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Quest for Equal Pay for Equal Work



Subminimum Wage Report A Call to Action to End Subminimum Wage Practice

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This report is the result of teamwork from many members of the staff, including David Monroe, Olivia Pilcher, Alison Butler and Mary Anne Harvey. An electronic version is available on our website www.DisabilityLawCO.org/EqualPay. Thank you to everyone who helped contribute and may we soon have a day were there is equal pay for equal work.

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Background

Disability Law Colorado, as part of the nation-wide federally-mandated and state-designated Protection and Advocacy System, has had an ongoing concern about sheltered workshops in Colorado and the number of individuals with disabilities who are paid subminimum wage in our state. Unfortunately, Disability Law Colorado (“DLC”) is concerned that though there have been some movements in the right direction, too little progress at too slow a pace is being made toward creating equity in wages and work conditions for people with disabilities.

Disability Law Colorado believes it is time for a change--a change that recognizes the value of people with disabilities in the employment and human rights settings. We also recognize that change is never easy and we are recommending a coalition of Colorado public, private and state-run service agencies come together and make a full commitment to change the law. We propose that the best place to begin this process is through a series of focused, outcome driven discussions with stakeholders to determine how to most expediently and effectively bring about this change in the law. Together we can develop creative, practical solutions that will lead to *fully integrated, fully supported work opportunities for all individuals with disabilities*.

What is subminimum wage?

It refers to a provision in the Fair Labor Standards Act (Section 14(c)) that allows employers to pay people with disabilities less than the minimum wage if their disability impairs their earning or productive capacity. It can be as low as 10¢ per hour up to a few dollars per hour. This is substantially lower than both Colorado’s minimum wage (\$10.20) and the federal minimum wage (\$7.25).

A Short History of Sheltered Workshops and Subminimum Wage

Since 1938, Section 14(c) of the Fair Labor Standards Act (FLSA) has authorized employers to pay subminimum wages, which are wages less than the Federal minimum wage, to workers who have disabilities. Employers must first obtain an authorizing certificate from the Wage and Hour Division, usually referred to as a Section 14(c) certificate, prior to paying subminimum

wages to employees who have disabilities. Ironically, one of the original motivations for passing this legislation was to encourage employers to hire more individuals with disabilities, which would allow them to integrate more fully into their home communities. That goal has not been obtained.

Ever since the establishment of this exception and these 14(c) certificates, the most common approach to the employment of individuals with disabilities has

What is a sheltered workshop or segregated employment? The term refers to people with disabilities not being included among a group of peers who do not have disabilities to provide an opportunity for integration and meaningful inclusion, but rather segregates the population of people with disabilities to work and socialize among themselves.

been the sheltered workshop model. *Sheltered workshops* or *segregated employment* are generally places where individuals with disabilities perform menial jobs, such as shredding paper, putting labels on jars, assembling small parts, or stuffing envelopes--essentially doing mindlessly repetitive work for hours on end at a rate of pay that is far less than minimum wage. Despite often promising individuals with disabilities the opportunity for meaningful employment training, sheltered workshops typically offer no training programs which lead to the development of marketable employment skills, and the individuals who find themselves stuck in these workshops rarely move on to more competitive, integrated employment.

Sustained criticism of sheltered workshops over many decades has failed to lead to their demise. Today there are still hundreds of thousands of individuals with disabilities participating in such programs nationwide, being paid subminimum wage to do so, and in some cases being paid pennies per hour.¹ Additionally, while the Fair Labor Standards Act subminimum wage law is clearly outdated, to the point of being antiquated, today as many as 2,000 employers nationwide still continue

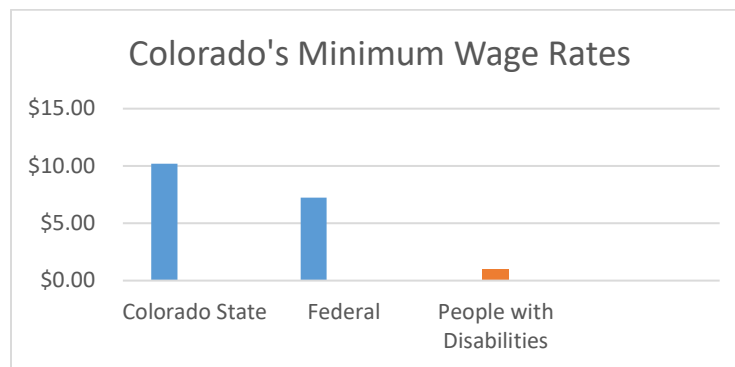
to take advantage of the law to pay their employees with disabilities subminimum wages.² As of 2018, over 320,000 people in our country are legally paid less than the minimum wage, and on average, less than \$2 an

¹ See *Bottom Dollars*, a documentary produced by *Rooted in Rights* which can be found at <https://www.rootedinrights.org/videos/employment/bottom-dollars/>

² See *For People With Disabilities, Earning Pennies Per Hour Is Only Part of the Problem* by Robyn Powell, published by Rewire. News, May 17, 2018 at <https://rewire.news/article/2018/05/17/people-disabilities-earning-pennies-per-hour-problem/>

hour.³ An investigative report done by NBC News in 2013 discovered that one of the nation's best-known charities was paying disabled workers as little as .22 cents an hour while their CEO's earned hundreds of thousands of dollars a year.⁴ U.S. Labor Department records from 2009 showed that some workers with disabilities in Pennsylvania earned wages as little as .22, .38 and .41 cents per hour for their labor.

In Colorado, there are at least 18 employers who hold 14(c) certificates allowing them to pay people with disabilities significantly less than their counterparts without disabilities. This includes over 750 individuals and employers from non-profit organizations, to community center boards to state-run facilities. Colorado needs this change for the 750 people and all those who come after them.



Maintaining Sheltered Workshops and Subminimum Wage is Not the Answer

An often repeated but demonstrably inaccurate assertion is that sheltered workshops and subminimum wage programs provide meaningful training opportunities for people with disabilities which will lead to integrated employment at fair wages. Despite ample evidence to the contrary, there are those who still insist that paying individuals with disabilities less than their non-disabled peers will allow for much needed vocational training and job

³ See National Council on Disability, *National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future*, p. 19; *Bottom Dollars*, a documentary produced by *Rooted in Rights* and which can be found at <https://www.rootedinrights.org/videos/employment/bottom-dollars/>

⁴ See *Disabled workers paid just pennies an hour – and it's legal* by Anna Schechter, published by NBC News at http://investigations.nbcnews.com/_news/2013/06/25/19062348-disabled-workers-paid-just-pennies-an-hour-and-its-legal

opportunities for individuals with disabilities. The data which has been collected over time related to these assertions simply does not support their validity.

In 2001 the U.S. General Accounting Office (GAO) reported that over half of sheltered workshop employees remain at the workshops more than five years, and some stay for more than 20 years while being paid subminimum wages.⁵ The reason why this is often the case is readily explainable:

*While individuals [employed in sheltered workshops] may experience the normal task requirements of work such as using time clocks, working a fixed schedule, and being supervised, most [workshops] provide bench work and do not promote self-direction, self-determination or skill development.*⁶

The same GAO report cited above also found that the 14(c) subminimum wage program is used “primarily by non-profit or state-operated social services providers – specifically, sheltered workshops – rather than private, for-profit businesses. According to the GAO report, 95% of all workers with disabilities being paid less than minimum wage under the 14(c) program were employed by sheltered workshops.”⁷

In 2012, the National Council on Disability (NCD) called for a transformation strategy designed to phase-out sheltered workshops and subminimum wage, calling them a “policy relic from the 1930s.”⁸ Just this fall, NCD issued a new report aimed at clarifying how subminimum wage emboldens employers and exploits workers with disabilities to the detriment of our society and

⁵ See General Accounting Office (GAO) report, *Special Minimum Wage Program, Centers Offer Employment and Support Services to Workers with Disabilities, But Labor Should Improve Oversight*, GAO-01-886 General Accounting Office published in September 2001, also at <https://www.gao.gov/new.items/d01886.pdf>

⁶ See *Segregated & Exploited: The Failure of the Disability Service System to Provide Quality Work*, published in 2012 by the National Disability Rights Network, at https://www.ndrn.org/images/Documents/Resources/Publications/Reports/Beyond_Segregated_and_Exploited.pdf

⁷ GAO, September 2001 report, *Special Minimum Wage Program, Centers Offer Employment and Support Services to Workers with Disabilities, But Labor Should Improve Oversight* GAO-01-886, Page 9.

⁸ See *National Council on Disability Report on Subminimum Wage and Supported Employment*, published in 2012 by the National Council on Disability, at <https://ncd.gov/publications/2012/August232012>

economy. In noting its failure to live up to its idealistic goals, NCD remembered:

[O]ne of the primary purposes of enacting the [Americans with Disabilities Act] was for people with disabilities to be “a new source of workers” for American business, and for federal law to remove barriers to work, including discrimination and segregation, to assist such persons to “move proudly into economic mainstream of American life.” Yet, the achievement of equal opportunity in employment for people with disabilities remains an important, however unrealized, goal nearly 30 years after the signing of the ADA, as people with disabilities remain disproportionately poor, unemployed and underemployed, and face significant barriers to joining and remaining in the American middle class.⁹

Throughout the research examining the outcomes and cost-effectiveness of sheltered workshops there is consistent and sustained evidence that the sheltered workshop employment training model has never lived up to the promise of being a pathway to competitive integrated employment. Not surprisingly, in recent years the U.S. Labor Department has been promoting an *Employment First* policy, which aims to end sheltered workshop programs and subminimum

What is *Employment First*?

It is a philosophy based on practical, yet innovative thinking about employment of all people with disabilities, including those most significantly impacted. Proponents contend that before opting out of work, people with disabilities should be provided appropriate information, encouragement, supports and services to learn how they can meet the business needs employers present. Additionally, people with disabilities should be given meaningful, individualized opportunities to explore the world of work, to discover how they might contribute, and to chart a course to employment and greater prosperity.

⁹ National Council on Disability, *National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future*, p. 10, quoting President George H.W. Bush, “Statement on Signing of the Americans with Disabilities Act” (Washington, DC, July 26, 1990)

wages, stating that all people, regardless of disability, should be able to find jobs in competitive workplaces.¹⁰

Why We Must End Subminimum Wage in Colorado

While evidence related to rates of subminimum wages paid to individuals with disabilities in Colorado is difficult to find due to the sparsity of state based statistical data, research shows that in the recent past up to as many as 1500 individuals with disabilities living in Colorado were paid subminimum wages. Recent statistics indicate that more than 750 individuals in our state are presently receiving subminimum wage pay, in a state where the cost of living is one of the highest in the nation.

Federal Efforts to End Subminimum Wage

- Executive Order 13658, signed by President Obama in 2014, established a minimum-wage rate of \$10.10 per hour for all workers on government contracts, including workers with disabilities under FLSA Section 14(c).
- In 2016, Congress passed the federal Workforce Innovation and Opportunity Act (WIOA), which mandates many protections and proactive solutions for additional vocational rehabilitation and training by employers that pay a subminimum wage to people with disabilities. The WIOA additionally bars employers from hiring workers with disabilities who are 24 years old or younger unless they obtain, verify and maintain documents proving that workers have completed specific steps intended to improve their access to competitive integrated employment.
- In April of 2018, a group of seven U. S. Senators wrote a letter to Secretary of Labor Alex Acosta seeking information about the Department of Labor's oversight of employer subminimum wage waivers under FLSA Section 14(c). In the letter, these Senators expressed a strong stance that subminimum wage payments and sheltered workshops should all be phased out in a responsible way.

¹⁰ See The U.S Department of Labor Office of Disability Employment Policy website at <https://www.dol.gov/odep/topics/EmploymentFirst.htm>

States' Efforts to End Subminimum Wage

- Vermont eliminated sheltered workshops in 2003. Maryland, New Hampshire and Rhode Island passed similar laws in recent years, and in February 2018, Alaska eliminated subminimum wages for workers with disabilities.
- The state of Illinois is now exploring legislative options to end sheltered workshops and subminimum wage programs. Illinois Senator Daniel Biss recently introduced Senate Bill 201, the “[Dignity in Pay Act](#)” which would begin the phase-out of the subminimum wage in that state. Data from Illinois indicates that of the almost 12,000 people working in sheltered workshops in that state, only 5% of those individuals go on to other employment, while the rest remain in a sheltered workshop setting making an average of \$2.50 an hour for their work.¹¹
- Other states and some cities (Hawaii, New York and Seattle) are presently considering changing subminimum wage laws for their residents with disabilities.

Implementing a Phased Out Approach to Ending Subminimum Wage in Colorado

When confronted with this discrimination, a growing number of federal legislators, states, and disability rights advocates are looking into and advocating for a phased-out approach to ending subminimum wage. This approach recognizes that the outdated and discriminatory practice must end, while also attempting to get meaningful practices and training in place for people who will be joining the competitive and integrated workforce – perhaps for the first time. Disability Law Colorado and other advocates appreciate that a transition like this can be difficult for an individual and working to assist a person in recognizing their strengths, desires and work abilities is not a short process, but it is one that must be undertaken. This is consistent with the nation-wide trend toward [supported employment](#). Additionally, the phasing out approach also allows time for the families and guardians of individuals with disabilities to understand the process better and meaningfully participate in the individuals’ future employment opportunities.

¹¹ See the home page for the organization *Dignity in Pay* at <https://www.dignityinpay.org/>

What is Supported Employment?

It is competitive work performed in an integrated work setting where individuals are matched to jobs consistent with the strengths, resources, abilities, capabilities, interests, and informed choice and are provided individualized supports to learn and keep the job.

For example, when Maryland phased out subminimum wage in 2016, it required the Maryland Department of Health Developmental Disabilities Administration to develop and implement a four-year phase-out plan with input from stakeholders representing both the state and the community. The plan sets out benchmarks for progress related to tracking outcomes for individuals with disabilities in a number of areas, including wages; unemployment rates; the number of individuals who move from subminimum wage positions to competitive, integrated employment; and the number of individuals who move

from subminimum wage positions to nonpaying activities.

An important aspect that Maryland employs, and we believe must be included in Colorado's proposed new law includes the development of resources designed to ensure that individuals with disabilities receive full support during the transition phase, and that it consider their needs and preferences for employment in an integrated setting, regardless of the nature or severity of their disability. This includes:

- Best practices for accessing funding and resources to help implement the plan, including for staffing, transportation, and other needed services and supports;
- Best practices for supporting decision making by the individual and/or the individual's supported-decision making group, as appropriate;
- Best practices for accessing medical or behavioral support as needed; and
- Best practices for addressing family members' concerns or opposition to the process.

Conclusion & Call to Action

- Inform yourself on subminimum wage practices in Colorado
- Consider the resources available to work with individuals to gain meaningful, integrated employment and the positive impact employment will have on individuals and society
- Contact your local 14(c) certificate holders, advocacy groups, and legislators and tell them you want the law changed

Disability Law Colorado has looked at the practice of paying individuals with disabilities substantially lower rates than other workers without disabilities and has concluded that the practice is nothing less than discrimination, segregation and exploitation – and it must end. The truth is that workers with all levels of disabilities are working and participating in their communities and we are all better for it. We just need to take meaningful steps to make it a reality for all individuals with disabilities.

Numerous studies done related to sheltered workshops and subminimum wage do not support the assertion that they are useful models for developing essential employment skills for individuals with disabilities. The ideals behind subminimum wage and sheltered workshops were lofty, intending to serve as a real-life training opportunity for people with disabilities. Instead, however, people with disabilities too often ended up segregated away from their communities, performing menial tasks with little to no judgment involved and interacting only with other workers with disabilities. They were not and have not learned the skills they need to work in the community. That must change and the time is now. All this now happens within the context of a modern day employability culture where the ability to keep and maintain widespread social connections is often considered one of the most important employment skills a person can bring to the job.

We also must highlight a critical foundational goal which all disability rights advocates seek to facilitate: the goal of helping individuals not find work simply for work's sake, but rather to help them find *meaningful, gainful employment* that can directly facilitate these individuals leading a more genuinely independent life. Given all the progress made in this country over the past 150 years in the arena of civil rights it can be argued that there is no other class of people in our society which still faces blatant, government authorized wage discrimination, based simply on their attributes as human beings.

The subminimum wage certificate process allowed under Section 14(c) of the Fair Labor Standards Act is an archaic relic of the past. Past and present justifications for its continued existence fall far short of being reasonable, and are painfully inconsistent with our shared cultural values as a state and a nation. The time has come - and in fact is well overdue - to provide the same equity in employment for individuals with disabilities that we extend to every other member of our society.

To that end, Disability Law Colorado is calling for the creation of a coalition of public service agencies and private entities to come together with the goal of bringing about the elimination of subminimum wages for individuals with disabilities in our state with legislation anticipated in the 2020 session. We are asking you to join us in this effort. This report is meant to supply our potential partners in advocacy with the information they may need to consider this call to action. That said, we know that many of you already share our conviction that now is the time to renew our efforts to end both sheltered workshops and subminimum wages for people with disabilities living and working in our state.

Please join us.



*These are all workers who previously received subminimum wage and through supports and services were able to move to competitive, integrated employment. See *Bottom Dollars* the documentary by Rooted in Rights for more information on each of their stories.