January 17, 2025

Daniel Navarrete
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division, U.S. Department of Labor
200 Constitution Ave. NW, Room S-3502,
Washington, D.C. 20210

RE: Comment on notice of proposed rulemaking: Employment of Workers with Disabilities under Section 14(c) of the Fair Labor Standards Act, RIN 1235–AA14

Dear Mr. Navarrete:

I am an attorney with the Competitive Enterprise Institute. I was a senior policy advisor in Department of Labor's Wage and Hour Division in 2019. The Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on regulatory policy. On behalf of the Competitive Enterprise Institute, I submit to the Department of Labor (Department) the following comments regarding its proposed rule entitled "Employment of Workers with Disabilities under Section 14(c) of the Fair Labor Standards Act," 89 Fed. Reg. 96,466 (proposed Dec. 4, 2024) (to be codified at 29 C.F.R. pt. 525).

Section 14 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 214, mandates that the secretary of labor provide for the employment of four categories of workers at wages below the minimum wage to the extent necessary to prevent curtailment of their opportunities for employment. The third category of such workers is covered by section 14(c), entitled "Handicapped workers." Section 14(c)(1) provides:

> The Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are—
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> (A) lower than the minimum wage applicable under section 206 of this title,
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> (B) commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work, and
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> (C) related to the individual's productivity.

Proposed section 525.9(a) states, "As of [EFFECTIVE DATE OF FINAL RULE], the Secretary has determined that certificates allowing for the payment of subminimum wage rates for workers with disabilities are no longer necessary to prevent the curtailment of opportunities for employment." As a result of that proposed determination, the proposed rules would phase out section 14(c) certificates by permitting applications only for renewal of a certificate. No certificate would be valid three years after the effective date of the final rule regardless of a pending renewal application. This comment argues that the Department has not put forward an analysis that supports the proposed determination and the consequent phase out. The comment recommends that the Department should instead attempt to disentangle its application process for section 14(c) certificates.

Critique of the Proposal

A basic requirement of rulemaking is that an agency "must give adequate reasons for its decisions," *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016), and "articulate a satisfactory explanation for its action 'including a rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, (1962)). The Department has not met that requirement.

The Department relies upon two factors in support of its proposed determination. The first factor is that since the adoption of the FLSA and since the last amendments to its section 14, new programs, laws, and attitudes—"a comprehensive system of new approaches"—have arisen to expand employment opportunities for the disabled. 89 Fed. Reg. at 96,467. The second factor is that the use of section 14(c) certificates has diminished in both its size and its scope. The estimated number of section 14(c) workers declined sharply from 2014 to 2022 and plateaued from 2014 to 2022. *Id.* at 96,498 (fig. 1, pt. B). In May of 2024, 801 employers had certificates issued or pending compared to 2,820 in April of 2015. *Id.* at 96,499. In addition, approximately 93 percent of certificate holders are community rehabilitation programs (also known as sheltered workshops), *id.* at 96,473, which offer little or no opportunity for advancement. *Id.* at 96,488.

On the basis of these factors, the Department's "preliminary findings are that employment opportunities exist sufficiently apart from section 14(c) certificates to justify the proposed determination to stop issuing certificates through a multi-year phaseout." 89 Fed. Reg. at 96,496. That conclusion is not what section 14(c) calls for. The standard does not ask whether there are opportunities other than opportunities with employers who have section 14(c) certificates; there always are. [1] Rather, the statute requires (with the mandatory word "shall") the Department to issue certificates to the extent necessary to prevent *curtailment* of opportunities for employment. Elsewhere in the preamble the Department states its determination in words that more closely track the statutory language, but it may be that the Department was applying the lower standard quoted above because neither of the two factors leads to the conclusion that to *no extent at all* are certificates necessary to prevent curtailment of opportunities for employment.

[1] Similarly, the Department states: "This comprehensive system of new approaches has rendered it unnecessary to depend upon subminimum wages to secure employment opportunities for individuals with disabilities. . . ." 89 Fed. Reg. at 96,467. "The Department believes the results of this analysis, while not dispositive, further support its preliminary conclusion that employment opportunities exist for workers with disabilities that are independent from section 14(c) certificates." *Id.* at 96,493.

The process by which a rulemaking agency reaches a result must be logical and rational. *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998). Here, however, the Department's analysis of the two factors to reach its determination rests upon unsupported assumptions. First, the Department assumes that because there exists "a comprehensive system of new approaches" to address a problem, the problem does not exist. Second, the Department assumes that because the use of section 14(c) certificate is limited and declining, they are no longer necessary.

The proper analysis that the Department should have presented in the preamble would begin with the question of whether there exists a problem of unemployment among the disabled not whether there exist purported remedies for the problem. The answer to the question the Department should have asked is yes. In 2023 only 22.5 percent of people with a disability were employed in contrast to 65.8 percent of people without a disability.[2] And the proportion of the population with a disability has gradually increased over the past decade. *Id.* at 96,490 (fig. 1, panel A). Individuals whose disability renders them unable to engage in any substantial gainful activity are eligible for benefits under the Social Security Disability Insurance Program. In 2023 the Social Security Administration paid disability benefits to 7,365,987 disabled workers.[3]

Thus, a problem persists notwithstanding laws, programs, etc. intended to address it. The next issue the Department should have addressed is the utility of section 14(c) certificates: to what extent are they necessary to prevent curtailment of opportunities for employment? The Department asserts that the use of section 14(c) certificates is limited and declining, but that does not fully answer the question. State and local minimum wages that are higher than the federal minimum wage reduce the utility of section 14(c) certificates, as the Department points out. However, the certificates could still be necessary to prevent curtailment of opportunities but are unused for a different reason that is within the Department's control: they are too difficult to obtain and so do not serve their function. This is a common flaw of governmental programs, one which Prof. Cass Sunstein, former administrator of OIRA, discussed in a recent law review article:

> Even if the benefits are high, the relevant costs might prove overwhelming. These costs can take qualitatively different forms. They might involve acquisition of information, which might be difficult and costly. They might involve time, which people might not have. They might be psychological, in the sense that they involve frustration, stigma, and humiliation. For any of those reasons, it might be very difficult to navigate or overcome the sludge. In some cases, doing the relevant paperwork might be literally impossible; it simply may not be feasible for people to fill out the forms. By themselves, these points help explain low take-up rates for many federal and state programs. . . .

Cass R. Sunstein, *Sludge and Ordeals*, 68 Duke L.J. 1843, 1853 (2019).

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[2] Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics — 2023*, (Feb. 22, 2024), https://www.bls.gov/news.release/pdf/disabl.pdf.

[3] Soc. Security Admin., *Annual Statistical Report on the Social Security Disability Program* (2023), https://www.ssa.gov/policy/docs/statcomps/di_asr/2021/sect01.html.

In the case of section 14(c) certificates, applicants must conduct a survey to ascertain the prevailing wage of experienced, nondisabled employees who are employed in the vicinity and are engaged in work comparable to the work to be performed at a subminimum wage. 29 C.F.R. § 525.10(c)-(f). The applicant must maintain certain records from its survey. *Id.* § 525.10(g). When an employer's work force primarily consists of nondisabled workers, the employer may use as the prevailing wage the wages paid to the nondisabled workers performing similar work. *Id.* § 525.10(b). The employer must measure the productivity of its disabled employees at least every six months to determine a wage that is commensurate, i.e., proportional to the prevailing wages. *Id.* § 525.12. The Department fined the Lowndes Advocacy Resource Center for incorrectly rounding two of the prevailing wage rates it used to determine employees' pay.[4] The special minimum wage that the employer has calculated by the prescribed methodology is subject to administrative review at which the employer bears the burden of proof. FLSA § 14(c)(5).

It is a wonder that any employers have found applying for and maintaining a section 14(c) certificate through those procedures to be worthwhile or cost effective. The only places it would seem to be cost effective would be shops that have a high proportion of disabled employees and a mission to help them. But as the Department observes, sheltered workshops do not mainstream disabled employees or afford them much opportunity for advancement. The high transaction costs of applying for and maintaining section 14(c) certificates may explain their declining use and restriction to sheltered workshops.

Therefore, it may well be that despite the Department's recent experience, subminimum wage certificates are "necessary to prevent curtailment of opportunities for employment" of disabled workers. This statutory standard refers to "curtailment." Curtailment by what? Curtailment by "the minimum wage applicable under section 206 of this title." FLSA § 14(c)(1)(A). Minimum wage laws can impose a greater burden on disabled persons than on others. Richard A. Epstein, *Forbidden Grounds* 484 (1992). In section 14(c), Congress provided a means of relieving that burden—a means to prevent the minimum wage from curtailing opportunities for the disabled.

The Department proposes to eliminate the relief that Congress mandated. On the basis of its unsupported determination, the Department proposes a rule that would harm some disabled workers, ignoring the pleas of their families. *See* 89 Fed. Reg. at 96,484.

As with any imposition of a minimum wage, employers would respond to the unavailability of section 14(c) certificates in some cases by raising wages but in other cases by laying off workers or not hiring workers they would have hired otherwise.[5] It may be that for

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[4] Press Release, U.S. Dep't of Labor, Wage & Hour Div., *Georgia Resource Center to Pay $157,473 to Employees after U.S. Department of Labor Uncovers Federal Labor Law Violations* (July 18, 2019), https://www.dol.gov/newsroom/releases/whd/whd20190718-4.

[5] *See, e.g.,* Debra Burke, Stephen Miller & Joseph Long, *Minimum Wage and Unemployment Rates: A Study of Contiguous Counties*, 46 Gonz. L. Rev. 661, 663 (2011); Guillaume Rocheteau & Murat Tasci, *The Minimum Wage and the Labor Market*, Federal Reserve Bank of Cleveland (May 1, 2007), https://www.clevelandfed.org/publications/economic-commentary/2007/ec-20070501-the-minimum-wage-and-the-labor-market.

some of the laid off disabled workers "there are not insurmountable barriers to transitioning to employment at or above the full Federal minimum wage." *Id.* at 46,492. The absence of *insurmountable* barriers is cold comfort. Nearly all laid off disabled workers will face barriers and difficulties in finding another job, and many will not be able to surmount them. The Department delicately acknowledges that they "may incur costs associated with reduced wellbeing from no longer being employed or due to a reduction in hours worked." *Id.* at 96,502. The "costs associated with reduced wellbeing" resulting from unemployment or underemployment include insolvency, ill health and increased health care costs,[6] depression, and death.[7]

Job losses do not account for all of the harm that can result from a minimum wage requirement. Employers usually try to avoid laying off employees as a consequence of the imposition or the increase of a minimum wage by implementing other tradeoffs short of staff cuts. These include reduced hours, reduced fringe benefits, less favorable vacation and sick leave policies, stricter attendance policies, increased automation, and higher insurance co-payments.[8]

Recommendation

Before reaching a determination that imposes those costs, the Department should, within the confines of section 14(c)(2)'s requirements, attempt to make section 14(c) certificates less difficult to obtain.[9] The Department has made section 14(c) prevailing wage calculators available online. One of them calculates a straight or simple average; another calculates a weighted average. It also has commensurate hourly wage calculators. The Department's 54-page user guide cautions that "[e]mployers remain independently responsible for determining whether their wages are in compliance with federal law."[10] The Department should offer employers more of a safe harbor than that. It should provide prevailing wage determinations as it does for wage determinations under the Davis-Bacon Act and the Immigration and Nationality Act. The

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[6] National Center on Leadership for Employment and Economic Advancement of People with Disabilities, *The Impact of Employment on the Health Status and Health Care Costs of Working-Age People with Disabilities* (Nov. 2015), https://leadcenter.org/wp-content/uploads/2021/07/impact_of_employment_health_status_health_care_costs_0.pdf.

[7] *See, e.g.,* Adam Skinner et al., *Unemployment and Underemployment Are Causes of Suicide*, Sci. Advances 9, no. 28 (July 12, 2023), https://www.science.org/doi/full/10.1126/sciadv.adg3758; Augustine J. Kposowa & Kevin Breault, *Disability Status, Unemployment, and Alcohol-Related Liver Disease (ALD) Mortality: A Large Sample Individual Level Longitudinal Study*, 12 Substance Abuse & Rehabilitation 81 (Oct. 19, 2021), https://www.tandfonline.com/doi/pdf/10.2147/SAR.S334851.

[8] Ryan Young, *Minimum Wages Have Tradeoffs: Unintended Consequences of the Fight for 15*, (Oct. 2019), https://cei.org/studies/minimum-wages-have-tradeoffs/. *See also* Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. Chi. L. Rev. 511, 519 (2023); Richard A. Epstein, *On Wal-Mart: Doing Good by Doing Nothing*, 39 Conn. L. Rev. 1287, 1300-1301 (2007).

[9] Whether the Department considered this alternative is unclear. The Department states that it "considered revising its existing regulations to change the process and evidence employers would need to provide in order to demonstrate that the payment of a subminimum wage is necessary to prevent the curtailment of employment opportunities." 89 Fed. Reg. at 96,496. The Department does not say whether it considered making the process and the required evidence less burdensome or more burdensome. It appears to be the latter. An advisory committee recommended that the Department require applicants to submit even more information. *Id.* at 96,486.

[10] U.S. Dep't of Labor, *Section 14(c) Online Calculators User Guide*, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/calculatorGuide.pdf.

regulations should be revised to allow employers to rely upon prevailing wage determinations provided by the Department.

In addition, amendment of 20 C.F.R. § 525.22(f)-(h) to remove intermediate appellate review by the Administrative Review Board, which is neither required nor authorized by section 14(c)(5) of the FLSA, could reduce employers' litigation costs.

Conclusion

Only after the Department has made applying for and maintaining a section 14(c) certificate less onerous should the Department determine the extent those certificates are necessary to prevent the curtailment of opportunities for employment. The determination the Department has made is based upon a flawed analysis that does not support the proposed phaseout of section 14(c) certificates.

Cordially yours,

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