

United States Senate

WASHINGTON, DC 20510

April 23, 2018

The Honorable Alexander R. Acosta
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Secretary Acosta:

We write to request information on the Department of Labor's ("the Department") oversight and enforcement of employers that use 14(c) waivers to hire workers with disabilities and pay them less than the federal minimum wage. These waivers are inherently discriminatory and should be phased out in a responsible way. While the Department continues to issue these waivers, however, we are concerned by past abuses of the program and hope to better understand the extent to which the Department is able to prevent employers' mistreatment of and discrimination against workers with disabilities.

As you know, Section 14(c) of the Fair Labor Standards Act (FLSA) allows the Department to issue certificates to eligible employers that allow them to pay workers "whose earning or productive capacity is impaired by age, physical or mental deficiency" a "special minimum wage" that is lower than the federal minimum wage.¹ According to public Department data, as of January 2018, employers held more than 1,700 14(c) certificates covering more than 150,000 workers eligible to receive a subminimum wage.² Many of these individuals are employed in "sheltered workshops," where they do not work in a competitive integrated environment alongside peers without disabilities. These practices have continued in many places despite some states having taken steps to reduce state funding of these facilities and three states having prohibited subminimum wages entirely.³

We are concerned that Section 14(c) permits employers to discriminate against workers on the basis of disability status and unjustifiably sets low expectations for workers with disabilities. Subminimum wage employees at some Goodwill Industries sites, for example, have reported earning as low as 22, 38, or 41 cents per hour. One former worker said she felt "like a

¹ "The Fair Labor Standards Act of 1938, as Amended." Wage and Hour Division. *U.S. Department of Labor*. (accessed Feb. 16, 2018). Online at: <https://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf>

² "14(c) Certificate Holders." Wage and Hour Division. *U.S. Department of Labor* (accessed Feb. 16, 2018). Online at: <https://www.dol.gov/whd/workerswithdisabilities/certificates.htm>

³ Campbell, A. F. "Paying disabled workers less than minimum wage is legal in the US. Alaska has now banned it." *Vox* (Feb. 23, 2018). Online at: <https://www.vox.com/policy-and-politics/2018/2/23/17036472/disabled-workers-minimum-wage-alaska>.

second-class citizen” working at the organization.⁴ A *USA Today* report on the use of 14(c) certificates in New York found workers earning as little as 16 cents per hour at organizations that were simultaneously doling out tens of thousands of dollars in bonuses to their executives.⁵ In particularly egregious abuses of the subminimum wage, law enforcement has discovered sheltered workshops that essentially amount to sweatshops, such as at a “vocational school” in Rhode Island where students with intellectual and developmental disabilities were forced to work long hours for little or no wages.⁶ In the infamous “Henry’s Turkey” case, dozens of men with intellectual disabilities spent three decades living in a run-down schoolhouse in Atalissa, Iowa, where they earned two dollars per day to work for a turkey-processing plant and were subjected to physical abuse, verbal abuse, and unsanitary conditions. Eventually, the U.S. Equal Employment Opportunity Commission (“EEOC”) helped these men get justice when it won the largest single judgment ever awarded in an EEOC labor discrimination case,⁷ totaling hundreds of millions of dollars against the employer, who at one point held a 14(c) certificate from the Department.⁸

Numerous self-advocates and experts in the disability community have recognized that the subminimum wage has a high potential for abuse. The Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, created by the bipartisan Workforce Innovation and Opportunity Act, released a final report in fall 2016 (“Advisory Committee Report”) recommending a “well-designed, multi-year phase-out of the Section 14(c) Program that results in people with disabilities entering CIE [competitive integrated employment].” That report also detailed a number of steps that the Wage and Hour Division of the Department can take to strengthen the enforcement of 14(c) certificates and to ensure that they are issued only when “necessary in order to prevent the curtailment of opportunities for employment,”⁹ as current regulation requires.¹⁰ Because of the inherently discriminatory nature of the program, we agree that it should be phased out in a responsible way.

While the Department makes public a list of 14(c) certificate holders and the number of employees the certificate holder is permitted to hire, neither Congress nor the public knows how many individuals with disabilities are actually employed under the more than 1,700 certificates.

⁴ Schecter, A. “Disabled workers paid just pennies an hour – and it’s legal.” *NBC News* (June 25, 2013). Online at: http://investigations.nbcnews.com/_news/2013/06/25/19062348-disabled-workers-paid-just-pennies-an-hour-and-its-legal?lite

⁵ Reilly, S. “Watchdog report: Workers with disabilities earn pennies per hour.” *pressconnects*. (July 3, 2014). Online at: <https://www.pressconnects.com/story/news/2014/06/28/watchdog-report-workers-with-disabilities-earn-pennies-per-hour/11629369/>

⁶ “Feds: Rhode Island wrongly separated disabled students.” AP. *USA Today* (June 12, 2013). Online at: <https://www.usatoday.com/story/news/nation/2013/06/12/ri-disabled-segregated/2417043/>

⁷ “Jury Awards \$240 Million for Long-Term Abuse of Workers with Intellectual Disabilities” [press release]. *U.S. Equal Employment Opportunity Commission* (May 1, 2013). Online at: <https://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm>.

⁸ Noguchi, Y. “A ‘Wake-Up Call’ to https://www.npr.org/2013/05/16/184491463/disabled-workers-victory-exposes-risks-to-most-vulnerable

⁹ “Final Report...” Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities. *U.S. Department of Labor* (Sept. 15, 2016). Online at: https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf.

¹⁰ “Criteria for employment of workers with disabilities under certificates at special minimum wage rates.” 29 CFR 525.9. Online at: <https://www.law.cornell.edu/cfr/text/29/525.9>.

We also do not know what their rates of pay are. In order to better understand the program and the use of the subminimum wage, the Department should publicly report, on at least an annual basis, the pay rates of individuals with disabilities paid by employers using 14(c) certificates, at the national level, and at the state level.

As a step toward improving oversight of 14(c) certificates and to inform further policymaking related to this issue, we request that you provide us with the following information no later than May 11, 2018:

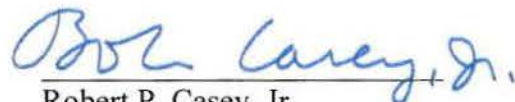
1. The annual number of applications for 14(c) certificates that the Department has received; the number that the Department has accepted for each of the past 10 years, broken down by certificate type (Business Certificate, School Work Experience Program, Community Rehabilitation Program, and Employers of Patient Workers); and the number that the Department has rejected for each of the past 10 years and the reasons for the rejection;
2. The number of individuals working for 14(c) certificate holders on October 1, 2017 and, for each 14(c) holder,
 - a. the average, median, standard deviation, and range of pay earned by workers paid the special minimum wage; and
 - b. the average, median, standard deviation, and range of the length of employment of workers paid the special minimum wage;
3. The number of individuals who received the subminimum wage under a 14(c) certificate, then, at some point in Fiscal Year 2017, moved to another, higher-paying job that was not covered by a 14(c) certificate;
4. The annual number of applications for renewal of 14(c) certificates, the number of applications accepted, the number rejected, and the reasons for rejecting renewal applications, for the past 10 years;
5. The procedures for evaluating a new application and renewal application for a 14(c) certificate, including any standards or criteria the Department uses to determine if a 14(c) certificate is “necessary in order to prevent the curtailment of opportunities for employment” and any evidence the applicant is required to provide when the Department is making this determination;
6. The annual number of inspections of 14(c) certificate holders that the Wage and Hour Division conducts, including as a percentage of total 14(c) certificate holders for the past 10 years, by year, and an annual summary of the results of those inspections;
7. A description of any notable trends that the Wage and Hour Division has observed in the use of 14(c) certificates and the number or nature of violations of the FLSA, terms of certificates among 14(c) certificate holders, and other labor laws in each of the past 10 years;

8. A detailed description of the Wage and Hour Division's strategy for inspections of 14(c) certificate holders, particularly the process the Department uses to choose which employers to inspect and its allocation of budgetary and personnel resources for doing so, including how these allocations compare to those of the Division's other enforcement functions, and any changes in this strategy or in the allocation of funds or personnel since January 20, 2017;
9. The annual number of 14(c) certificates that the Wage and Hour Division revoked pursuant to 29 CFR 525.17¹¹ as a percentage of 14(c) holders that the Division has found in violation of the FLSA or the terms of the certificate, as well as the numbers of certificates that the Department has revoked (a) retroactively to the time of issuance, (b) retroactively to the time of violation, and (c) as of the date of a notice of revocation, respectively, for each of the past 10 years;
10. A description of the Department's efforts to implement the recommendations detailed in Chapter Three of the final report of Advisory Committee Report that relate to the Wage and Hour Division's enforcement of 14(c) certificates and the standard that it uses for issuing and renewing such certificates;¹² and
11. A description of any steps the Department has taken to implement each of the recommendations assigned to the Department or any of its agencies in Appendix E of the Advisory Committee Report.¹³

Sincerely,



Elizabeth Warren
United States Senator

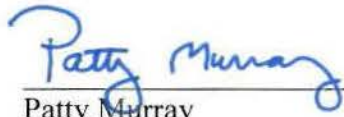


Robert P. Casey, Jr.
United States Senator

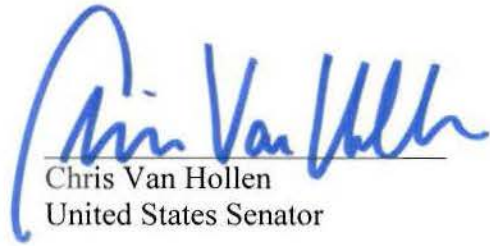
¹¹ "Revocation of certificates." 29 CR 525.17. Online at: <https://www.gpo.gov/fdsys/pkg/CFR-2003-title29-vol3/pdf/CFR-2003-title29-vol3-sec525-17.pdf>.

¹² "Final Report..." *supra* note 19.

¹³ *Id.*



Patty Murray
United States Senator



Chris Van Hollen
United States Senator



Margaret Wood Hassan
United States Senator



Tammy Duckworth
United States Senator



Bernard Sanders
United States Senator