care Facilities), 621498 (All Other Outpatient Care Centers), and 623110 (Nursing Care Facilities (Skilled Nursing Facilities)). Of the 203 entities in the ''Other NAICS'' category, 66 entities are in one of these five NAICS codes.
[c] Of the 636 small entities affected, 598 (or 94%) are Community Rehabilitation Programs (CRPs), the majority of which are non-profit. As discussed in the preamble, many CRPs provide employment and other services, such as rehabilitation and training, and receive public funding. Such entities also often pay their operating costs through a mix of public funding and public and private contracts for goods or services. CRPs generally operate differently than private, for-profit small businesses and do not focus on earning profit through their operations. For the cost-revenue ratio calculations of the 598 CRPs, the Department used their total receipts, which includes grants and donations, instead of just revenue. Therefore, the cost-revenue ratios in Table 6 may not accurately reflect the cost impact on their operational continuity.

TABLE 7—ESTIMATED RATIOS OF COMPLIANCE COST TO REVENUE FOR SMALL ENTITIES CURRENTLY HOLDING VALID SECTION 14(c) CERTIFICATES, BY ENTITY TYPE

Entity type	Proportion of revenue impacted														All entities
	<1%		1%–2%		2%–3%		3%–4%		4%–5%		5%–10%		≥10%		
Businesses	8	29.6%	1	3.7%	4	14.8%	1	3.7%	1	3.7%	4	14.8%	8	29.6%	27
CRPs	147	24.6%	72	12.0%	66	11.0%	57	9.5%	34	5.7%	86	14.4%	136	22.7%	598
Hospitals or Residential Care Facilities that Employ Patients	7	100.0%	0	.....	0	.....	0	.....	0	.....	0	.....	0	.....	7
School Work Experience Program (SWEP)	2	66.7%	0	.....	0	.....	0	.....	0	.....	0	.....	1	33.3%	3
Total [a]	164	25.8%	73	11.5%	70	11.0%	58	9.1%	35	5.5%	90	14.2%	145	22.8%	635

Note: ''Entity Type'' is as designated based on the ''Certificate Type'' listed in the current section 14(c) certificate holders list, available at *https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders/archive.* If an entity lists more than one certificate type, and one of those types is Community Rehabilitation Program, the entity is categorized as a CRP. Entities with certificate types of ''Business Establishment'' only are categorized as Businesses and entities with certificate types of ''Hospital/Patient Worker'' only are categorized as Hospitals or Residential Care Facilities that Employ Patients.
[a] One entity has a Certificate Type of ''Unknown'' with a proportion of revenue impacted of 4%–5% but is excluded from this table.

The Department has concerns about the accuracy of the underlying data used to calculate these ratios. For example, although the Department was able to verify revenue data for most nonprofit organizations using Form 990 filings with the IRS, other entities' revenue data listed in the business databases may be inconsistent with other company data. Business database listings for other affected section 14(c) certificate holders may show reasonable values for revenue compared to employees but list a number of section 14(c) workers on their form WH–226A that is many times larger than the total number of employees listed in the business database.[362] Finally, some entities appear to have multiple conflicting records in the same database.

The Department considered using other data sources to estimate the impact of this proposed rule on small entities. One option is to use revenue data from the Statistics of U.S. Businesses (SUSB).[363] However, to estimate revenues from SUSB data would require determining the appropriate employment size class of the entity. As described above, due to the prevalence of part-time employment, and duplication in counting the number of employees using section 14(c) certificates, strong assumptions would be required to assign each entity to an employment size class. Furthermore, SUSB only publishes revenue data every 5 years (the Economic Census years and has not yet published revenue data from the 2022 Economic Census). While it is

[362] Some examples of certificate holders for which the respective number of section 14(c) employees greatly exceeds the business database listing for total employees are: 182 versus 2, 102 versus 1, 42 versus 4, and 51 versus 2. Of the 655 small entities, 66 have data values such that the number of section 14(c) workers is at least five times greater than the total number of employees listed in a business database. The WHD application for a section 14(c) certificate requires employers to provide data about the workers with disabilities employed at each separate work site or location. Applicants must include workers corresponding to each work site, and therefore, summary data may count workers multiple times if that worker works for the employer at multiple locations. However, these potential duplicates likely do not account for the large differences noted. Moreover, as explained above in section VII.B.1, the information collected from the form WH–226A is submitted by applicants and may include inaccuracies, such as instances when an employer reports a piece rate instead of an hourly wage rate or miscalculates the wage.

[363] United States Census Bureau, Statistics of U.S. Businesses, *https://www.census.gov/programs-surveys/susb.html.*

possible to inflate 2017 revenues to represent 2022 dollars, that again requires a strong assumption given the impact of COVID on the economy between 2017 and 2022. The Department welcomes comments and data that could provide a more accurate measure of the costs of this proposed rule relative to revenues of affected small entities.

As discussed in section VII.E.1., the Department estimated payroll costs [364] as an upper bound corresponding to a scenario in which all workers on section 14(c) certificates were to find employment at the full minimum wage. However, actual costs are likely to be somewhat lower, as it is possible not all affected subminimum wage workers will transition to employment at the full minimum wage for the same number of hours worked at subminimum wages. For those employers that choose to do so, their increased payroll costs will depend on the number of current workers they have employed under section 14(c) certificates, and their current wages.

In addition, the Department expects costs could be offset by cost savings for affected employers. These cost savings consist of no longer applying for section 14(c) certificates and no longer participating in the activities required to maintain their certificate and determine appropriate commensurate subminimum wage rates for workers. As discussed in section VII.D., the cost savings of no longer filling out the application forms for a section 14(c) certificate could save employers $188.63 annually, while the cost savings of no longer performing time studies of the work of a ''standard setter'' and the hourly paid worker with a disability could save employers, at least, $116.08 (2.5 hours × $58.04) annually.

The Department welcomes comments and data that could help refine the estimates of payroll costs for affected small employers.

D. Alternatives to the Proposed Rule

The Department considered various regulatory alternatives in the formation of this proposed rule. For example, the Department also considered proposing different phaseout periods. As detailed above, the Department proposes that WHD will no longer issue new section 14(c) certificates for initial applications postmarked or submitted online on or after the effective date of the final rule. For employers who seek to renew a section 14(c) certificate, the Department proposes a phaseout period of 3 years from the effective date of the final rule during which those employers may continue to hold a valid section 14(c) certificate (provided that they comply with the statutory and regulatory requirements for certificate holders) and WHD will continue to process renewal applications.

The Department considered proposing both a shorter and longer phaseout period. However, the Department declined to propose a shorter phaseout period (or no phaseout period) because some individuals with disabilities who have been working for employers holding a section 14(c) certificate, employers who have held a section 14(c) certificate, and government entities may need more time to mitigate potential disruptions that might otherwise cause curtailment of employment opportunities. A shorter phaseout period would also be more burdensome on small entities. The Department also declined to propose a longer phaseout period because, in most cases, 3 years should be sufficient to allow for such transitions, and because a longer period might incentivize delay of effective transition measures. As explained above, States that enacted laws containing multi-year phaseouts ranged from 2 years to 7 years, with many States adopting a 2- or 3-year phaseout. The Department has also considered proposing an extension period but instead asks stakeholders to comment on the necessity of any extensions and if so, their scope, structure, and length.

E. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Proposed Rule

The Department is unaware of any Federal rules which duplicate, overlap, or conflict with the proposed rule.

IX. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA),[365] requires agencies to prepare a written statement for rulemaking that includes any Federal mandate that may result in increased expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of $200 million ($100 million in 1995 dollars adjusted for inflation to 2023) or more in at least one year. This rulemaking is not expected to exceed that threshold. *See* section VII. for an assessment of anticipated costs, transfers, and benefits.

X. Executive Order 13132, Federalism

The Department has (1) reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

XI. Executive Order 13175, Indian Tribal Governments

This proposed rule would not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects in 29 CFR Part 525

Administrative practice and procedure, Equal employment opportunity, Individuals with disabilities, Minimum Wages, Reporting and recordkeeping requirements, Vocational rehabilitation, Wages.

■ 1. The authority citation for part 525 continues to read as follows:

Authority: 52 Stat. 1060, as amended (29 U.S.C. 201–219); Pub. L. 99–486, 100 Stat. 1229 (29 U.S.C. 214).

■ 2. Revise § 525.1 to read as follows:

§ 525.1 Introduction.

The Fair Labor Standards Act (FLSA) authorizes the Secretary of Labor, to the extent necessary to prevent curtailment of opportunities for employment, to issue certificates to employers to pay workers whose disabilities impair their earning or productive capacity at commensurate wage rates below the Federal minimum wage rate. In view of the legal and policy developments that have expanded access to employment opportunities for individuals with disabilities since Congress first included the provision for subminimum wages in 1938 and since the Department last substantively updated its regulations in 1989, the Secretary has determined that subminimum wages are no longer necessary to prevent the curtailment of opportunities for employment for individuals with disabilities, see § 525.9. In light of this determination, the Secretary will cease issuing new certificates immediately as of [EFFECTIVE DATE OF FINAL RULE]

[364] For additional discussion of payroll costs, see section VII.E.

[365] 2 U.S.C. 1501 *et seq.*

and certificates will be available only to renewing applicants for a limited phaseout period ending [DATE 3 YEARS AFTER THE EFFECTIVE DATE OF FINAL RULE]. See § 525.13.

■ 3. Revise § 525.2 to read as follows:

§ 525.2 Purpose and scope.

The regulations in this part govern the issuance and cessation of all certificates authorizing the employment of workers with disabilities at special minimum wages pursuant to section 14(c) of FLSA.

■ 4. Revise § 525.7 to read as follows:

§ 525.7 Application for certificates.

(a) As of [EFFECTIVE DATE OF FINAL RULE], an application for a certificate may be filed only by an applicant seeking to renew a certificate pursuant to § 525.13. An applicant seeking to renew a certificate may do so by completing an online application or submitting paper application forms provided by the Wage and Hour Division. For more information and to access the online application system or download forms, see the Wage and Hour Division website at *https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/apply,* or its successor website.

(b) The employer must provide answers to all of the applicable questions contained in the application.

(c) The application must be signed by the employer or the employer's authorized representative.

■ 5. Revise § 525.9 to read as follows:

§ 525.9 Criteria for employment of workers with disabilities under certificates at special minimum wage rates.

(a) As of [EFFECTIVE DATE OF FINAL RULE], the Secretary has determined that certificates allowing for the payment of subminimum wage rates for workers with disabilities are no longer necessary to prevent the curtailment of opportunities for employment.

(b) Pursuant to the regulations set forth above related to certificate phaseout, in order to be granted a renewal certificate authorizing the employment of workers with disabilities at special minimum wage rates during the phaseout period, the employer must provide the following written assurances concerning such employment:

(1) In the case of individuals paid hourly rates, the special minimum wage rates will be reviewed by the employer at periodic intervals at a minimum of once every six months; and,

(2) Wages for all employees will be adjusted by the employer at periodic intervals at a minimum of once each year to reflect changes in the prevailing wages paid to experienced nondisabled individuals employed in the locality for essentially the same type of work.

■ 6. Revise § 525.11 to read as follows:

§ 525.11 Issuance of certificates.

(a) Upon consideration of the criteria cited in these regulations, a special certificate may be issued.

(b) If a special minimum wage certificate is issued, a copy will be sent to the employer. If denied, the employer will be notified in writing and told the reasons for the denial, as well as the right to petition under § 525.18.

(c) Certificates will not be issued to any employer after [3 YEARS FROM THE EFFECTIVE DATE OF FINAL RULE].

■ 7. Revise § 525.13 to read as follows:

§ 525.13 Renewal of special minimum wage certificates.

(a) Applications may be filed for renewal of special minimum wage certificates.

(b) If an application for renewal has been properly and timely filed, an existing special minimum wage certificate will remain in effect until the application for renewal has been granted or denied. No certificate will be valid as of [DATE 3 YEARS AFTER EFFECTIVE DATE OF FINAL RULE] regardless of any pending renewal application.

(c) Workers with disabilities may not continue to be paid special minimum wages after notice that an application for renewal has been denied.

(d) Except in cases of willfulness or those in which the public interest requires otherwise, before an application for renewal is denied facts or conduct which may warrant such action shall be called to the attention of the employer in writing and such employer shall be afforded an opportunity to demonstrate or achieve compliance with all legal requirements.

■ 8. Revise § 525.18 to read as follows:

§ 525.18 Review.

Any person aggrieved by any action of the Administrator taken pursuant to this part may, within 60 days or such additional time as the Administrator may allow, file with the Administrator a petition for review. Such review, if granted, shall be made by the Administrator. Other interested persons, to the extent it is deemed appropriate, may be afforded an opportunity to present data and views. Any review granted cannot result in section 14(c) certificate authority being extended beyond [DATE 3 YEARS AFTER THE EFFECTIVE DATE OF FINAL RULE].

■ 9. Add § 525.25 to read as follows:

§ 525.25 Severability.

The provisions of this part are separate and severable and operate independently from one another. If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision must be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding will be one of utter invalidity or unenforceability, in which event the provision will be severable from this part and will not affect the remainder thereof.

Jessica Looman,

Administrator, Wage and Hour Division.

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