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**END  
HOUSING  
BARRIERS  
BASED ON  
CRIMINAL  
RECORDS**



**APPLY  
DISPARATE  
IMPACT THEORY**

Ensure Fair Wages for Workers with Disabilities  
Reform H-2B Guest Worker Program  
Consider Lump-Sum Settlements and Public Benefit Eligibility  
Target Underlying Causes of Poverty  
Protect Users of Electronic Benefit Cards  
Offer Opportunities with Housing Choice Vouchers



Sargent Shriver National Center on Poverty Law



# ENSURING FAIR WAGES?

Subminimum Wages for Individuals with Disabilities Under the Fair Labor Standards Act | By David T. Hutt |

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Following a media investigation, local and state officials discovered, in February 2009, twenty-one men with intellectual and cognitive disabilities living in “deplorable” conditions in a bunk house in Atalissa, Iowa.<sup>1</sup> These men—employed by, housed by, and under the control of their employer, Henry’s Turkey Service—had been transported from Texas to Iowa some twenty to thirty years earlier and were working for about \$0.41 an hour at an entity known as West Liberty Foods.<sup>2</sup> Henry’s Turkey Service had contracted with West Liberty Foods to provide workers for its processing plant.<sup>3</sup> The U.S. Equal Employment Opportunity Commission (EEOC) and state agencies investigated the case, and the U.S. Department of Labor filed suit for wage, overtime, and records violations under the Fair Labor Standards Act on behalf of thirty-eight men eventually found to have worked for Henry’s Turkey Service since 2006.<sup>4</sup> The EEOC determined that Henry’s underpaid the workers with disabilities at least \$1 million over a three-year period and subjected them to a hostile work environment in violation of the Americans with Disabilities Act.<sup>5</sup> The Labor Department had investigated Henry’s Turkey Service, and, as far back as 1974, an Iowa Department of

<sup>1</sup>Clark Kauffman, *State Closes Bunkhouse that Housed Mentally Retarded Workers*, DES MOINES REGISTER, Feb. 8, 2009, at 1.

<sup>2</sup>Associated Press, *Report: Texas Firm Cheated Disabled Iowa Workers*, BLOOMBERG BUSINESSWEEK, May 7, 2010, <http://buswk.co/hjKPSM>.

<sup>3</sup>Complaint ¶ 2, *Solis v. Hill Country Farms d/b/a as Henry’s Turkey Services and Kenneth Henry*, No. 3:09-cv-162 (S.D. Iowa filed Nov. 11, 2009).

<sup>4</sup>Associated Press, *supra* note 2; see also Clark Kauffman, *State Agency Appeals Cut in Penalty for Henry’s Turkey Service*, DES MOINES REGISTER, Nov. 1, 2010, at A5; see also Complaint, *Solis*, No. 3:09-cv-162. In *Solis* the U.S. Department of Labor alleges that Henry’s paid each worker \$65 a month regardless of the hours worked. The case is scheduled for trial in May 2011.

<sup>5</sup>Associated Press, *supra* note 2.

Human Services social worker wrote that a worker with a disability once employed by Henry's, "for all practical purposes, loses most of his basic human rights."<sup>6</sup>

The Atalissa incident brought national attention to the treatment and potential exploitation of employees with disabilities as well as migrant workers.<sup>7</sup> More specifically Atalissa focused attention on the Fair Labor Standards Act's Section 14(c), which allows employers holding special certificates to pay less than the federal minimum wage to workers "whose earnings or productive capacity is impaired by age, physical or mental deficiency, or injury."<sup>8</sup> In existence since the Act was passed in 1938, the current version of Section 14(c) allows the Labor Department to issue special minimum-wage certificates "to the extent necessary to prevent curtailment of opportunities for employment" of individuals with disabilities.<sup>9</sup> Once in possession of a Section 14(c) certificate, the employer must calculate a "commensurate wage" for the worker with a disability based on (1) the prevailing wage paid to workers who have no disabilities and are doing similar work and (2) the productivity of the worker with a disability compared with workers without disabilities.<sup>10</sup> A 2001 survey of the Section 14(c) program found that 23 percent of workers paid under a certificate made less than \$1 an hour while 54 percent made less than

\$2.50 an hour.<sup>11</sup> Here I look at the details of the Section 14(c) certificate provisions and offer advice for advocates representing workers with disabilities.<sup>12</sup>

### Obtaining a Section 14(c) Certificate

The Labor Department classifies Section 14(c) certificate holders as work centers (also referred to as "sheltered workshops"), hospital or residential care facilities, or business establishments.<sup>13</sup> According to the department's data, 2,924 employers had either a work center or a business establishment certificate as of January 2010, with 79.4 percent held by nonprofit organizations, 13.6 percent by state or local governments, and 6.6 percent by for-profit businesses.<sup>14</sup> Others holding Section 14(c) certificates as of January 2010 were 169 hospital or residential care facilities, also known as "patient worker" facilities, with 57.4 percent held by state or local governments, 24.3 percent by nonprofit organizations, and 17.8 percent by for-profit businesses.<sup>15</sup> The "patient worker" certificates apply to workers residing in, or receiving outpatient treatment from, hospitals or residential care programs.<sup>16</sup> A business establishment must seek renewal of its Section 14(c) certificate every year after the Labor Department approves the establishment's initial application.<sup>17</sup> Work centers and hospital or residential facili-

<sup>6</sup>Complaint, *Solis*, No. 3:09-cv-162, ¶ 11; see also Clark Kauffman, *Henry's Turkey Service Once Praised, Now Condemned*, DES MOINES REGISTER, MAY 25, 2009, at 1.

<sup>7</sup>*Preventing Worker Exploitation: Protecting Individuals with Disabilities and Other Vulnerable Populations: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 111th Cong. (2009), <http://1.usa.gov/f4qohi>.

<sup>8</sup>Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219, § 214(c) (2011).

<sup>9</sup>*Id.*, 75 Pub. L. No. 718, § 14, 52 Stat. 1060, 1068 (1938); 29 U.S.C. § 214(c).

<sup>10</sup>29 U.S.C. § 214(c).

<sup>11</sup>U.S. GENERAL ACCOUNTING OFFICE, GAO-01-886, SPECIAL MINIMUM WAGE PROGRAM: CENTERS OFFER EMPLOYMENT AND SUPPORT SERVICES TO WORKERS WITH DISABILITIES, BUT LABOR SHOULD IMPROVE OVERSIGHT 22 (Sept. 2001), <http://1.usa.gov/hZclz9>.

<sup>12</sup>Jayesh M. Rathod, *A Season of Change: Reforming the H-2B Guest Worker Program*, in this issue, deals with workplace problems affecting nonagricultural migrant workers.

<sup>13</sup>WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR, FIELD OPERATIONS HANDBOOK (Ch. 64: Employment of Workers with Disabilities at Special Wages Under Sec. 14(c), § 64d00) (n.d.) [hereinafter FIELD OPERATIONS HANDBOOK], <http://1.usa.gov/gxP73R>.

<sup>14</sup>See Wage and Hour Division, U.S. Department of Labor, Community Rehabilitation Programs (CRPs) and Patient Worker Certificate Holders (Jan. 5, 2010), <http://1.usa.gov/dKJfEp>.

<sup>15</sup>*Id.*

<sup>16</sup>Employment of Workers with Disabilities Under Special Certificates, 29 C.F.R. § 525.3(e) (2011); FIELD OPERATIONS HANDBOOK, *supra* note 13, § 64c01.

<sup>17</sup>FIELD OPERATIONS HANDBOOK, *supra* note 13, § 64d01.

ties must renew their certificates every two years.<sup>18</sup>

Federal regulations governing the Section 14(c) program are precise and require employers to complete several steps before paying individuals with disabilities less than the federal minimum wage.<sup>19</sup> Most workers paid under Section 14(c) have intellectual and cognitive disabilities. Given the nature of their disabilities, these individuals are especially vulnerable to abuse by their employers.<sup>20</sup> Unsurprisingly the Labor Department receives very few complaints about the program, likely because the workers paid under Section 14(c) do not understand the program's requirements or do not recognize when they are being exploited.<sup>21</sup> Advocates should be aware of the specific details of the program to help prevent the exploitation of workers with disabilities.

Possession of a valid 14(c) certificate is a prerequisite to paying subminimum wages, and thus the first potential wage violation against individuals with disabilities is failure to maintain an up-to-date certificate. Although Henry's Turkey Service held a Section 14(c) certificate at one point, the Labor Department, believing that Henry's had withdrawn an application to renew the certificate in 2003, revoked the certificate effective in 2006.<sup>22</sup> Workers paid under the certificate must be informed, either orally or in writing, about the terms of the certificate, and the employer must display a Labor Department poster, similar to the wage

and hour and equal employment opportunity posters required of all employers, explaining the special minimum-wage program.<sup>23</sup> Employers should be willing to present a copy of the certificate if requested.<sup>24</sup> The Labor Department may revoke the certificate, either back to the date of issuance or to the discovery of a violation.<sup>25</sup> An employer without a valid certificate would be liable for payment of the federal minimum wage provided the employer or the individual employee is covered under the Fair Labor Standards Act, a topic discussed below.

Even with the certificate, an employer may pay less than the minimum wage only to workers whose physical or mental disability is an impediment "for the work to be performed," a point emphasized in the *Field Operations Handbook* of the Labor Department's Wage and Hour Division.<sup>26</sup> Thus an employer is allowed to pay an individual whose physical impairment restricts the individual's ability to perform light industrial work, such as assembling certain electrical switches, less than the federal minimum under a valid certificate. The employer is not allowed, however, to pay less than the minimum wage if the same individual can fully operate a computer with assistive technology devices to perform the tasks of a job. The emphasis must be on the specific job performed by the individual with a disability, and in most cases the employer is required to provide reasonable accommodations to the individual under Title I of the Americans with Disabilities Act to allow the individual to perform a

<sup>18</sup>*Id.*

<sup>19</sup>29 C.F.R. §§ 525.1–.24.

<sup>20</sup>GENERAL ACCOUNTING OFFICE, *supra* note 11, at 19 (finding "mental retardation" and other developmental disabilities as primary impairment for 74 percent of Section 14(c) workers employed by work centers); *Preventing Worker Exploitation*, *supra* note 7, at 29 (statement of James B. Leonard, Former Attorney, U.S. Department of Labor).

<sup>21</sup>*Preventing Worker Exploitation*, *supra* note 7, at 15, 29.

<sup>22</sup>Declaration of Michael Staebell, District Director, Wage and Hour Office, Department of Labor, Des Moines, Iowa, *Solis*, No. 3:09-cv-162; see also Clark Kauffman, *Henry's Failed to Get OK for Low Pay*, DES MOINES REGISTER, March 12, 2009, at A1.

<sup>23</sup>29 C.F.R. §§ 525.12(g), 525.14 (2011).

<sup>24</sup>*Id.* § 525.12(g).

<sup>25</sup>*Id.* § 525.17.

<sup>26</sup>*Id.* § 525.3(d); FIELD OPERATIONS HANDBOOK, *supra* note 13, §§ 64a01, 64g00.

job.<sup>27</sup> A Section 14(c) certificate is not an employer's *carte blanche* to pay all individuals with disabilities a subminimum wage for all jobs. The Labor Department requires employer documentation of the disability and the impairment for the work performed for each worker paid subminimum wages.<sup>28</sup>

### Establishing the Commensurate Wage

The exact wage, known as the “commensurate wage,” paid to a worker with an impairment is based on (1) the prevailing wage paid to experienced workers who have no disabilities and are performing similar jobs, (2) the productivity—characterized by such as the work quantity and quality—of the experienced worker without a disability, and (3) the productivity of the worker with a disability.<sup>29</sup> Employers may pay workers under a 14(c) certificate either an hourly rate or a piece rate. Regardless of the method of payment, federal regulations require specific steps that the employer must take to establish the commensurate wage.

First, the employer must objectively determine the prevailing wage in the area for experienced workers performing the same or similar work.<sup>30</sup> The employer may not consider entry-level wages.<sup>31</sup> If a sufficient number of workers without disabilities are employed by the Section 14(c) certificate holder, the employer

may base the prevailing wage on what it pays workers without disabilities.<sup>32</sup> Otherwise, if the employer primarily employs individuals with disabilities, it needs to consider the wages paid experienced workers without disabilities at three other employers engaged in similar jobs in the vicinity.<sup>33</sup> The regulations allow for consideration of fewer than three employers if firms in the “geographic area from which the labor force of the community is drawn” are insufficient.<sup>34</sup> The employer is required to reassess the prevailing wage rate at least once a year.<sup>35</sup>

The second step in establishing the commensurate wage is to determine the productivity standard of workers without a disability. If the employer is paying an hourly rate, a time study or other form of work measurement must be performed to determine the quantity and quality of work completed by the worker without a disability.<sup>36</sup> If the employer is paying a piece rate, a “personal time, fatigue, and unavailable delay” factor must be included when completing the work measurement to establish the piece rate.<sup>37</sup>

Once the productivity “standard” of the worker without a disability is established, the final step is to assess the productivity of the individual with a disability. For hourly rates, the employer must measure the productivity rate of the individual with a disability against the standard within the first month of employment

<sup>27</sup>Under the Americans with Disabilities Act, an employer with fifteen or more employees for twenty or more calendar weeks per year must provide a reasonable accommodation to qualified individuals with disabilities (42 U.S.C. §§ 12101–12213 (2011)). Similarly, under Section 504 of the Rehabilitation Act of 1973, as amended, employers who are of any size and receive federal financial assistance must provide reasonable accommodations to individuals with disabilities (29 U.S.C. § 794 (2011)). See also FIELD OPERATIONS HANDBOOK, *supra* note 13, § 64a02 (noting that, in the opinion of the Solicitor's Office of the Labor Department, a Section 14(c) certificate “would not protect an employer from charges pursuant to the [Americans with Disabilities Act].”).

<sup>28</sup>29 C.F.R. § 525.16 (2011).

<sup>29</sup>*Id.* § 525.12(h)–(j).

<sup>30</sup>*Id.* § 525.10.

<sup>31</sup>*Id.* § 525.10(d).

<sup>32</sup>*Id.* § 525.10(b).

<sup>33</sup>*Id.* § 525.10(c).

<sup>34</sup>*Id.* §§ 525.3(j), 525.10(c).

<sup>35</sup>*Id.* § 525.9(b)(2).

<sup>36</sup>FIELD OPERATIONS HANDBOOK, *supra* note 13, §§ 64g04–64g05.

<sup>37</sup>29 C.F.R. § 525.12(h)(2)(ii) (2011).

and then at least every six months.<sup>38</sup> For piece rate, the employer must use the standard production rate and prevailing wage rate paid to workers in the vicinity.<sup>39</sup>

After the employer determines that the worker is impaired by the worker's disability for the job performed, the employer must calculate the commensurate wage for an hourly worker. The following simple example illustrates how employers should accomplish this. Experienced assembly workers without a disability are paid on average \$8 an hour putting together twenty simple electric circuits an hour in the geographic vicinity near the Section 14(c) holder. An employee with a disability can put together a similar circuit at a rate of five circuits an hour, or 25 percent productivity compared with the standard. The employer with the Section 14(c) certificate would thus pay the employee with the disability \$2.00 per hour for this job regardless of how many circuits the employee actually completes within an hour.

If the employer in the above example decided to pay a piece rate, the employer would need to convert the hourly rate to a piece rate and allow nine or ten minutes for personal time, fatigue, and unavailable delay.<sup>40</sup> If the worker without a disability could complete seventeen circuits in fifty-one minutes, the piece rate would be \$8 divided by seventeen circuits, or \$0.4706 per circuit. The Labor Department requires employers to carry piece-rate calculations to five decimal points and to round up, and never down, to at least four decimal points.<sup>41</sup> The individual with a disability would be paid \$0.4706 per electric circuit completed. If the worker maintained a normal hourly

rate of five acceptable circuits per hour, the worker would receive \$2.36 per hour.

When investigating or advocating on behalf of a worker with a disability, advocates should assess whether the employer completed each step in the process precisely. Keep in mind that the employer must keep records—besides regular payroll records—on how it determined the prevailing wage rate, productivity standards for both workers with and without disabilities, and verification of the disability of the workers.<sup>42</sup> The employer must also pay for overtime wages and for time when the worker is required to remain available for the next work assignment even if the worker is not performing work.<sup>43</sup>

### Eligibility for Fair Labor Standards Act Protection

Coverage under the Fair Labor Standards Act, and hence under a Section 14(c) certificate, adds to the complexity of determining whether a violation exists. Only employers working for an “enterprise” engaged in interstate commerce or the production of goods in commerce, or who themselves are actually engaged in interstate commerce, are entitled to wage protection under the Fair Labor Standards Act.<sup>44</sup> An enterprise with \$500,000 in gross annual sales employing workers engaged in interstate commerce must pay all its employees in accordance with the Act, as must all hospitals, schools, colleges and universities, public entities, schools for individuals with disabilities, and residential institutions for the aged and individuals with disabilities, unless the employee is otherwise exempt under the Act.<sup>45</sup> All other employers who do not

<sup>38</sup>*Id.* § 525.12(j).

<sup>39</sup>*Id.* § 525.12(h)(1)(i).

<sup>40</sup>FIELD OPERATIONS HANDBOOK, *supra* note 13, § 64i01. The Labor Department allows the employer to convert an hourly wage to a piece rate wage. If the prevailing wage rate for the job is a piece rate, however, the employer should simply use the prevailing piece rate.

<sup>41</sup>*Id.*

<sup>42</sup>29 C.F.R. § 525.16 (2011).

<sup>43</sup>*Id.* § 525.6.

<sup>44</sup>29 U.S.C. §§ 203(b), 203(s), 206(a).

<sup>45</sup>*Id.* § 203(s).

fall within “enterprise coverage” are required to pay federal wages only to individual employees specifically engaged in interstate commerce or in work closely related and essential to the production of goods in interstate commerce.<sup>46</sup>

Since nonprofit organizations have almost 80 percent of nonpatient-worker Section 14(c) certificates, coverage issues are likely in potential Section 14(c) violation cases. The question in such cases is whether the nonprofit organization needs to follow any wage provision in the Fair Labor Standards Act. The Labor Department does not consider a nonprofit organization, regardless of the annual dollar value of its sales, as an “enterprise” under the Act.<sup>47</sup> Only nonprofit retail outlets, certain organizations such as schools or hospitals listed in the Act, or those with federal contracts subject to the McNamara-O’Hara Service Contract Act or the Walsh-Healey Public Contracts Act, may be subject to enterprise coverage requiring payment of wages according to the Fair Labor Standards Act to all employees not otherwise exempt.<sup>48</sup> A number of nonprofit Section 14(c) holders have contracts to provide goods or services to the federal government under the Javits-Wagner-O’Day Act, a program that requires federal agencies to give a preference in obtaining certain commodities and services to nonprofit organizations that employ individuals who are blind or have severe disabilities and therefore are likely subject to enterprise coverage.<sup>49</sup> If investigating a potential Section 14(c) violation at a nonprofit organization, advocates should request copies of the nonprofit organization’s contracts to determine if the nonprofit

organization falls within the McNamara-O’Hara Service Contract Act or the Walsh-Healey Public Contracts Act.

If the Section 14(c) holder does not fall within enterprise coverage, then consideration turns to the work of the individual employee. The Labor Department considers—besides the obvious work of packing, sorting, or assembling goods that eventually enter interstate commerce, and the less obvious work, including salvage operations, such as shredding of documents, that might result in good being sold and reentering the flow of interstate commerce—work closely related and directly essential to work involved with interstate commerce to establish “individual coverage.”<sup>50</sup> Cleaning the floors where interstate goods are produced, a type of janitorial work commonly performed by workers paid Section 14(c) subminimum wages, is, according to the Labor Department, one example of work closely related and directly essential to work involving interstate commerce.<sup>51</sup> Any employee involved in any interstate commerce-related work in any workweek is entitled to Fair Labor Standards Act wages for the entire week, even for work not related to interstate commerce.<sup>52</sup>

### State and Local Protections

If the worker with a disability is not working for an “enterprise engaged in commerce” or not working on interstate commerce-related activities, the worker with a disability, as with other workers, is not entitled to federal wages. Workers with disabilities not within the coverage of the Fair Labor Standards Act, regard-

<sup>46</sup>FIELD OPERATIONS HANDBOOK, *supra* note 13, § 64b02.

<sup>47</sup>*Id.* § 64b01.

<sup>48</sup>*Id.*; 29 U.S.C. 203(s); see also McNamara-O’Hara Service Contract Act, 41 U.S.C. §§ 6704–6707 (2011) (formerly at 41 U.S.C. §§ 351–358 (2010)), and Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 6501–6511 (2011) (formerly at 41 U.S.C. §§ 35–45 (2010)).

<sup>49</sup>Javits-Wagner-O’Day Act, 41 U.S.C. §§ 8501–8506 (2011) (formerly at 41 U.S.C. §§ 46–48 (2010)); see also 41 C.F.R. § 51–1.2 (2011); GENERAL ACCOUNTING OFFICE, *supra* note 11, at 7 n.11. Also note that prevailing wages set by contracts under the McNamara-O’Hara Service Contract Act or the Walsh-Healey Public Contracts Act must be used when determining the commensurate wage.

<sup>50</sup>FIELD OPERATIONS HANDBOOK, *supra* note 13, at § 64b02.

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

less of whether the employer has a Section 14(c) certificate, are protected only by state or local laws governing minimum wages and hours.<sup>53</sup> Many states with minimum-wage laws, however, allow employers, following procedures similar to federal law, to pay less than the minimum wage to individuals with disabilities. Some states either authorize or require their labor departments to establish regulations to issue licenses or certificates using language similar to Section 14(c).<sup>54</sup> New York and North Carolina regulators, for example, have implemented their enabling legislation by creating regulations or wage orders.<sup>55</sup> In New Mexico employers under one certificate must pay at least 50 percent of the state minimum wage.<sup>56</sup> Other subminimum certificates, however, are available in the state without the 50 percent floor. The exception applies to individuals who have disabilities and are engaged in training or evaluation, to individuals with multiple or severe disabilities, or to individuals who have disabilities and are employed at certain work centers where the employee's "productive capacity is inconsequential."<sup>57</sup>

Other states, such as Iowa, exempt employers from payment of the state minimum wage if the employer has a Section 14(c) certificate.<sup>58</sup> Texas considers nonprofit charitable organizations engaged in evaluating, training, and employment services to be in compliance with the state's minimum-wage law if they follow "federal regulations covering those activities."<sup>59</sup> Be aware, however, that there is no federal preemption in this area because the regulations allow a state or locality to opt out of the 14(c) program by requiring payment of a state or local minimum wage even if an employer has the 14(c) certificate.<sup>60</sup>

### Protecting Section 14(c) Employees

In 2001 the Labor Department's Office of Inspector General and the Government Accountability Office pointed out problems with the oversight and management of the Section 14(c) program; they noted the lack of data about the program, an unreliable management information system, and the low level of priority devoted by the Labor Department toward ensuring compliance with the Section 14(c) program.<sup>61</sup>

<sup>53</sup>As of January 2011, five states (Alabama, Louisiana, Mississippi, South Carolina, and Tennessee) had no state minimum-wage laws, four states (Arkansas, Georgia, Minnesota, and Wyoming) and Puerto Rico had a minimum-wage rate less than the federal rate, with the remaining forty-one states along with the District of Columbia, Guam, and the Virgin Islands having rates the same or higher than the federal minimum wage (see Wage and Hour Division, U.S. Department of Labor, Minimum Wage Laws in the States—January 1, 2011, <http://1.usa.gov/id3c5Z>). Special rules apply for American Samoa and the Northern Mariana Islands (see Fair Minimum Wage Act of 2007, Pub. L. No. 110-28, § 8103(b), 121 Stat. 112, (2007) (as amended by Pub. L. No. 111-244, 124 Stat. 2618 (2010))).

<sup>54</sup>See, e.g., GA. CODE ANN. § 34-4-4 (2010) (provides labor commissioner power to exempt "certain categories of organizations and businesses" for "certain classes of persons to be employed" below minimum wage "because of overriding considerations of public policy to allow employment of certain persons with disabilities and others who cannot otherwise compete effectively in the labor market"); MINN. STAT. ANN. § 177.28(5) (2010) (requires labor and industry commissioner to issue permits to pay less than minimum wage for individuals with disabilities); N.C. GEN. STAT. § 95-25.3 (2010) (allows labor commissioner to establish rates less than minimum wage similar to Fair Labor Standards Act); N.Y. LAB. LAW § 655(5)(c) (McKinney 2010) (allows state wage board to recommend regulations for labor commissioner to issue certificates for payment less than minimum wage if individual's earning capacity is impaired by disability); OHIO REV. CODE ANN. § 4111.06 (LexisNexis 2010) (requires commerce director to permit employment of individuals with disabilities for less than minimum wage); R.I. GEN. LAWS § 28-12-9 (2010) (allows labor and training director to develop regulations).

<sup>55</sup>See 13 N.C. ADMIN. CODE 12.0202 (2011); N.Y. COMP. CODES R. & REGS. tit. 12, §§ 142-3.12(c)(12), 142.3.13 (2009).

<sup>56</sup>N.M. STAT. ANN. § 50-4-23(A) (2010).

<sup>57</sup>*Id.* §§ 50-4-23(B)–(C).

<sup>58</sup>IOWA ADMIN. CODE r. 875-215.4(7) (2008).

<sup>59</sup>TEX. LAB. CODE ANN. § 62.161 (LexisNexis 2010).

<sup>60</sup>See 29 C.F.R. § 525.20 (2011) ("No provisions of these regulations, or of any special minimum wage certificate issued thereunder, shall excuse noncompliance with any other Federal or State law or municipal ordinance establishing higher standards.").

<sup>61</sup>See GENERAL ACCOUNTING OFFICE, *supra* note 11; see also Office of Audit, Office of Inspector General, U.S. Department of Labor, No. 05-01-002-04-420, The Wage and Hour Division's Administration of Special Minimum Wages for Workers with Disabilities (March 19, 2001), <http://1.usa.gov/e0qWH7>.

For its part, the Labor Department took steps to solve some of these problems.<sup>62</sup> One of the strongest protections available under Section 14(c) is the ability of the employee, or the employee's guardian or parent, to petition the Labor Department for an administrative law judge to review payment of the special minimum wage.<sup>63</sup> In these proceedings the employer has "the burden of proof on all matters relating to a wage at issue."<sup>64</sup>

The petition is handled through the Labor Department's administrative law judge hearing procedure.<sup>65</sup> There is no particular form for the petition, but the petition must be signed by the employee, or the employee's parent or guardian, and should include the name and address of the employee and the employer.<sup>66</sup> Advocates should be aware, however, that unless the employee clearly requests a review under Section 14(c)(5) of the Fair Labor Standards Act, the Labor Department will not schedule an administrative law judge review and will simply conduct an investigation.<sup>67</sup>

Although the hearing procedure can be a powerful tool because the burden of proof lies with the employer, the disabilities of many individuals paid under Section 14(c) certificates can present ethical challenges. Advocates need to be confident that the individual can make the decision about filing a petition or can work with any legal guardian. Advocates need to explain clearly the petition process to the client or guardian. As with Henry's Turkey Service, often the individual, besides working for

the employer, receives from the employer other services, such as residential or support services. As a result, the employee may be reluctant to rock the boat by filing a petition against the employer. Recognizing and easing the concerns of the worker is important to increase the petition's chance of success.

Paying less than minimum wage to workers with disabilities has been allowed under federal law for over seventy years, but the abuse that occurred in Atalissa, Iowa, highlights the need for vigilance by advocates and government officials. Henry's Turkey Service already faces \$1.1 million in fines imposed by the Iowa Workforce Development Agency, while the Labor Department seeks partial summary judgment of over \$1.7 million in back wages and liquidated damages in the federal case against Henry's.<sup>68</sup> Most of the former workers at Atalissa were moved to group homes run by a social service provider, and some began work "hanging clothes at retail stores or sorting donations at Goodwill" while others tried to retire.<sup>69</sup> Disability advocates from the federally funded protection and advocacy agencies in Iowa and Texas still have concerns about the workers—concerns that were especially piqued when four of the workers were moved to a nursing home operated by the nephew of the founder of Henry's Turkey Service in Texas.<sup>70</sup> The continuing saga in Atalissa shows how early identification and effective advocacy on behalf of vulnerable workers is vital to protect workers' rights.

<sup>62</sup>Preventing Worker Exploitation, *supra* note 7, at 10–11 (prepared statement of John McKeon, Deputy Administrator for Enforcement, Wage and Hour Division, U.S. Department of Labor, commenting on how the Wage and Hour Division implemented all of the Government Accountability Office's recommendations).

<sup>63</sup>29 U.S.C. § 214(c)(5).

<sup>64</sup>29 C.F.R. § 525.22(d) (2011).

<sup>65</sup>*Id.* § 525.22(b).

<sup>66</sup>*Id.* § 525.22(a).

<sup>67</sup>FIELD OPERATIONS HANDBOOK, *supra* note 13, § 64h05.

<sup>68</sup>Clark Kauffman, *Henry's Fine of \$1.1 Million Is Reinstated*, DES MOINES REGISTER, March 9, 2011, at B1; Motion for Summary Judgment, *Solis*, No. 3:09-cv-162 (filed Dec. 17, 2010).

<sup>69</sup>Tony Leys, *Months After Leaving Bunkhouse, Men from Atalissa Are Doing Well*, DES MOINES REGISTER, Jan. 3, 2010, at B1.

<sup>70</sup>Clark Kauffman, *Four Atalissa Men's Welfare Doubted*, DES MOINES REGISTER, Aug. 7, 2010, at A1.



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