The Legal Intelligencer

Workers With Disabilities Still Face Federally Approved Wage Discrimination

This article is a collaboration between two authors—an attorney whose practice includes disability rights and an advocate for the rights of blind people who has witnessed Section 14(c)'s role in perpetuating injustice.

By **Robin Lipp and Justin Salisbury** | October 12, 2020

Justin Salisbury from the National Federation of the Blind of Pennsylvania and Robin Lipp of Berney & Sang Courtesy photo

The 30th anniversary of the 1990 Americans with Disabilities Act (ADA) is a good time to reflect on progress toward ending discrimination against people with disabilities. But it is also a moment to face the distance we have yet to go. While Title I of the ADA bans many employers from discriminating against qualified individuals on the basis of their disabilities, another federal statute allows employers to discriminate against employees with disabilities by paying them lower wages, including wages below the federal minimum wage. That statute is Section 14(c) of the Fair Labor Standards Act, 29 U.S.C. Section 214(c). It has spurred unconscionable business practices at the expense of adults with disabilities. Now, 30 years after the ADA, the time has come to repeal Section 14(c).

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Section 14(c) Relies on the Biases of Another Era

Section 14(c) allows employers to pay their disabled employees lower wages based on lower asserted productivity. To do so, employers apply to the Department of Labor (DOL) for "special minimum wage" certificates (SMWs) based on a claim that they have employees whose earning capacity is "impaired by age, physical or mental deficiency or injury." Employers judge the diminished earning capacity of their own workers based on a periodic measurement of their productivity compared to nondisabled workers. Notably, if a nondisabled employee has lower than average productivity, minimum wage laws still apply. The carve-out under Section 14(c) applies only to people with disabilities.

Understanding Section 14(c) begins with unpacking the outmoded thinking underlying the law. A 2018 report from the National Council on Disability (https://ncd.gov/publications/2018/new-deal-real-deal) describes the law's origins and present effects. Originally enacted in 1938, Section 14(c) rests on the fallacy that people with disabilities cannot be productive in typical work settings, and so employers should be able to pay them less with no obligation to support or enhance their productivity. Contemporary thinking differs, as the ADA illustrates. The ADA rests on the contrary premise that workers with disabilities should be accommodated in typical work settings so that they can be equally productive.

The Program Has Been Implemented Poorly

While Section 14(c) rests on a false and inherently discriminatory principle, problems under the program have also spread due to a lack of transparency and oversight. Egregious abuses of the program have been documented in reporting by the New York Times (https://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html). Rooted in Rights, a project to convey the stories of people with disabilities, has also documented extensive abuses under the Section 14(c) program (https://www.youtube.com/watch?v=oEYaRuQp0CU&list=PLaYgKAZMUNMx9Ca-9Z4NdIIwLCuQ7FJcB&index=2). But a 2018 investigation by the National Council on Disability found, for example, that DOL's Wage and Hour Division (WHD) "could not identify or report its enforcement efforts by list" of SMW certificate holders, leaving "the public … with no way of knowing whether the WHD has conducted oversight over the private businesses participating in this program."

The National Council on Disability's investigation yielded more disturbing results:

- In a telephone survey of 50 business establishments holding SMW certificates across 18 states and a review of certificate applications, the investigators found businesses paying negligible wages for productive work. One business "reported paying employees with disabilities wages as low as 25 cents and 30 cents per hour to perform assembly and disassembly work when the prevailing wage is $8.15 per hour for the same work performed by nondisabled workers."
- A review of SMW certificate applications for Patient Workers found people earning "between 7 cents and 8 cents per hour on an activity called 'pinatas,'" with average wages across the largest 10 certificate holders at $2.06 per hour.
- A review of Community Rehabilitation Programs (also known as "sheltered workshops"), the largest category of SMW certificate holder, found that the largest ten Community Rehabilitation Programs had a combined annual revenue of over $500 million, but employed over 9,000 disabled workers at below minimum wage in jobs like retail work, janitorial services, and packaging.

Since 1986, there has been no wage floor under Section 14(c), meaning that wages as low as 1 cent per hour are permissible.

Recently, on Sept. 17, the U.S. Commission on Civil Rights issued a report (//www.usccr.gov/files/2020-09-17-Subminimum-Wages-Report.pdf) affirming that "Section 14(c) is antiquated … and its operation in practice remains discriminatory by permitting payment of subminimum wages based on disability without sufficient controls to ensure that the program operates as designed." The report also noted that from 2011 to 2019 over 80% of cases investigated by DOL uncovered violations of 14(c)'s requirements—meager as those requirements are.

The Victims Are Hidden

One reason the program persists is that its victims lack social visibility. Supply chains for things that we all consume include subminimum wage sheltered workshops, but the consumer has little opportunity to discover which products and services rely on subminimum wage labor. While the DOL publishes the list of 14(c) SMW certificates (https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders), businesses that use SMW certificate-holders as subcontractors are unlisted. For example, someone who washes dishes at a restaurant, which itself lacks a certificate, may still be earning less than the minimum wage under a SMW certificate if they work for a subcontractor with a SMW certificate.

According to the DOL's latest figures, there were over 80 Pennsylvania employers with SMW certificates in January 2020, employing over 8,000 Pennsylvanians with disabilities. Nationally, there were over 1,500 employers with SMW certificates in January 2020, employing over 100,000 adults with disabilities. Yet, the reader may have never encountered one of these places.

Many of the sheltered workshops with SMW certificates are physically isolated. Although advocates of the Section 14(c) program have claimed that sheltered workshops get people with disabilities out of institutional settings, in many cases the program moves people with disabilities from one kind of institution to another: Some workshops also provide special housing for the disabled. Controlling—and charging for—the housing arrangements, they shuttle workers back and forth between the workshop and the housing facility. Workers may find themselves living a segregated existence, almost never seeing people from the outside world.

The Program Creates Perverse Incentives for Employers

Section 14(c) creates opportunities for exploitation, even when employers use the program to pay sub-prevailing wages which are higher than minimum wages. For example, if the prevailing wage for a job is $60 per hour, a business could subcontract with a sheltered workshop at $40 per hour for the same work if they agree to use the labor of workers with disabilities. The workshop can then internally assess the workers to be 25 percent productive and subsequently pay them $10 per hour. This allows the workshop to keep $30 per hour for administrative costs. Under scenarios like that, skimming off the value created by workers with disabilities becomes an especially attractive business proposition when workers are highly productive. This form of exploitative wage discrimination is specifically legal because of Section 14(c).

Moreover, the methods employers use to judge worker productivity are easily abused to keep wages low and reduce the potential of workers to leave for competitive jobs. Typically, SMW employers perform a productivity assessment at least once every six months, forecast their workers' productivity based on that assessment, and pay workers according to that production forecast. To avoid increasing pay as productivity naturally rises, and to avoid losing their supply of sub-minimum workers to competitive employment, sheltered workshops can rotate workers among tasks periodically. Workers remain eternally "in training," never gaining the skills needed to transition to a better job. As long as the workshops maintain their pool of workers with disabilities, they retain access to lucrative government contracts, grants, Medicaid funding, philanthropy, and nominal labor costs. These workshops are not designed or incentivized to train workers and transition them to competitive, integrated employment; they are designed to retain their workers, with no incentive to innovate and improve their productivity.

Conclusion

The United States already has systems to rehabilitate people with disabilities and train them for competitive, integrated employment. If we finally reject 1938's view of disabled workers by repealing Section 14(c), we can move forward with finding the potential in every human being and building a society that affords equal dignity to the work of people with disabilities. On the ADA's 30th anniversary, this change is long overdue.

Robin Lipp *is an associate at Berney & Sang. He joined the firm in December after serving as a judicial law clerk in the U.S. District Court for the Western District of Pennsylvania. He earned his Juris Doctor from Harvard Law School and his master's degree in public policy from the Harvard Kennedy School of Government in 2014. Contact him at rdlipp@berneylaw.com.*

Justin Salisbury *is a member of the legislative committee of the National Federation of the Blind of Pennsylvania.*