



## ACCSSES POSITION PAPER

### THE CONTINUUM OF APPROACHES NECESSARY FOR ENHANCING EMPLOYMENT OPPORTUNITIES FOR PERSONS WITH THE MOST SIGNIFICANT DISABILITIES

#### An Analysis of and Recommendations Regarding Disability Employment Issues That Include Center-Based Employment and Section 14(c) of the Fair Labor Standards Act

On March 9, 2009, Senator Tom Harkin held a hearing before the Senate Committee on Health, Education, Labor, and Pensions to address a fundamental public policy question regarding the employment of persons with significant disabilities—what policies, practices and procedures will facilitate the promotion of employment for persons with significant disabilities and at the same time prevent their exploitation by employers? More specifically, the hearing raised questions about the Section 14(c) program under the Fair Labor Standards Act (special minimum wage) and centered-based employment programs operated by community rehabilitation programs (CRPs).

The purpose of this paper is to articulate ACCSES' values and principles regarding the continuum of approaches necessary for enhancing employment opportunities for persons with the most significant disabilities. In addition, the paper presents a specific set of recommendations for expanding and improving the continuum of approaches, including center-based employment programs, and a separate set of recommendations related to special minimum wages under Section 14(c).

ACCSSES represents more than 80 partner organizations across the country as the Voice of Disability Service Providers. ACCSES works to promote and enhance community-based solutions that maximize employment and independent living opportunities for people with disabilities through collaboration with government and other stakeholders to assure that services recognize and support the full potential of each person with a disability to enjoy a meaningful life.

In order to understand our positions, it is important to address several misperceptions about centered-based employment programs and special minimum wages. With respect to center-based employment programs, there is a misperception that all or most workers are paid a wage that is less than the federal minimum wage; this is simply not the case. With respect to Section 14(c), there is a misperception that the law only permits workers with disabilities who are unable to meet productivity standards to be paid wages below the applicable minimum wage when in fact the law enables such workers with disabilities to be paid above the minimum wage (e.g., \$10-12 an hour) but below the prevailing wage in the community when they are working on Federal service contracts.

Thus, the reality is that consistent with the Fair Labor Standards Act, center-based programs pay their workers a range of wages commensurate with their productivity, including wages that are:

- Less than the federal minimum wage (Section 14(c)),
- Above the federal minimum wage but less than the prevailing wage (Section 14(c)),
- At or above the minimum wage, and
- At or above the prevailing wage.



## WHAT ACCSES BELIEVES

**DISABILITY IS A NATURAL PART OF THE HUMAN EXPERIENCE. PRACTICES BY PROVIDERS MUST REFLECT THE FOUR GOALS OF DISABILITY POLICY ARTICULATED IN THE ADA.**

ACCSSES embraces the precept embedded in numerous disability-specific laws that disability is a natural part of the human experience that in no way diminishes the right of individuals with significant disabilities to achieve the four goals of disability policy articulated in the Americans with Disabilities Act (ADA): equality of opportunity, full participation (informed choice and self-determination); live independently, and enjoy economic self-sufficiency commensurate with one's interests, strengths, abilities and capabilities.

ACCSSES respects the inherent value and distinctiveness of each person we serve.

ACCSSES and its members provide services tailored to the distinct needs and desires of each individual. These services allow for individual choice and participation, while affirming the uniqueness of every life. ACCSES fosters independence and community participation among individuals we serve, enhancing their quality of life. ACCSES and its members empower individuals through tools, resources and support they need for increased independence and inclusion in the community.

### CRITICAL IMPORTANCE OF WORK

The mission of ACCSES member organizations encompasses finding work for individuals with disabilities, including those with the most significant disabilities for whom competitive employment has not traditionally occurred. ACCSES believes that work provides both tangible and intangible benefits. Work helps people with disabilities achieve independence and economic self-sufficiency. Work also gives people with disabilities purpose, dignity, self-esteem, and a sense of accomplishment and pride. Individuals should enjoy every opportunity to pursue careers, participate in the workforce and engage actively in the economic marketplace. Both the individual and society benefit from this engagement.

### WORKER EXPLOITATION

ACCSSES members abhor worker exploitation; we support initiatives to protect individuals with disabilities and vulnerable populations from exploitation. ACCSES believes that we must draw a bright line in prohibiting and preventing employers from taking advantage of persons with significant disabilities.



## INFORMED CHOICE AND SELF-DETERMINATION

As a group, individuals with the most significant disabilities experience staggering levels of unemployment and poverty. Reasons include discrimination, work disincentives, lack of adequate health care and personal assistance services and supports. Many of these individuals experience significant work function barriers and/or employment activity limitations. Some individuals with the most significant disabilities may not be qualified i.e., cannot meet production standards and perform the essential functions of a job, even with reasonable accommodations. Notwithstanding their impairments, many of these individuals for whom competitive employment has not traditionally occurred are capable of employment when provided individualized jobs and services and supports on an ongoing basis (or on a recurrent basis when the manifestation of the impairment is episodic) over an extended period of time.

Consistent with the right of the individual with a significant disability to make an informed choice and the principle of self-determination, ACCSES supports the full continuum of community-based work opportunities available for persons with the most significant disabilities, including supported employment and customized employment opportunities provided in integrated settings and center-based employment opportunities provided by CRPs.

More specifically, public policy should encourage and facilitate efforts to find competitive integrated employment opportunities (at or above the minimum or prevailing wage) for those who are qualified i.e., can meet production standards and perform the essential functions of a job, with or without a reasonable accommodation. This is particularly the case for youth with disabilities graduating from school. This includes expanding and improving supported employment and customized employment initiatives.

At the same time, the right of an individual with a significant disability to make an informed choice consistent with the principle of self-determination should also include the right to work in a center-based program operated by a qualified nonprofit community rehabilitation program that provides individualized jobs, ongoing services and supports, job stability and security the individual needs and desires, provides intangible benefits, and the opportunity for promotion and advancement.

This opportunity to work in a center-based program may be temporary until the individual develops necessary job skills and is able to secure the necessary services and supports to work for a private sector employer. For these individuals, CRPs should facilitate outplacement of current workers with significant disabilities interested in such jobs with private sector employers either directly or through support by, collaboration with, or referral to publicly-supported programs providing funding for necessary ongoing services and supports.

For other individuals with significant disabilities, the opportunity to work in a center-based program may be long term given the individual's capacity, interests and desires, negative experiences working in private sector jobs, and ongoing needs for supports and services not traditionally provided in the private sector. This same right to informed choice and self-determination should extend to employment opportunities that include job crews and enclaves.



## **OPPORTUNITY TO WORK WHEN UNABLE TO MEET PRODUCTIVITY STANDARDS WITH OR WITHOUT REASONABLE ACCOMMODATIONS.**

According to GAO, approximately 425,000 workers with disabilities currently receive special minimum wages because they are unable to meet productivity standards with or without reasonable accommodations. Of this total, about 75% are people with intellectual disabilities. Workers with disabilities that receive special minimum wages include workers paid wages that are less than the federal minimum wage as well as individuals who are paid above the federal minimum wage but below the prevailing wage in the community. ACCSES recognizes that some individuals with significant disabilities may not be able to meet productivity standards and perform the essential functions of a job (with or without reasonable accommodations) that entitle them to be paid the federal minimum wage or prevailing wage. In order to enable such individuals to work and receive the benefits of working, Congress enacted Section 14(c) of the Fair Labor Standards Act (FLSA). In the language of the legislation, Section 14(c) is designed “to prevent the curtailment of opportunities for employment” of persons with significant disabilities by allowing the payment of special minimum wages commensurate with their level of productivity.

If CRPs and other employers were required to pay the federal minimum wage or prevailing wage, these individuals with disabilities would likely never have been offered the opportunity to work in the first place once it was determined that they were unable to meet production standards i.e., they were determined not qualified for the job. Those individuals with significant disabilities who were offered an opportunity to work but were determined to be unable (with or without reasonable accommodations) to meet productivity standards likely would not be retained and would be replaced by persons with less significant disabilities or higher productivity capacity i.e., individuals who were able to meet the qualification/productivity standards with or without reasonable accommodations.

Without Section 14(c), these individuals would be forced to stay at home, enter day habilitation centers (if a space were available) or live in an institution. In short, eliminating or phasing out the special minimum wage would likely result in many individuals with significant disabilities receiving no pay whatsoever instead of a special minimum wage and denying them the tangible as well as the intangible benefits of work. In addition, such a policy would likely result in “creaming” or “cherry-picking” (i.e., excluding those with the most significant disabilities in favor of those with more moderate impairments).

## **RECOMMENDATIONS**

### **REFORMS TO ENHANCE EMPLOYMENT OPPORTUNITIES FOR PERSONS WITH THE MOST SIGNIFICANT DISABILITIES**

ACCSSES supports the following initiatives to enhance meaningful choice for individuals with the most significant disabilities, including enhanced opportunities to work in competitive integrated employment (at or above the minimum or prevailing wage).



- 1) Support systems change initiatives designed to expand the availability of supported and customized employment in competitive, integrated settings (at or above the minimum wage) and other vocational supports by creating additional incentives to operate such programs, including funding for long-term services and supports and ensuring seamless transitions between funding streams. This also includes support and technical assistance to community rehabilitation programs that want to expand and improve their supported employment and customized employment programs.
- 2) Fund research and demonstration projects to test different types of incentives, wage subsidies, flexible funding or other strategies that would work best to improve wages for individuals with significant disabilities currently paid below the minimum or prevailing wage and expand employment options. Research should also identify cost implications.
- 3) Acquire, adopt and utilize best practices to enhance the quality of the work environment, including adopting approaches for enhancing productivity and wages (including through the use of assistive technology) and career advancement and promotion in various work environments.
- 4) Increase focus, emphasis and priority on youth across systems and agencies, including all federal employment projects and proposals including internships, job readiness, AmeriCorps, Job Corps, and mentoring programs and strengthen statutory connections between IDEA and the Rehabilitation Act as well as Social Security Act, SCHIP, Medicaid, and the developmental disabilities and other systems to require smooth transition from school to work.
- 5) Improve state delivery infrastructures to increase successful employment outcomes such as vocational schools, VR, community and four-year colleges (disability and career services).
- 6) Expand focus on employer and business related outreach initiatives.
- 7) Make work pay by expanding and improving work incentive provisions in SSI and SSDI programs and expanding the availability of health care, including Medicaid and Medicare.
- 8) Provide better education/targeted outreach to increase knowledge of SSI and SSDI work incentives, including increased support for benefits counseling.
- 9) Modernize the AbilityOne Program.
- 10) Establish a National Commission on People with Disabilities, Employment and Social Security.
- 11) Direct DOL to effectively implement affirmative action programs under Section 501 and 503 of the Rehabilitation Act, including changes in the Section 503 regulations to include goals and timetables.
- 12) Reinstate Executive Order 13173 mandating the hiring of 100,000 new qualified federal employees with disabilities and establish a dedicated OPM unit led by a senior administration official to maximize awareness and use of Schedule A across all portals and federal agencies.
- 13) Implement and enforce existing laws.



## SECTION 14(c) PROGRAM

ACCSSES opposes the elimination or phasing out of the Section 14(c) program for all or a subset of the population of persons with the most significant disabilities. ACCSES also opposes the imposition of an arbitrary floor (e.g., 30% of minimum wage) with or without exceptions. People with disabilities must retain their right to make informed choices and exercise the right to self-determination. Individuals with the most significant disabilities must not be denied the opportunity to work in a center-based employment at a wage that reflects their productivity. Eliminating or repealing Section 14(c) or setting an arbitrary floor will simply have the effect of denying the opportunity to work for individuals with the most significant disabilities who cannot meet the productivity standards.

ACCSSES supports the following recommendations for improving the Section 14(c) program, including efforts to foster increased employment, minimize exploitation, and strengthen enforcement and sanctions when exploitation does occur.

### ADMINISTRATIVE RECOMMENDATIONS:

- 1) Establish an advisory committee at the Wage-Hour Division, which includes community rehabilitation providers, tasked to review the administration of the Section 14(c) program and make recommendations for streamlining and simplifying the program to avoid unintended violations and at the same time enhance accountability and accuracy of determinations.
- 2) Significantly increase funding to enforce wage and hour laws for the two agencies that administer the section 14(c) provisions—the DOL Wage and Hour Division and the Office of the Solicitor. More specifically, direct the Department of Labor to substantially increase:
  - The availability of funding for technical assistance provided directly by DOL or by others to employers to maximize voluntary compliance, and
  - The number of onsite investigations to ensure compliance.
- 3) Add increased penalties for willful violations – up to \$2500 in civil penalties per violation. Second willful violations subject to possible \$5000 civil fine. Compliance of violators will be re-evaluated after violations found. Repeat violations can result in certificate revocation for one year. Willful violations may be criminally prosecuted and fined up to \$20,000. DOL may bring suit for back pay and an equal amount for liquidated damages and it may obtain an injunction to restrain persons from violating the act.
- 4) Increase administrative funding to the Social Security Administration to improve oversight of the representative payee system.
- 5) Develop and implement a plan to make information about the section 14(c) program more readily accessible to workers themselves, their families and authorized representatives as well as to the public. Information should be available about the wages, types of disabilities of the workers and the number of workers.



## RECOMMENDATIONS FOR UPDATING THE SECTION 14(c) PROGRAM

- 6) Spell out the requirements for determining productivity for persons with disabilities paid on a piece rate and by the hour. Clarify that the correct piece rate must be established for each job and validated time studies must be used.
- 7) For hourly rated workers, initial productivity must be determined within 30 days of job start and if a higher wage is determined within the 30 day period, the persons pay should be adjusted retroactively to start date. If the wage rate would go down as a result of the evaluation, the worker should retain the higher wage until the new wage determination has been completed.
- 8) Clarify that hourly evaluations must occur no less than every six months or when the job changes or there is a noticeable increase in the workers' productivity.
- 9) For hourly workers whose productivity is less than 30%, evaluation of productivity must be measured at least every three months or more frequently if there is a noticeable change in productivity or the job changes.
- 10) Employers with a certificate would have to maintain records of productivity for each worker and submit all productivity assessments when applying for a renewal of a Sec. 14(c) certificate.
- 11) Initial certificates would be issued for no more than six months and DOL would have to review the application and applicant before a regular certificate could be issued.
- 12) Require training on the law, regulations and other relevant material prior to each certificate renewal.
- 13) To ensure an informed decision, require the employer to obtain written permission from the employee (or parent or guardian, as appropriate) to make deductions for room, board, or other expenses in accord with Section 3(m).

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