



November 22, 2021

Submitted via www.regulations.gov

U.S. AbilityOne Commission
1401 S. Clark Street
Suite 715
Arlington, VA 22202

Re: Comments in Response to Proposed Rulemaking: Prohibition on the Payment of Subminimum Wages Under 14(c) Certificates as a Qualification for Participation as a Nonprofit Agency Under the Javits Wagner O'Day Program; RIN 3037-AA16

Dear Commissioners and Staff:

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) entitled, "Prohibition on the Payment of Subminimum Wages Under 14(c) Certificates as a Qualification for Participation as a Nonprofit Agency Under the Javits Wagner O'Day Program." The National Disability Rights Network (NDRN) welcomes the Committee for Purchase from People Who Are Blind or Severely Disabled's (better known as the AbilityOne Committee) proposal to severely curtail subminimum wage payments to better align with modern disability and civil rights law, and with the desires of people with disabilities. The proposed rule further comports with the reality of the modern-day workforce and an emerging consensus against the payment of subminimum wages to people with disabilities.

NDRN is the non-profit membership association of Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies, which are located in all 50 States, the District of Columbia, Puerto Rico, and the United States Territories. In addition, there is a P&A and CAP affiliated with the Native American Consortium, which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A and CAP Network comprises the nation's largest provider of legally-based advocacy services for persons with disabilities, including advocacy on employment so that those who want to live and work in their community can do so.

Over the years, NDRN and our members, the nationwide network of P&As and CAP agencies have led the campaign for greater inclusion of people with disabilities in the workforce. In particular, we have been [vocal and adamant](#) about the need to eliminate section 14(c) of the Fair Labor Standards Act (FLSA), which permits employers to pay

certain people with disabilities less than the applicable federal minimum wage. NDRN documented the concerns of the P&A network and the broader disability community about work performed by persons with disabilities in segregated settings including in sheltered environments, the low wages paid to workers with disabilities, and the massive breakdown between good federal and state policies and their implementation and oversight in two reports: [Segregated and Exploited](#) and [Beyond Segregated and Exploited](#). Additionally, concerns about sub-minimum wages were well documented in the award-winning film [Bottom Dollars](#). The evidence over the years has shown that full employment of people with disabilities is not only possible, but also probable if high expectations are set and individuals are provided the supports and services they need.

As outlined in the preamble of the NPRM, section 14(c) is incompatible with modern disability and civil rights law. Most notably, section 14(c) conflicts with the Americans with Disabilities Act (ADA), which established a national goal of economic self-sufficiency for people with disabilities, and the Workforce Innovation and Opportunity Act (WIOA) which prioritizes competitive integrated employment, where people with disabilities work in mainstream jobs alongside, and are paid comparable wages to co-workers without disabilities. Not only do sub-minimum wages perpetuate a life of poverty and dependency for people with disabilities, their continued existence is a serious civil rights violation, which has yet to be completely resolved despite years of advocacy.

While we appreciate the AbilityOne Commission's desire to cease its support for the use of 14(c) certificates among its nonprofit agencies (NPAs), we take issue with the claim in the NPRM where it states "Work provides structure, purpose, and a sense of meaningful contribution to family and community. That is why the AbilityOne Program is so important for individuals with significant disabilities." While we certainly agree that work can provide structure, purpose, and meaning, which should also extend to workers with disabilities, we disagree that the AbilityOne Program has played any role in furthering the national policy of expanding the opportunities within the community for persons with significant disabilities. In fact, we would argue that the AbilityOne Program exacerbates existing problems within the system of support and services for workers with disabilities by perpetuating segregation and an "other system" for persons with disabilities.

NDRN's comments on this NPRM must be viewed through the framework of ultimately eliminating the AbilityOne Program to ensure the full integration of persons with disabilities into the community. In October 2020, the National Council on Disability (NCD) concluded in a report that the AbilityOne program no longer serves its purpose of promoting Congress' goal of improving employment opportunities for people who are blind or have significant disabilities¹. This recommendation was based on the reality that the AbilityOne Program has not kept pace since its inception in 1938 and expansion in 1971 with the evolution of federal civil rights law and disability policy. In fact, rather than investing in developing the skills of individuals with significant disabilities to succeed in employment in the general workforce, the AbilityOne Program continues to perpetuate

¹ Federal advisory agency recommends phase out, replacement of federal. (2020, October 14). Retrieved from <https://ncd.gov/newsroom/2020/NCD-releases-AbilityOne-report>

outdated models that segregate and alienate people with disabilities, and decrease opportunities for developing skills in fields that people with disabilities may be interested in based on low expectations of what these workers can do when given the proper supports. For these reasons, NCD ultimately recommended that the program be phased out and replaced. While the phase out of the use of 14(c) certificates by all AbilityOne participating NPAs is necessary and long overdue, the continued existence of the AbilityOne Program clings to an outdated, antiquated, and discriminatory model by which the government views the employment of people with disabilities as a separate system outside of the full community. We want to take this opportunity in these comments to underscore our support for the recommendations outlined in the 2020 NCD report, most notably the recommendation to phase out the program in its entirety.

The NPRM also notably highlights Executive Order (E.O.) 13985, Advancing Racial Equity and Support for Underserved Communities, issued by President Biden on January 25, 2021, which directs the entire Federal Government to pursue a comprehensive approach to advancing equity for all. This E.O., as noted in the NPRM, encompasses individuals with disabilities. The AbilityOne program also runs counter to the objectives of E.O. 13985 because it is fundamentally at odds with the objective of advancing the inclusion of underserved communities in the general workforce. It has become clear that employment of individuals in competitive, integrated employment (CIE) is not only the desire of the disability community, but also the direction the larger workforce is headed. The national priority for CIE is reflected in WIOA, and CIE furthers the goal of the ADA to advance the economic self-sufficiency of people with disabilities. While the prohibition on NPAs paying subminimum wages is certainly a part of the solution, the continued use of segregated work settings by NPAs and the lackluster performance by the AbilityOne Program to improve employment outcomes for the populations it is purportedly meant to serve all underscore the need for the program to be eliminated should the Commission truly want to implement E.O. 13985 with any fidelity, and align the employment of people who are blind or have significant disabilities with modern disability law. Additionally, while the focus of this proposed rule is on the elimination of 14(c) as it pertains to AbilityOne contracts held by NPAs, we strongly urge the Commission to take action to prohibit the entire NPA from using 14(c) certificates, not just on AbilityOne contracts, just as the 75% direct labor hour ratio requirement applies to the entire NPA and not just to AbilityOne contracts.

Please find our comments to the questions posed in the NPRM below:

(1) Should the requirement that a qualified NPA not use section 14(c) certificates to pay subminimum wages on AbilityOne contracts apply to the renewal or extensions of contracts once they expire or only to new contracts? The Commission is interested in receiving data in support of any comment on this question.

The requirement that a qualified NPA not use section 14(c) certificates to pay subminimum wages on AbilityOne contracts should apply to both renewal and extensions of contracts once they expire in addition to new contracts. As outlined

above, it is long past time to phase out the use of 14(c) certificates. We cannot prohibit discriminatory practices for one group of workers because they happen to work at an NPA with a new AbilityOne contract and not extend the same policy to another group of workers because they happen to work at an NPA with an existing contract. A piecemeal approach will only serve to further delay what is required to come into compliance with disability law, which is a total prohibition and phase out of all 14(c) certificates.

Per the 2020 NCD report, it is clear that the central nonprofit agencies (CNAs) and their affiliate NPAs have already begun to successfully phase out the use of 14(c) certificates. The National Industries for the Blind (NIB) decided in 2014 to eliminate the use of 14(c) certificates by their affiliated NPAs, and all but one NPA complied¹. The NIB example shows how NPAs can transition from utilizing a 14(c) model to a model that is more aligned with CIE in terms of the payment of wages.¹ Though not going as far as NIB, SourceAmerica, the other AbilityOne CNA, already is “fully committed to maximum pay for people with disabilities and supports the elimination of Section 14(c).”² Since 2014, NPAs who provide services and concessions to, or construction for the federal government are already required under E.O. 13658 to pay the established minimum wage and cannot utilize a 14(c) certificate to pay less than this wage.

More recently, E.O. 14026 signed in April increased the minimum wage on such federal contracts to \$15.00 an hour beginning on January 30, 2022 and again included the provision that 14(c) certificate holders still must pay at least that amount to workers with disabilities. Furthermore, 10 states have now begun to phase out the ability of employers to pay 14(c) wages by requiring the employer to pay the state minimum wage even if they possess a 14(c) certificate.

All of these developments point to an emerging national consensus about the unfair and discriminatory practice of paying persons with disabilities, no matter what the disability, subminimum wages. The proposed rule would extend the prohibition on the payment of subminimum wages to AbilityOne good, supplies, and materials contracts, and eliminate the ability of any NPA to pay less than any required prevailing wage if higher than the minimum wage, thus eliminating all discriminatory treatment of workers with disabilities under all AbilityOne contracts.

Given the documented ability of NPAs to make this transition, there is no justifiable reason to narrow the scope of this new rule to apply only to new contracts. Broadly speaking, the only conceivable reason that NPAs continue to utilize 14(c) certificates is the benefit to their business operating model, which inevitably comes at the expense of the civil rights of their employees with disabilities. Again, the Commission should publish a final rule that clearly requires that NPAs not use section 14(c) certificates to pay subminimum wages on all AbilityOne contracts regardless of whether the contract is up for renewal, an extension, or represents a new contract. Anything short of that standard will be inconsistent with disability law and both E.O. 13985 and statements made by this

² SourceAmerica, “Letter to NPA Leaders,” accessed April 7, 2020, http://wintac-s3.s3-us-west-2.amazonaws.com/topic-areas/ta_511/SourceAmerica-Letter.docx

Administration to phase out 14(c)³.

(2) Should the requirement that a qualified NPA not use section 14(c) certificates to pay subminimum wages on AbilityOne contracts apply to the exercise of an option on an existing contract? The Commission is interested in receiving data in support of any comment on this question.

Yes, the requirement should apply to the exercise of an option on an existing contract unless prohibited by the Federal Acquisition Regulations (FAR). AbilityOne contracts may allow for multiple options, which could delay the applicability of the proposed requirement for years for some NPAs. With more states prohibiting the payment of 14(c) wages by requiring adherence to state minimum wage laws, there is no reason to further delay the prohibition within the AbilityOne program until after a contract is renewed or re-competed.

(3) What impact, if any, would the proposed regulatory change make to the receipt of social security benefits, such as Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) and attendant government health insurance, such as Medicare and Medicaid, to employees with disabilities? The Commission is also interested in receiving suggestions on how to address any possible adverse impacts that may be identified.

A reduction or loss of benefits can be disruptive for people with disabilities who do not earn enough to maintain self-sufficiency but are considered to be working too much for public benefit program assistance¹. The so-called benefits cliff⁴ is a legitimate barrier to some employees with disabilities who do not want to lose access to critical government programs and government healthcare. The reduction or removal of benefits can, and does, create barriers to accessing health care, which could affect the health, housing, and overall participation in society of people with disabilities. This very real and imminent threat discourages people with disabilities from participating in full-time employment¹. With that being said, the potential for an individual to experience a benefits cliff in and of itself is not a legitimate reason to scale back or not implement this proposed regulatory change.

There is ample evidence to suggest that NPAs can pay above the minimum wage while also maintaining healthcare benefits and other important benefits for workers with disabilities. One tactic would be for NPAs to offer supplemental insurance benefits to their employees. Some NPAs who offered supplemental insurance received fewer requests from employees to work less hours to maintain benefits¹. According to the 2020 NCD report, one NPA reported that none of their AbilityOne employees received public benefits because they were paid above the minimum wage and received

³ https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/30/a-proclamation-on-national-disability-employment-awareness-month-2021/?utm_source=link; <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/26/a-proclamation-on-anniversary-of-the-americans-with-disabilities-act-2021/>

⁴ A benefits cliff is when a public benefit program lessens or stops when a person's earnings increase.

employer provided benefits. By paying workers with disabilities above the minimum wage, it will inevitably lead to financial independence and the abandonment of government benefits similar to many non-disabled workers not working under 14(c) certificates.

While we appreciate the Commission’s thoughtful exploration of the loss of benefits should this regulation be implemented, it is ultimately not an AbilityOne problem. The problem is an important ancillary issue about how the nation’s system to assist persons with disabilities can limit the full employment of people with significant disabilities or who are blind, and can hinder CIE¹. Given the evolution of disability employment policy and the policy and legal foundations outlined earlier in these comments, the focus of programs like AbilityOne should be to transition their business models to ones that promote CIE. There is evidence to demonstrate that increasing employment for people with disabilities will reduce poverty, improve health outcomes, and ultimately lead to lower public health care costs⁵. Additionally, many studies overwhelmingly focus on the financial and psychological benefits of employment for people with disabilities and draw the conclusion that improved financial and psychological benefits lead to better health and therefore lower health care costs⁶.

Finally, other services exist in the continuum of supports and services for workers with disabilities who wish to maintain access to means-tested cash benefits and healthcare while working in a CIE environment. For example, the Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act (P.L. 113-295) created tax-favored accounts to enable people with disabilities to save for and pay for disability-related expenses that include education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, and financial management. Resources saved in an ABLE account are not taken into consideration when determining the individual’s eligibility for federally funded means tested benefits, including Supplemental Security Income (SSI) and Medicaid. An ABLE account is a great tool for workers whose income rises to a point where a benefits reduction or complete ineligibility becomes a real threat. The one caveat is that under current law ABLE accounts are only available to individuals whose disability onset prior to their 26th birthday.

5 Melanie Bush, “Addressing the Root Cause: Rising Health Care Costs and Social Determinants of Health,” *North Carolina Medical Journal* 79, no. 1 (January 2015): 26–29. Philip W. Bush, Robert E. Drake, Haiyi Xie, Gregory J. McHugo, and William R. Haslett, “The Long-term Impact of Employment on Mental Health Service Use and Costs for Persons with Severe Mental Illness,” *Psychiatric Services* 60, no. 9 (August 2009): 1024– 1031. Jean P. Hall, Noelle K. Kurth, and Suzanne L. Hunt, “Employment as a Health Determinant for Working-Age, Dually-Eligible People with Disabilities,” *Disability Health Journal* 6, no. 2 (April 2013): 100–106.

6 Evan E. Dean, Karrie A. Shogren, Mayumi Hagiwara, and Michael L. Wehmeyer, “How Does Employment Influence Health Outcomes? A Systematic Review of the Intellectual Disability Literature,” *Journal of Vocational Rehabilitation* 49, no. 1 (August 2018): 1–13. Nanette Goodman, Policy brief: The Impact of Employment on the Health Status and Health Care Costs of Working-Age People with Disabilities (Washington, DC: The National Center on Leadership for the Employment and Economic Advancement of People with Disabilities (LEAD Center), (November 2015), accessed July 23, 2020, http://www.leadcenter.org/system/files/resource/downloadable_version/impact_of_employment_health_status_health_care_costs_0.pdf.

(4) How much time, if any, would be necessary for NPAs to meet the new requirements?

Given the contract implications, we recommend that NPAs be given six months for both options and new contracts which should be a reasonable amount of time for NPAs to come into compliance with the new requirements.

Please contact Cyrus Huncharek, Senior Public Policy Analyst, at cyrus.huncharek@ndrn.org should you have any questions or concerns with these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Curtis L. Decker", enclosed in a light blue rectangular box.

Curtis L. Decker
Executive Director