

Policy Report

April 2002

SECTION 14C OF THE FAIR LABOR STANDARDS ACT: FRAMING POLICY ISSUES

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Document produced for: National Center on Workforce and Disability
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POLICY REPORT

SECTION 14C OF THE FAIR LABOR STANDARDS ACT: FRAMING POLICY ISSUES

I. INTRODUCTION

The Section 14(c) provisions of the Fair Labor Standards Act of 1938 (FLSA) establishes a program that allows employers to pay less than minimum wage to individuals with physical or mental disabilities whose productivity capacity is below the level considered appropriate for a particular work task.¹ An individual with a disability “whose earnings or productive capacity is impaired by a physical or mental disability, including those relating to age or injury, for the work to be performed”² would be eligible for special wage certification under 14(c). This policy report reviews the purpose, history, and administrative requirements of the 14(c) subminimum wage certification program and offers a framework to consider policy reform and six areas for policy development, technical assistance and demonstration activities. The report uses Robert Silverstein's *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy (Emerging Disability Policy Framework)*,³ articulated in the Americans with Disabilities Act, as a lens to evaluate the range of policy options for further development.

Silverstein, Director of the Center for the Study and Advancement of Disability Policy, completed research that offers a Disability Policy Framework to be used as a benchmark for both designing and evaluating public policy that seeks to address the needs of Americans with disabilities. The *Emerging Disability Policy Framework* is the result of extensive review of the hearing records, committee reports, statutory and regulatory bases for the Americans with Disabilities Act, the Developmental Disabilities Assistance and Bill of Rights Act, and the Individuals with Disabilities Education Act.

II. PURPOSE AND CURRENT STATUS

As the statute indicates, the purpose of this special minimum wage program is “to prevent curtailment of opportunities for employment” for individuals with disabilities.⁴ According to Blanck and Scharz and Scharz (2001), because of the individual's level of disability and limited productivity, activity centers utilizing the special minimum wage program “have been charged with a dual purpose: (1) to prepare some of their clients for entry into integrated employment, and (2) to provide long-term employment for individuals who are not likely to move into integrated employment.”⁵

While the term “14(c)” may be used to discuss any type of special minimum wage employment, a recent General Accounting Office (GAO) report estimates that of the 424,000 employees working in special minimum wage employment under Section 14(c), approximately 95% work in sheltered workshops (also referred to as “work activity centers”).⁶ The Department of Labor defines a sheltered workshop as “a nonprofit organization primarily engaged in assisting handicapped workers toward achieving their vocational potential through a controlled work environment and remunerative employment and ordinarily developing individualized goals and providing supportive services.”⁷ Of the 5,600 employers utilizing the 14(c) program in 2001, 84% are sheltered workshops, 9% are businesses, 5% hospitals or residential care facilities, and less than 2% are schools.⁸

In 2000, the GAO surveyed 506 work activity centers and 284 businesses. According to the results of this survey, the majority of 14(c) workers (86%) work less than full-time (less than 32 hours a week) (GAO, 2001, p. 23) and more than half earn less than half of the federal minimum wage (<\$2.50).⁹ In addition to their earned

income, most workers receive federal disability benefits (Supplemental Security Income [SSI] and/or Social Security Disability Insurance [SSDI]).¹⁰ The GAO estimated that 74 percent of the workers paid subminimum wages by work centers have mental retardation or another developmental disability as their primary impairment and 46 percent have multiple disabilities.¹¹ Work activity center employers also provide either direct support services to workers or appropriate referrals for services. These supports include services such as speech therapy, teaching appropriate social behavior, and transportation.¹² In addition, some work activity centers provide independent living skills training for employees such as managing personal funds and effectively navigating in the community, e.g., shopping at the grocery store or eating at a restaurant.¹³

The work performed at the centers is frequently based upon the needs of the local business economy and usually involves “light assembly work done by hand or in service-oriented jobs such as grounds maintenance or janitorial work.”¹⁴ The funding for these centers come from two principle sources: state and county grants or reimbursement for services (on average, 46 percent of funding base), and production contracts with government agencies or private companies (about 35 percent of funding base).¹⁵

While one of the purposes of Section 14(c) is to increase employment opportunities for individuals with disabilities, some disability advocates have criticized the program as financially exploiting workers and as ineffective in moving employees into integrated employment settings.¹⁶ In a study of sheltered workshop participants in seven states, Blanck, Schartz and Schartz (2001) found that “substantial numbers of individuals in sheltered employment did not progress to integrated work settings over time.”¹⁷ The GAO estimates that only approximately 5 percent of the workers left work

activity centers in 2000 to enter integrated employment settings, and it is unknown if these workers were receiving wages at or above the minimum wage.¹⁸

III. HISTORICAL PERSPECTIVE

A historical perspective is helpful to understand the origins of workshops and the carving out of exemptions from minimum wage protections for workers with disabilities. Developed in response to a need to provide employment and other rehabilitation services to persons with severe disabilities, workshops of one kind or another have been in existence since the mid-1800s.¹⁹ Prior to the passage of the Fair Labor Standards Act, private churches and other quasi-religious organizations took responsibility for establishing and operating “sheltered workshops,” primarily for people with physical disabilities, individuals who are aging, and persons dependent upon alcohol.²⁰

Although passage of the Vocational Rehabilitation Act in 1921 created government funding for rehabilitation services for persons with physical disabilities, the sheltered employment system remained outside of government control.²¹ The federal government’s first formal attempt at work with sheltered workshops – establishing a code of fair competition under the National Industrial Recovery Act (NIRA) – was struck down as unconstitutional by the Supreme Court shortly after its passage.²²

Finally, in 1938 the Fair Labor Standards Act created a federally-mandated minimum wage as well as an exemption to that minimum for “handicapped workers.”²³ In the interest of creating and maintaining employment opportunities, Section 14 allowed employers with special certificates to pay below the federal minimum wage for “the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury.”²⁴

The Department of Labor established the Advisory Committee on Sheltered Workshops in 1939. The Committee – now called the Advisory Committee on Special Minimum Wages – is charged with making recommendations “concerning the administration and enforcement of these regulations [Part 525: Employment of Workers With Disabilities Under Special Certificates] and the need for amendments thereof.”²⁵ Whether the Committee serves any value-added purpose is questionable, as it was dismantled in 1977 but revived in 1981, only to be slotted for review and possible termination again in 1993, since it made no expenditures and held no meetings that year. While the Committee was not terminated, a recent GAO study encourages the Department of Labor to “improve oversight,” implying that the Committee could take a more active role in 14(c) administration.²⁶

Section 14 was amended in 1966 to further define “special minimum wage” as “not less than 50 per centum of such wage [national minimum wage] and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.”²⁷ Three classifications of employment activities – (1) certificates authorizing wages not less than 50 percent of the applicable statutory minimum; (2) certificates which did not provide for a minimum guarantee, approved by state agencies administering or supervising the administration of vocational rehabilitation services for evaluation or training programs or for multihandicapped individuals; and (3) certificates for work activities centers which also did not provide for minimum guarantees²⁸ – were also created under the 1966 amendments.

Section 14 was amended again in 1986. Due to the increased deinstitutionalization of many individuals with severe disabilities, work activity centers offering employment comprised over 55 percent of certified programs and accounted for nearly 60 percent of workers working under certificates by 1986,²⁹ eliminating the usefulness of the three-tiered system. In order to minimize administrative difficulties, the three separate provisions were collapsed into one section and codified as Part 525: “Employment of Workers With Disabilities Under Special Certificates.”³⁰ Additional revisions included, but are not limited to, requiring pre-authorization from the Secretary of Labor for wage rate reductions of certain workers; requiring employers to provide written assurances of semi-annual wage reviews; and deletion of the terms “mental deficiency” or “mentally defective” in defining “worker with a disability.”³¹

IV. CURRENT ADMINISTRATIVE REQUIREMENTS

The current administrative requirements of 14(c) are found at 20 C.F.R. § 525.1 - § 525.24 (2001). Employers interested in participating in the program must obtain a special certificate from the Department of Labor’s Wage and Hour Division (WHD) of the Employment Standards Administration.³² In the certificate application, employers must determine the special minimum wage rate(s) based upon productivity measurements of each individual worker. The employer must demonstrate how they established the rates. Workers can be paid at either an hourly or a piece rate for the number of pieces they produce.³³

First, an employer must determine the prevailing wage for an experienced worker without a disability in their geographic area performing similar work. Second, the employer must measure the productivity of each worker in each job they perform, as

compared to the productivity of a worker without a disability. Then the employer can calculate the wage of the worker with a disability as the “productivity percentage” of the worker without a disability.³⁴ For example, if an experienced worker without a disability is paid \$10.00 per hour, and the employer determines that a given worker with a disability performs similar work at 40% productivity, the employer may pay the worker with a disability a rate of \$4.00 per hour. These calculations must be based on the higher minimum wage – state or federal³⁵ – and require the employer to obtain 14(c) certificates for each employee and for each job that the employee performs from WHD of the Department of Labor.³⁶

An employer is required to periodically review the wage rate(s) at least every six months and wages are adjusted at a minimum once every year to reflect changes in the minimum wage rate of workers without disabilities (29 CFR § 525.9). The special minimum wage rate certificate applies to all workers with disabilities at an employment site.³⁷ Work centers and hospitals are required to renew their 14(c) certificates biannually; businesses and schools, annually.³⁸ The Department of Labor is responsible for review of all 14(c) certificates, investigation of participating employers, and training and outreach to both its own staff and 14(c) employers.³⁹

V. TAX IMPLICATIONS

Once a sheltered workshop has been formed, and wage rates have been established, all employees must be classified for tax purposes. Many individuals begin their employment – and often remain – classified as “trainees.” Others may participate in sheltered workshops for therapeutic purposes, never reaching a level of productivity that would allow movement into traditional employment status. Because of these factors,

many sheltered workshop managers may resist classifying their participants as “employees,” and may resist paying taxes – particularly FICA tax (Federal Insurance Contributions Act which fund two federal government benefits programs: Social Security and Medicare) – on the “wages” paid to these individuals.

While the Internal Revenue Service (IRS) does allow for exemptions to the general rule that all wages require payment of FICA taxes (a set amount taken from the employee’s wage and matched by the employer), these exemptions are both limited and fact-specific. In a 1965 Revenue Ruling many still consider the black letter law on this issue, the IRS discussed three classes of individuals working at a charitable organization’s sheltered workshop for blind persons.⁴⁰

The IRS termed Class One “individuals in training,” and described the training period as an orientation averaging 16 weeks in length, intended to “accustom the individual to industrial working conditions.”⁴¹ Trainees were not eligible for traditional benefits, such as vacation or sick time, and no permanent employment relationship was intended.⁴² The IRS held that trainees in Class One were not employees for tax purposes, and exempt from FICA tax liability.

Class Two participants were described as “regular workshop employees” who had completed the workshop’s training program and were “capable of performing one or more of a wide range of jobs offered by the Association.”⁴³ These participants were subject to discipline and discharge, benefited from pay scales and working conditions “comparable to private industry,” and were subject to the “kind of direction and control over ... workers which is necessary to establish [an employment] relationship under the

usual common law rules.”⁴⁴ Consequently, “regular workshop employees” were not exempt from FICA tax liability.

Class Three participants were termed “individuals working at home.” A Class Three individual was probably incapable of working at the workshop, but if provided with materials from the workshop could produce salable articles.⁴⁵ These individuals were described as working for primarily “therapeutic” purposes.⁴⁶ Since these individuals were not subject to work schedules or direct supervision, the IRS did not believe an employment relationship was intended and exempted them from FICA tax liability.

Although several Private Letter Rulings and Technical Advice Memoranda exist on the topic of FICA liability for sheltered workshop participants,⁴⁷ the IRS has made it clear that the key determination is whether an employment relationship is intended. In a 1978 Revenue Ruling the IRS set forth 20 factors it considers when determining whether an employment relationship exists, and hence, whether tax liability attaches.⁴⁸ The factors do not appear in any order of importance, nor are any particular factors considered dispositive. The importance of a given factor “varies depending on the occupation and the factual content in which the services are performed ... [and] special scrutiny is required in applying the twenty factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement.”⁴⁹

For sheltered workshops, the key to the determination is whether the participant’s relationship with the workshop mirrors traditional employment. If the individual maintains a set schedule, must take direction from workshop staff, is subject to discipline,

promotion and termination, and is eligible for standard benefits, an employment relationship, and therefore tax liability, likely exist. Correspondingly, short-term trainee positions and those participants whose involvement is primarily therapeutic are likely not employees and therefore exempt from FICA tax liability.

VI. POLICY CONTEXT

The evolution and development of workshops from the mid-1800s⁵⁰ was consistent with the prevailing attitudes and assumptions of policymakers and rehabilitation professionals of the same period that persons with disabilities were not capable of working and needed a safe and supportive environment. Segregation and exclusion was perceived as benevolent to protect the individual rather than focus on the development of abilities.^{51, 52}

The historical context for the creation of the 14(c) subminimum wage exemption was with an economy based on manufacturing and individual repetitive tasks. With the passage of the Americans with Disabilities Act⁵³ and subsequent legislation in the 1990s,⁵⁴ the context for the analysis of the purpose and methodology of 14(c) has shifted from a focus on evaluating individual levels of productivity for specific tasks, to adapting the physical and social environment to provide effective and meaningful opportunity through reasonable accommodation.⁵⁵ The research of Silverstein on the *Emerging Disability Policy Framework* has isolated the core values that can be used for analyzing public policy. These core values of equality of opportunity, full participation, community living, and economic self-sufficiency recognize that disability, like race and gender, is a natural and normal part of the human experience that in no way diminishes a person's right to full participation in all aspects of society.⁵⁶

Equality of opportunity is further defined by three critical elements: individualization, effective and meaningful opportunity, and inclusion and integration. With individualization, decisions affecting an individual will be made based on facts, state of the art science and on a person's needs and preferences.⁵⁷ The critical element of effective and meaningful opportunity is the provision of reasonable accommodations,⁵⁸ which may include modifications to policies, practices and procedures. Inclusion includes a presumption that services are provided in an inclusive setting with necessary support services that prevent unjustified segregation.⁵⁹

Full participation requires active and meaningful involvement of persons with disabilities and their families in decisions affecting them. This means policies, practices, and procedures must provide for real informed choice and self-determination.⁶⁰

Community living recognizes the need for long term services and supports such as technology related assistance to promote independence.⁶¹ **Economic self-sufficiency** recognizes incentives to work and advancement of economic independence as a legitimate outcome of public policy.⁶²

These precepts and specific elements identified in the *Emerging Disability Policy Framework* offer an objective lens to analyze the current 14(c) program and potential policy changes. The following chart isolates--for analysis and discussion--the critical elements of the current 14(c) program.

14(c) PROGRAM		
Focus	Disability Policy Framework	Challenge
Employment	Economic Self-Sufficiency	Do subminimum wages and documented historical patterns of limited movement out of workshops advance economic independence?
Individual Case-by-Case Decision Making on	Effective and Meaningful Opportunity	Are decisions about productivity made based on state of the art science with utilization of technology assistance to improve productivity?

Productivity and Wage Levels		What kinds of reasonable accommodations if any are considered?
Segregated Setting	Inclusion and Integration	Has government and the employer (holder of the 14(c) certificate) met their burden of proof to demonstrate why inclusion is not appropriate to meet the unique needs of the individual?
Individual Choice to Employment and Wages in the Workshop Setting	Full Participation	Are policies in place that promote informed choices, person-centered planning and direction of individual budgets? Are government policies offering support for work in integrated settings at equal or better wage scales?

In a post ADA environment, the emerging Disability Policy Framework has shifted the fundamental goals of disability policy to encourage individual choices and self-determination to advance social and economic independence.⁶³ Public policy changes now being managed by the Social Security Administration (SSA) expand incentives to work.⁶⁴ Implementation of individual training accounts (ITAs) under the Workforce Investment Act offer increased consumer control over public resources for preferred skills development and career advancement.⁶⁵ Post Olmstead driven planning and systems change activities are beginning to change expectations about ability to work and income generation and asset development.^{66,67,68,69} It is this environmental context that presents a new opportunity to identify policy options for changes to 14(c).

All policy options to be considered must recognize distinct differences in the current status of the targeted class of individuals with disabilities. The targeted class can be subdivided into three groups: a) current workers being paid subminimum wage in segregated environments under 14(c) certificates, b) individuals with disabilities not yet employed who are youth in transition from school-to-work, and c) others who are of working age with disabilities who are in nonwork day activity or habilitation programs. The first group may require expanded choices to transition to better wages in more

integrated settings. The second group may require expanded choices to divert from 14(c) options and to support them in training and employment opportunities in integrated settings. The third group also may require expanded choices for training and employment based on an enhanced set of expectations about work and customized supports in integrated work environments. To be responsive to the emerging Disability Policy Framework, all three subgroups of individuals with disabilities would benefit from public policies offering expanded choices.

The strongest voices for continuation of 14(c) defend their position by explaining that 14(c) offers a needed approach to provide entry-level skills training and development regardless of an individual's productivity and severity of disability. Others have expressed concern that the elimination of 14(c) will result in persons with the most significant disabilities having less favorable options and therefore increased reliance on Medicaid funded work/day activity that by definition cannot offer income-producing activity.

In light of these concerns, policy options must be formulated to build support for changes to 14(c) that:

1. Place an emphasis on transition planning after time limited skills development that seeks to transition out of sheltered work and subminimum wage status individuals with disabilities currently covered by a 14(c) certificate;
2. Place an emphasis on diversion from 14(c) coverage by offering more choices for meaningful work and customized support in integrated settings for youth and young adults with disabilities who can be diverted from work at a

subminimum wage with an organization or entity that currently utilize a 14(c) certificate;

3. Place an emphasis on systems change and capacity building activities by offering more choices for service providers who are current 14(c) certificate holders to convert their capacity away from sheltered work to more integrated options with wages at the minimum wage rate or better; and
4. Place an emphasis on broader policy reforms that recognize the interrelationship between changes to 14(c) and other public policy that constrains opportunity for work and income production by persons with significant disabilities.

VII. POLICY OPTIONS

There is no single strategy that will simply or immediately transform options for work and better wages for persons with disabilities who constitute one of the three targeted subgroups. Utilizing the core elements of the *Emerging Disability Policy Framework* as a lens, following are six areas to be considered for future policy development, technical assistance, and demonstration activities:

Policy Option One:

Improve Program Administration and Oversight

On September 4, 2001, the GAO issued its findings on the 14(c) special minimum wage program as a result of a review of the Department of Labor records, visits to work sites in six states where workers with disabilities were paid subminimum wages, and interviews with diverse interested stakeholders including 14(c) workers, employers, and disability advocacy groups.⁷⁰ The GAO report makes a number of recommendations that

collectively urge the Department of Labor to improve their oversight and technical assistance to 14(c) certificate holders.

- A. Improve the accuracy of data collection and management of 14(c) employer certificates and renewals and track the status of complaint investigation and resolution.
- B. Conduct a self-initiated investigation of a randomly selected sample of 14(c) employers in all regions with particular attention to employers' calculations of productivity and wage rates, activities to improve skills development, and transition to integrated work settings and improved wage status.
- C. Train staff in all of its regions on the requirements of the special minimum wage program contained in the newly revised *Field Operations Handbook* and incorporate this training into its standard curriculum for investigators.
- D. Post the revisions of the sections of the *Field Operations Handbook* that relate to the special minimum wage program on the Department of Labor's Web site so it is available to employers.
- E. Regularly conduct outreach sessions for employers in each region on the requirements of the special minimum wage program, with special emphasis on correcting errors identified in WHD's reviews of employers' 14(c) certificate renewal applications and investigations of employers.
- F. Expand data collection to track the status of movement of workers with disabilities from workshops to integrated placements. Require 14(c) employers to track wage status changes for each worker covered by a certificate and aggregate

data per year regarding wage status changes, average number of hours employed, and changes in placement status.

Recommendations A through E have begun to be implemented by the WHD of the Department of Labor. Recommendation F would provide new empirical data to identify trends more accurately in the 14(c) certificate program with particular emphasis on outcome indicators pertaining to wage status changes and placement information similar to performance indicators under the Workforce Investment Act. The information collected and made available to individuals with disabilities would expand and improve opportunities for informed decision making that would differentiate objectively the performance of 14(c) certificate holders.

Policy Option Two:

Build Systems Capacity For Change and More Choices

There are currently no incentives for existing 14(c) certificate holders to consider changes to their employment service approaches that would transition employees with disabilities to higher wage scales in integrated settings. There is no funding streams targeted to capacity building and conversion of sheltered work opportunities. There is also no dollars available to support expanded choices for skill development and other work opportunities that enable the individual to pursue vocational/career choices that match their preferences.

In light of these concerns, the following capacity building activities should be considered:

- A. Provide technical assistance to 14(c) certificate holders to convert from sheltered work opportunities at subminimum wage to more integrated work options at a minimum wage or better rate.
- B. Offer Systems Change conversion grants to 14(c) certificate holder organizations who are willing to design and implement a multiphase strategy to close their sheltered workshop, build capacity for integrated community based skills development and job placement, involve employers as collaborators in design of natural supports in the workplace, and provide individualized person-centered planning for all individuals with significant disabilities currently in their day activity and workshop.
- C. Offer demonstration grants to community consortiums that include the local school system, private employers, disability-related organizations, One-Stops, and providers of employment services to design and implement a plan that diverts all youth and young adults with disabilities from participation in 14(c) coverage that offers subminimum wages, to jobs in integrated settings at minimum wage or better, or microenterprise development in response to market needs.

These capacity building demonstrations would promote expanded choices for the target audiences in integrated settings. In these demonstrations, the rebuttable presumption is that services are provided in inclusive settings with necessary support services that prevent unjustified segregation. The demonstration activities targeted to each of the three subgroups of the identified class of individuals with disabilities would

embrace the principles of full participation with the development of policies and practices that support self-determination.

Policy Option Three:

Reduce Utilization of 14(c)

Without legislative action, the Department of Labor could begin to restrict access to 14(c) and subminimum wage activities in sheltered work settings. Options to consider include:

- A. **Time Limits:** Set time limits for any individual receiving subminimum wages to a maximum of 12 consecutive months and a lifetime cap of three years. The original purpose of 14(c) was related to training and skills development. The creation of time limits ensures that no individual remains under a 14(c) subminimum wage status on a permanent basis.
- B. **Transition Planning:** Require all individuals covered by a 14(c) certificate to have an individual transition plan developed within 30 days of beginning their assigned tasks in the sheltered work setting. The plan must be jointly developed by the entity who has the approved 14(c) certificate and the individual. The plan will identify specific skill areas for mastery, strategies and interventions for achieving the specific competencies including technology – assistance, if appropriate, a timeline to achieve indicated skill levels, future career goals, and specific proposed agency actions related to job development and placement. All plans must be kept on file and reviewed at least quarterly with the individual, at which time progress to date will be reviewed and modifications to the plan will be considered.

- C. **Rebuttable Presumption:** Require a rebuttable presumption of training and customized employment support in integrated settings, to be considered on an individualized basis with the burden of proof on government and the 14(c) certificate holder to justify the segregated placement.
- D. **Public Reports:** Require all 14(c) certificate holders to report annually to the Department of Labor on wage adjustments per worker, success rate with transition of individuals out of sheltered work to integrated settings, and types of placements made. The Department of Labor will make available to the public these “quality performance reports” for the benefit of individuals with disabilities. The agencies will also be expected to post the information and notify all current or prospective entrants of its availability.
- E. **Productivity Calculation:** Re-evaluate the current approach to determine an individual worker’s productivity for essential job functions. The Department of Labor can require a three-part calculation that includes job restructuring, technology related assistance, and the identification of natural or other types of support in the workplace as required reasonable accommodations. These accommodations can individually or collectively significantly change the calculation of an individual’s productivity related to a specific job that then sets the wage rate. The resulting calculation may increase the wage rate to minimum wage or better.

Policy Option Four:

New Strategies to Employment and Asset Development

Individuals with disabilities are three times more likely to live in poverty than their nondisabled peer group of working age adults without disabilities.⁷¹ Poverty creates social isolation, limited choices, and continued dependence on public assistance. Less than 1 percent of SSI beneficiaries leave the rolls annually due to a positive change in wage status.⁷² By statute, SSI beneficiaries may not accumulate assets in excess of \$2,000.⁷³ Fifty percent of SSI beneficiaries have no direct banking relationship, lack basic financial literacy skills, and have no credit history.⁷⁴ For individuals with disabilities, the combination of legal authority through 14(c) to pay subminimum wages long term with historically low ceilings for asset limits to remain eligible for Social Security benefits and Medicaid provide impossible barriers to overcome in their struggle for self-sufficiency.

During the past ten years, with funding from the Robert Wood Johnson Foundation, over 25 states have been redefining the relationship between persons with disabilities and government. Through person-centered planning, individual budgets, and revenue generation through job and microenterprise development, the promise of self-determination for both individuals with disabilities and human service systems have become refocused on increased value purchased with Home and Community Service dollars.⁷⁵ There are a number of policy options to be explored that can reinforce the new social contract that promotes individual choices and direction of public resources to advance economic independence.

- A. Support state or local demonstration grants that utilize Medicaid funds under the Home and Community Based Services Waiver to implement person-directed plans and budgets to pursue customized employment strategies and/or microenterprise development. Such demonstrations must include state requests for waivers of current asset limits for eligibility for SSI and Medicaid.
- B. Support demonstration funding at a state or local level to develop nontraditional Employment Networks (EN) to expand service options for individuals with the most significant disabilities who want to utilize their Ticket to Work offered to SSI and SSDI beneficiaries by the Social Security Administration. Such demonstrations will utilize individual budgets with Medicaid, Social Security, and other public and private resources to design front end financing options for service delivery through nontraditional ENs that encourages customized supports in the workplace and microenterprise development.
- C. Create opportunities to encourage savings and reduce dependence on public assistance through Individual Development Accounts (IDAs) that encourage public and private sector match on at least a dollar-for-dollar basis with waivers of current means tested eligibility requirements for Social Security, Medicaid, and other public benefits programs. At a local level, these IDA demonstrations must be linked to community participation by employers, savings institutions, and other public and private involvement.

- D. Convene a time limited federal interagency working group to problem solve a coordinated approach to current eligibility requirements that are means tested for benefits and other program supports, and that result in a collaborative funding of customized employment and microenterprise development community demonstration projects. These demonstration projects can adjust the milestone payment schedule under the Ticket to Work to encourage support of Social Security beneficiaries currently in nonwork and sheltered work settings and earning less than minimum wage, and therefore accelerate their transition to improved wage status in integrated settings.

Policy Option Five:

Eliminate the 14(c) Certificate and Subminimum Wage Option

The elimination of the 14(c) certificate would require Congressional action. Changing expectations of individuals with disabilities and their families, new technology applications to enhance productivity, and emerging best practices in customized employment support across diverse work settings provide compelling reasons to re-evaluate the merits and rationale for continuation of the 14(c) certification process.

To successfully build support for elimination of the 14(c) certification process and subminimum wage status, any legislative strategy must also include concurrent amendments to Medicaid policy that expands the definition of allowable activities under work activity and day habilitation. Activities that provide skills training that will lead to expanded vocational options in integrated work settings, and/or microenterprise development that generates income would for the first time be accepted as reimbursable costs under Section 1915(c)(4) of the Social Security Act.

Policy Option Six:

Work Incentives For Employers

The cost of income maintenance payments in 2001 by the Social Security Administration to individuals with disabilities exceeded 50 billion.⁷⁶ Less than one percent of SSI and/or SSDI beneficiaries leave the social security rolls each year having met the wage test of substantial gainful activity (SGA).⁷⁷ The focus of work incentives in public policy has been to attract the interest of social security beneficiaries with disabilities to enter or return to the workforce and still maintain access to healthcare.⁷⁸

The Disability Policy Framework recognizes the importance of reasonable accommodations to provide equality of opportunity and advance economic independence.⁷⁹ To advance wages to a minimum wage or better in integrated settings may require the creation of new incentives for employers to modify hiring and business practices. The targeted job tax credit and small business deductions for accommodations for workers with disabilities are two examples of tax policy crafted to promote equal opportunity.^{80,81}

Wages up to 50 percent of minimum wage could be subsidized for up to three years to encourage small businesses to train on-the-job and hire social security beneficiaries with disabilities. At the end of the on-the-job training period, a tax credit could be structured for small businesses who then hire the worker with a disability at minimum wage or better.

To encourage specific business sectors with documented labor supply demands and growth potential to hire individuals with disabilities, a reasonable accommodation fund could be created that would allocate resources directly to employers on an

individual case-by-case basis. For each year of employment, up to 20 percent of savings to the Social Security Administration could be credited as a tax-free income for the employer.

These new proposed work incentive options for employers seek to improve the participation of workers with disabilities in the labor force as an alternative route to economic self-sufficiency without the current reliance and dependence on the provider system. Although the costs of implementation of these incentive provisions may be large, it shifts the allocation of costs from a social welfare context to employer driven participation stimulated by tax policy that embraces corporate interests.

The following chart provides a brief summary of the six major categories to be considered for further policy development and demonstration activities.

POLICY OPTIONS		
Focus	Disability Policy Framework	Challenge
Improve Program Administration and Oversight	Inclusion and Integration Effective and Meaningful Opportunity Informed Choice	Would data collection on key performance indicators that compared 14(c) certificate holders improve informed choice? Would increased oversight improve wage status and transition to inclusive settings?
Reduce Utilization of 14(c)	Effective and Meaningful Opportunity	Would time limits in 14(c) status improve or restrict opportunities for economic well being? Would time limits be effective only if other policy developments open up new choices for support of employment at equal or better wages in inclusive settings?
Build Systems Capacity For Change	Inclusion and Integration Informed Choice	What financial incentives are needed to capture the interest of current providers to expand employment support choices?
New Strategies to Employment and Asset Development	Economic Self-Sufficiency Informed Choice	Will creation of nontraditional ENs make the Ticket a viable option for persons with the most significant disabilities? What agreements need to be resolved among federal agencies (Social Security Administration, Centers for Medicare & Medicaid Services, Department of Labor) to support individual person directed budgets and a lifting of asset limits to encourage savings?
Eliminate Subminimum Wage Option	Informed Choice Integration	Without changes to allowable activities under the Medicaid waiver, have choices for the individual been restricted or expanded?
Work Incentives For Employers	Inclusion and Integration	Can tax policy be further developed to embrace the principles of the Disability Policy Framework? What political support can be developed for such policy changes with significant increased costs?

VIII. CONCLUSION

The policy options and activities proposed in this policy report will individually and collectively stimulate public discussion and push forward policy and practice. The complexity of the challenges requires multiple public policy changes and a new level of coordination and collaboration among major federal policy makers. Simply implementing the GAO recommendations for increased oversight and training for 14(c) certificate

holders without adoption of one or more of the other policy recommendations would be perpetuating the status quo and a view point of limited expectations for the target population. In a post ADA environment, persons with disabilities and their families expect more choices and will demand more not less in the future.

¹¹ See generally 29 U.S.C. § 14(c) (1994).

² 29 C.F.R. § 525.3(d) (2001).

³ Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy, 85 IOWA L. REV. 1691 (2000); author: Robert Silverstein.

⁴ 29 U.S.C. § 14(c) (1994).

⁵ Peter Blanck, Helen Schartz & Kevin Schartz, *Labor Force Participation and Income of Individuals with Disabilities in Sheltered and Competitive Employment: Cross-Sectional and Logitudinal Analyses from Seven States during the 1980s and 1990s*, U.S.D.O.L. 11 (2001) (forthcoming) (hereinafter “Labor Force Participation”).

⁶ See General Accounting Office, *Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers with Disabilities 1* (2001) (hereinafter “GAO Report”).

⁷ Labor Force Participation, *supra* note 4, at 11, *citing* U.S. DEP’T OF LABOR, ADVISORY COMMITTEE ON SHELTERED WORKSHOPS, *THE SHELTERED WORKSHOP: A STATEMENT OF PRINCIPLES*, 2 (1983).

⁸ See GAO Report, *supra* note 5, at 9.

⁹ See *id.* at 23.

¹⁰ See *id.* at 24.

¹¹ See *id.* at 3.

¹² See *id.* at 25.

¹³ See *id.* at 25.

¹⁴ See *id.* at 9.

¹⁵ See *id.* at 13.

¹⁶ See generally STEPHEN T. MURPHY & PATRICIA M. ROGAN, *CLOSING THE SHOP*, 1-33 (1995).

¹⁷ Labor Force Participation, *supra* note 4, at 47.

¹⁸ See GAO Report, *supra* note 5, 24.

¹⁹ See *Sheltered Workshop Study, A Nationwide Report on Sheltered Workshops and their Employment of Handicapped Individuals*, U.S.D.O.L., June 1977, p. 10.

²⁰ See *id.*

²¹ See *id.*

²² See *id.*

²³ Fair Labor Standards Act of 1938, Pub. Law. No. 718, June 25, 1938 at Sec. 14.

²⁴ Labor Force Participation, *supra* note 4 at 9, *citing* Fair Labor Standards Act of 1938, sec. 14.

²⁵ 29 C.R.F. § 525.24 (2001).

²⁶ GAO Report, *supra* note 5, at title page.

²⁷ Labor Force Participation, *supra* note 4 at 9, *citing* 29 U.S.C. 14(C)(1) (1966).

²⁸ Employment of Workers With Disabilities Under Special Certificates, 53 Fed. Reg. 18234 (May 20, 1988)

²⁹ Employment of Workers with Disabilities Under Special Certificates, 54 Fed. Reg. 32920 (August 10, 1989).

³⁰ Employment of Workers With Disabilities Under Special Certificates, 29 C.F.R. § 525 (2001); *see also* Employment of Workers With Disabilities Under Special Certificates, 54 Fed. Reg. 32920 (August 10, 1989).

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- ³¹ Employment of Workers With Disabilities Under Special Certificates, 54 Fed. Reg. 32920, 32921 (August 10, 1989).
- ³² Employees must also obtain a 14(c) certificate to pay workers less than hourly wage for contracts covered under the Service Contract Act and the Walsh-Healey Public Contracts Act. (Many of these contracts are part of the Javits-Wagner-O'Day program that provides preferential contracts with federal government entities for individuals who are blind or have severe disabilities). The wage rates for these contracts are frequently higher than minimum wage and, thus, a worker employed under these contracts may earn more than the federal or state minimum wage. *See* GAO Report, *supra* note 2, at 7.
- ³³ *See id.* at 7.
- ³⁴ *See id.* at 7.
- ³⁵ Ten states and the District of Columbia have a higher minimum wage than the federal rate. *See id.* at 7 n. 8.
- ³⁶ 29 C.F.R. § 525.9 (2001).
- ³⁷ 29 C.F.R. § 525.12 (2001).
- ³⁸ *See* GAO Report, *supra* note 5, at 6.
- ³⁹ *See* GAO Report, *supra* note 5, at 8.
- ⁴⁰ Rev. Ruling 65-165, 1965-1 C.B. 446 (1965)
- ⁴¹ *Id.*
- ⁴² *Id.*
- ⁴³ *Id.*
- ⁴⁴ *Id.*
- ⁴⁵ *See id.*
- ⁴⁶ *Id.*
- ⁴⁷ *See, e.g.* Priv. Ltr. Rul. 93-49-005 (Sept. 1, 1993) (classifying participants in a two-tier sheltered workshop program as employees for FICA tax purposes); Tech. Adv. Mem. 98-01-003 (Sept. 9, 1997) (classifying participants in a Community Based Work Adjustment Training program as non-employees and participants in a Sheltered Employment Program as employees).
- ⁴⁸ Rev. Rul. 87-41, 1987-1 C.B. 296. The 20 enumerated factors are: (1) instructions; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising and paying assistants, (6) continuing relationship, (7) set hours of work; (8) full time required; (9) doing work on employer's premises; (10) order or sequence set; (11) oral or written reports; (12) payment by hour, week, month; (13) payment of business and/or traveling expenses; (14) furnishing of tools and materials; (15) significant investment; (16) realization of profit or loss; (17) working for more than one firm at a time; (18) making service available to general public; (19) right to discharge; and (20) right to terminate. *Id.*
- ⁴⁹ *Id.*
- ⁵⁰ *See* Sheltered Workshop Study, A Nationwide Report on Sheltered Workshops and their Employment of Handicapped Individuals, U.S.D.O.L., June 1977, p. 10.
- ⁵¹ *See generally* STEPHEN T. MURPHY & PATRICIA M. ROGAN, CLOSING THE SHOP, 6-14 (1995).
- ⁵² Peter David Blanck, "Civil War Pensions and Disability," 62 Ohio St. L.J. 109, 213 (2001).
- ⁵³ 42 U.S.C. ch. 126 (1994). President Bush signed the ADA into law on July 26, 1990. *Id.* Senator Tom Harkin (D. Iowa), the chief sponsor of the ADA, often refers to the legislation as the "20th century Emancipation Proclamation for persons with disabilities." 136 CONG. REC. S9689 (daily ed. July 13, 1990).
- ⁵⁴ Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860; Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37; Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1994, Pub. L. No. 103-230, 108 Stat. 284; Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344.
- ⁵⁵ 29 C.F.R. § 1630.9(a) (1999); 28 C.F.R. § 41.53 (1999) (providing examples of reasonable accommodations, including modifying a workplace policy, acquisition or modifications of equipment, the provision of qualified readers and interpreters and appropriate adjustment or modification of examinations).
- ⁵⁶ ADA § 2(a)(8), 42 U.S.C. § 12101(a)(8) (1994).
- ⁵⁷ *See* Rehabilitation Act of 1973 § 102, 29 U.S.C. § 722 (1994 & Supp. IV 1998) (listing options for developing individualized plans for employment); IDEA § 614(c), 20 U.S.C. § 1414(c) (Supp. IV 1998), *repealed by* Pub. L. No. 91-230, 84 Stat. 188 (1970).
- ⁵⁸ 28 C.F.R. § 35.130(b)(7) (1999); 28 C.F.R. § 41.51(b) (1999).

⁵⁹ See 28 C.F.R. § 35.130(d) (1999) (discussing integration); 28 C.F.R. § 41.51(d) (1999) (providing the section 504 coordination regulations).

⁶⁰ See Rehabilitation Act of 1973 § 2(c)(1), 29 U.S.C. § 701(c)(1) (Supp IV 1998) (requiring that all programs receiving assistance be carried out in a manner consistent with “respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities”); Developmentally Disabled Assistance and Bill of Rights Act § 101, 42 U.S.C. § 6000 (1994) (same).

⁶¹ 29 U.S.C. §§ 796, 796f (1994 & Supp. IV 1998).

⁶² Title XVI of the Social Security Act authorizes the Supplemental Security Income program, a federally administered cash assistance program designed to provide a minimum income for, among others, persons who are blind and disabled. 42 U.S.C. § 1381 (1994). Section 1619 of the Social Security Act creates incentives for SSI beneficiaries with disabilities to work, including permitting these individuals to retain eligibility for Medicaid. See 42 U.S.C. § 1382h (1994) (enabling these individuals to continue to receive personal assistance services). See also Social Security Act § 1905(q), 42 U.S.C. § 1396d(q) (1994); Social Security Act, U.S.C. § 401 (1994) (authorizing a program of federal disability insurance benefits for, among others, workers who have contributed to the Social Security trust fund and become disabled or blind before retirement age); Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860 (amending the Social Security Act and Medicaid to create new work incentives and expand health care for workers with disabilities).

⁶³ IDEA § 601(c)(1), 20 U.S.C. § 1400(c)(1) (1994); Rehabilitation Act of 1973 § 2(a)(3), 29 U.S.C. § 701(a)(3) (1994); Developmental Disabilities Assistance and Bill of Rights Act § 101(a)(2), 42 U.S.C. § 6000(a)(2) (1994).

⁶⁴ Ticket to Work and Work Incentives Improvement Act of 1999, TWWIIA, Public Law 106-170. Through the Social Security Administration, the TWWIIA provides improved access to employment training and placement services for people with disabilities who want to work.

http://www.ssa.gov/work/Ticket/ticket_info.html

⁶⁵ Workforce Investment Act of 1998, WIA, Public Law 105-220. To consolidate, coordinate, and improve employment, training, literacy, and vocational rehabilitation programs in the United States, and for other purposes. <http://usworkforce.org/wialaw.txt>

⁶⁶ Guidance on Olmstead Decision and Fact Sheet: Letter to State Medicaid Directors. Health Care Financing Administration. <http://www.hcfa.gov/medicaid/letters/smd1140a.htm>.

⁶⁷ Most Integrated Setting - The Olmstead Decision. Office for Civil Rights, U.S. Department of Health and Human Services. This site includes information on the Olmstead Decision: <http://www.os.dhhs.gov/ocr/mis.htm>

⁶⁸ President Bush Highlights Commitment to Americans with Disabilities (June 18, 2001). The President signed an Executive Order on Monday, June 18, 2001, promoting community-based alternatives -- rather than institutions for individuals with disabilities. This Executive Order directs key federal agencies to work closely with states to ensure full compliance with the Supreme Court's ruling in the Olmstead case and the ADA. www.whitehouse.gov/news/releases/2001/06/20010620.html.

⁶⁹ The States Response to the Olmstead Decision. A Status Report (March 2001). The National Conference of State Legislatures. The National Conference of State Legislatures (NCSL) conducted a 50-state survey to determine initial state responses to the *Olmstead* decision. The purpose of the study was to enhance informed decision making by helping state policymakers understand the choices states are making and the options that are available to meet the needs of people with disabilities. <http://www.ncsl.org/programs/health/forum/olmsreport.htm>

⁷⁰ See General Accounting Office, Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers with Disabilities 1 (2001) (hereinafter “GAO Report”).

⁷¹ H. Stephen Kaye and Paul Longmore. Disability Watch: The Status of People with Disabilities in the United States. A report by the Disability Rights Advocate, Inc. 1997.

⁷² SSA Proposes Rule Change to Enable More Disability Beneficiaries to Return to Work. Social Security Administration Fact Sheet. <http://www.ssa.gov/pressoffice/factsqa.html>

⁷³ A Desktop Guide to SSI Eligibility Requirements. Social Security Administration Publication No. 05-11001, February 2002. <http://www.ssa.gov/pubs/11001.html>.

⁷⁴ The Supplemental Security Income Program at the Millennium. (2002) Social Security Administration. <http://www.ssa.gov/policy/programs/SSI/millennium/>. This report reviews the evolution and changing demographics of the Supplemental Security Income (SSI) program and current policy challenges after a quarter century of service to low-income aged, blind, and disabled persons. With a mix of data and policy analysis, the document examines the success of the program in providing economic security for the beneficiaries. It presents options for enhancing that function as well as options for simplifying the SSI program. Finally, the report updates the payment accuracy and program integrity initiatives set forth in the 1998 report, *Management of the Supplemental Security Income Program: Today and in the Future*.

⁷⁵ Thomas Nerney. Filthy Lucre: Creating Better Value in Long Term Supports. Center for Self Determination. October 2001. <http://members.shaw.ca/bsalisbury/Filthy%20Lucre%20-%20Tom%20Nerney.doc>

⁷⁶ Social Security Administration's FY 2001 Performance and Accountability Report.

⁷⁷ Social Security Administration Fiscal Year 2000 Budget.

⁷⁸ SSI Disabled Recipients Who Work (September 2000). Social Security Administration Office of Policy, Office of Research, Evaluation, and Statistics, Division of SSI Statistics and Analysis.

⁷⁹ 29 C.F.R. § 1630.9 (1999); 28 C.F.R. § 41.53 (1999).

⁸⁰ 26 U.S.C. § 44 (1994).

⁸¹ 26 U.S.C. § 51 (1994) (amended 1999).