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DOL Proposes End of Program Allowing Employers to Pay Disabled Employees Subminimum Wage

December 17, 2024
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As part of a program dating back to 1938, the little-spoken-about Section 14(c) of the Fair Labor Standards Act (FLSA) includes a provision that allows employers to obtain certificates from the U.S. Department of Labor (DOL) authorizing them to pay subminimum wage to workers with disabilities that impair the worker's productivity for the work being performed. Now, on the heels of mounting state legislation prohibiting the use of these certificates, the DOL is proposing to end the program altogether in its new Proposed Rule, *Employment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act*. Read on to understand the implications of this rulemaking, particularly with a new incoming presidential administration.

Understanding Section 14(c)

Currently, under Section 14(c) of the FLSA, employers can obtain a certificate from the DOL's Wage and Hour Division authorizing them to pay employees with disabilities less than the federal minimum wage (currently $7.25/hour) if the employee's "productive capacity" is impaired by their physical or mental disability. The FLSA has always stated that certificates may only be issued to the extent "necessary to prevent curtailment of opportunities for employment" (known as the

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"curtailment clause"). The FLSA gives the DOL authority to determine under the curtailment clause whether certificates are necessary to prevent the curtailment of opportunities as a condition to obtaining a certificate.

As the U.S. Supreme Court explained in the 1947 case of *Walling v. Portland Terminal Co.*, the language and legislative history of Section 14(c) 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." In that case, the Court also acknowledged that a "blanket exemption of all [such workers] from the Act's provisions might have left open a way for wholesale evasions." Thus, Section 14(c) has historically been viewed as establishing wage rate *flexibility* for employers with regard to workers with disabilities. Section 14(c) has remained untouched for 35 years; it was last amended in 1989 to clarify certain language and consolidate the regulations, which previously existed in three parts, among other administrative changes.

Employers that use Section 14(c) certificates set their own subminimum wages based on the productivity of the disabled employee in comparison to non-disabled employees who do the same work in the same geographic area. The subminimum wages are calculated by determining both the prevailing wage for non-disabled workers and the productivity of the disabled worker. Productivity is measured by the employer. Employers are required to reevaluate an employee's productivity at least every six months and the prevailing wages at least every 12 months. Certificates are valid for one to two years depending on the type of employer, and employers must file for renewal before that period expires.

The Proposed Rule

The DOL now takes the position that Section 14(c) certificates are no longer necessary to prevent the "curtailment" of opportunities for employees with

disabilities. The Proposed Rule explains that "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." Notably, the DOL cites the fact that Section 14(c)'s 1989 amendments were published a year *prior* to the 1990 passage of the Americans with Disabilities Act (ADA), and thus do not take into account the fundamental anti-discrimination and reasonable accommodation protections of the ADA. In turn, the DOL preliminarily concluded in its Proposed Rule that Section 14(c) certificates are not necessary and are potentially "counterintuitive" to the FLSA's intent of promoting opportunities for gainful employment.

The DOL's Proposed Rule would reverse course to stop the issuance of Section 14(c) certificates altogether and phase out their use over a three year period. If passed, starting on the effective date of the final rule, the DOL would (i) stop issuing new Section 14(c) certificates, and (ii) begin a three-year phase out period on existing certificates, where employers with existing certificates would gradually stop paying subminimum wages to employees with disabilities.

The Current State of 14(c) Certificates

The DOL's proposal is not novel. There are current (and pending) state-level bans, restraints, or limitations on the use of Section 14(c) certificates in half of the states: Alaska, Arizona, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Maine, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, New York, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, and West Virginia. The DOL analyzed data from these states to aid its conclusion that removing Section 14(c) certificates does not negatively impact — and actually appears to positively impact — rates of employment of those with disabilities.

Further, the number of employer certificate holders has decreased drastically over the last 20 years. According to the DOL, as of May 2024 there are only 801 employers with current or pending applications for Section 14(c) certificates, and only 40,579 workers were paid less than the federal minimum wage in those employers' last reported fiscal quarter. In sum, the removal of Section 14(c) would likely have a minimal impact on the nation's employers at large.

What's Next?

The Proposed Rule will be subject to a comment period, which will remain open until January 17, 2025, just three days before Trump's presidential inauguration. Comments can be submitted on the federal register located at regulations.gov until 11:59 pm ET on that date.

Effects on Employers

While no longer a widely used program, employers who currently use Section 14(c) should prepare for a possible phase out. Now would be a good time for employers currently using Section 14(c) certificates to analyze the financial impact of raising wages for workers with disabilities.

Because of the timing of the close of the Proposed Rule's comment period, the onus will almost certainly be on the incoming administration to accept or reject a final version of the Proposed Rule. It remains to be seen whether that administration will agree with this proposal as-is or in revised form, or nix it altogether. As such, we will continue to monitor and provide timely updates as necessary.

For any questions about how this development may impact you, reach out to your Akerman Labor and Employment attorney.

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