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Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

RE: Regulatory Information Number (RIN) 1235-AA14
Response to Notice of Proposed Rulemaking (NPRM): Employment of Workers with Disabilities under Section 14(c) of the Fair Labor Standards Act

To Whom It May Concern:

The Center for Public Representation ("CPR") strongly supports the U.S. Department of Labor's Notice of Proposed Rulemaking ("Proposed Rule" or "NPRM") sunsetting subminimum wage certificates issued under section 14(c) of the Fair Labor Standards Act ("FLSA"). For the reasons discussed below, the Proposed Rule is timely, well-supported by the evidence, and consistent with the Department's delegated authority to interpret the statute. The administrative record supports a finding that this outdated exception to the federal minimum wage standard is no longer necessary to "prevent the curtailment of opportunities for employment."[1]

CPR is a national legal advocacy center dedicated to enforcing and expanding the rights of people with disabilities. For more than 50 years, CPR has used legal strategies and policy to implement system reform initiatives that promote community integration, choice, and personal autonomy. CPR is committed to ensuring people with disabilities have access to the services and supports they need to live, work, and participate in their own communities. CPR provides technical assistance and support to a network of federally funded protection and advocacy programs in each of the United States and U.S. territories. Many of these programs represent

[1] 29 U.S.C. §214(c)(1).

individuals with disabilities in the employment context and are part of employment system transformation efforts in their own States.

CPR has litigated systemic cases on behalf of people with disabilities in more than twenty jurisdictions, including the first case in the country applying the Americans with Disabilities Act ("ADA") to sheltered workshops. The *Lane v. Kitzhaber*[2] case referenced in the Department of Labor's Proposed Rule and the resulting 2013 court-ordered Settlement Agreement established a national model for the delivery of integrated, supported employment services.[3] Over the last ten years, the case has been refenced by courts applying the ADA to employment settings, as well as States throughout the country looking to expand access to competitive integrated employment ("CIE") for residents with disabilities. CPR's experience building Oregon's supported employment service system, and its knowledge of the resulting employment outcomes for class members with disabilities, provides important context for the comments below.

I. <u>Introduction</u>

The administrative record assembled as part of the NPRM clearly supports the conclusion that payment of subminimum wage to people with disabilities – most commonly in segregated employment settings – is no longer necessary or justified and should be phased out permanently.[4] Sunsetting the 14(c) program is a critical first step towards expanding CIE opportunities for people with disabilities.

Under the FLSA, the Secretary of Labor is authorized to issue certificates allowing employers to pay productivity-based subminimum wages to workers with disabilities, but only where such certificates are necessary to "prevent the curtailment of opportunities for employment."[5] As noted in the NPRM, this statutory precondition has been an essential part of section 14 since its enactment.[6] The plain language of the statute makes clear that it is within the Department's delegated authority to determine whether this curtailment standard has been met.[7]

Further, the U.S. Supreme Court concluded that this section of the statute is not a "blanket exemption" from the minimum wage rule, but rather indicative of congressional intent to establish safeguards through "administrative permits."[8] The NPRM recounts this legislative

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[2] See *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199 (2012); Settlement Agreement at *Lane v. Brown*, 166 F.Supp.3d 1180 (D. Or. 2016).
[3] See https://www.federalregister.gov/d/2024-27880/p-578 (citing a 2022 report on employment outcomes following the 2016 settlement agreement in *Lane*, including the elimination of reliance on sheltered work and the transition of 1,138 individuals from subminimum wages into CIE. As the Department correctly observed, "[t]his data shows that it is possible, with the right supports, for large numbers of workers with disabilities earning the subminimum wage to transition to full-wage employment opportunities.")
[4] 29 U.S.C. 214(c)(1); see also https://www.federalregister.gov/d/2024-27880/p-30.
[5] 29 U.S.C. §214(c)(1).
[6] See https://www.federalregister.gov/d/2024-27880/p-51.
[7] See https://www.federalregister.gov/d/2024-27880/p-49.
[8] See https://www.federalregister.gov/d/2024-27880/p-14 (citing *Walling* v. *Portland Terminal Co.,* 330 U.S. 148, 151 (1947)).

history in detail,[9] noting statements from the joint Congressional hearings on the enactment of the FLSA in 1938, which address the Department's discretion in applying the curtailment standard set out under section 14:

> "[E]ven in the application of these rudimentary standards, a certain discretion is given to the enforcement agency so that it can protect the earning power of the workers and their opportunities for employment from unreasonable curtailment." Additionally, Congress advised that, in considering subminimum wages, the Department was to give "due consideration to the maintenance of the minimum standard of living, the health, efficiency, and well-being of the employees, and the avoidance of unreasonable curtailment of opportunities for employment and the earning power of the employees."[10]

The Department's Proposed Rule is an appropriate exercise of its long-standing administrative authority under the FLSA. Its determination that the subminimum wage exemption is no longer necessary is consistent with the central purpose of the FLSA – to establish fair minimum wage standards that protect vulnerable employees and recognize the dignity of all working Americans.[11]

As noted in the NPRM, the 14(c) program was created more than 80 years ago. Since that time, and particularly in the last 25 years, changes in federal law, employment programs, and state and federal policy justify -- if not necessitate -- the Proposed Rule. Significant reductions in the utilization of 14(c) certificates and increasing investments in the expansion of integrated employment options for persons with disabilities, make the Proposed Rule a timely and effective way to further Congress' goal of promoting access to employment for people with disabilities. The expansion of employment opportunities for people with disabilities is well documented within the administrative record, as are the resultant outcomes. The Department's decision to take into account the current scope of employment opportunities, instead of assuming that 14(c) certificates are necessary to prevent the curtailment of employment opportunities for individuals with disabilities, is amply supported by the evidence.

Finally, the Proposed Rule does not require individual 14(c) participants to change providers. Nor does it require entities formerly in receipt of 14(c) certificates to alter or cease their

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[9] See https://www.federalregister.gov/d/2024-27880/p-53.

[10] Id. (citing the Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Educ. and Labor, and House Comm. on Labor, 75th Cong. 1st Sess. Part 1, pp. 55, 57 (June 2-5, 1937)).

[11] In passing the FLSA, Congress intended to establish minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments. See, e.g., 29 U.S.C. 206(a), 207(a); https://www.federalregister.gov/d/2024-27880/p-53. The NPRM also references Congressional intent to limit the circumstances under which subminimum wage certificates could be issued so as to avoid undermining the larger purposes of the FLSA, granting the Department the authority to administer these limits. See https://www.federalregister.gov/d/2024-27880/p-53.

operations.[12] It allows for a three-year period of preparation to ensure a smooth and planful transition for remaining impacted programs. The experiences of States that have already abandoned or prohibited employers from paying subminimum wages demonstrate that this transition period is appropriate.

For all these reasons, we urge the Department to finalize the Proposed Rule and to require that certificate holders recognize and honor the value of employment contributions being made by individuals with disabilities.

II. The Department's Proposed Rule will further States' efforts to comply with federal laws prohibiting disability discrimination.

A. The ADA's Integration Mandate Applies to Employment Services.

In 1990, the United States Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[13] As the legislative history, express Findings, and specific mandates of Title II of the Act demonstrate, the ADA prohibits discrimination in both employment and employment services provided by a public entity. In the Findings and Purpose section of the ADA, Congress demonstrated its concern for the employment and economic self-sufficiency that comes with employment of people with disabilities and expressed a heightened concern that people with disabilities are improperly segregated in our society.[14]

Courts have applied Title II of the ADA broadly to cover all forms of state programs, activities, and benefits.[15] As the Ninth Circuit has stated:

> Attempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate into needless hair-splitting arguments. The focus of the inquiry, therefore, is not so much on whether a

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[12] See https://www.federalregister.gov/d/2024-27880/p-452.

[13] 42 U.S.C. § 12101(b)(1).

[14] See 42 U.S.C. § 12101(a)(2), (3), (5) & (7).

[15] See *Tennessee v. Lane*, 541 U.S. 509, 524 (2004) (Title II of the ADA was enacted to remediate a wide range of disability discrimination including unjustified civil commitment, abuse and neglect of institutionalized individuals with disabilities, and discriminatory zoning laws.); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998) (correctional settings and services). For a range of covered activities and programs, *see Kerrigan v. Philadelphia Bd. of Election*, 2008 WL 3562521 (E.D. Pa. Aug. 14, 2008) (elections); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009) (adult day health care,); *Armstrong v. Schwarzenegger*, 622 F.3d 1058 (9th Cir. 2010) (a state prison's grievance system and program for tracking the needs of disabled prisoners); *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (police arrests); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F. 3d 725, 731 (9th Cir. 1999) (zoning).

particular public function can technically be characterized as a service, program, or activity, but whether it is a normal function of a governmental entity.[16]

While there were initially few cases involving state-sponsored employment programs, recent court decisions in Oregon and the U.S. Department of Justice ("DOJ") Olmstead Guidance make it clear that Title II's broad scope encompasses employment services.[17]

1. The ADA's integration mandate

As directed by Congress, the Attorney General promulgated regulations necessary to implement Title II, including its integration mandate: "A public entity shall administer services, programs, disabilities."[18] Title II's integration mandate reflects the recognition that "[i]ntegration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status."[19] The regulations implementing Title II define the "most integrated setting appropriate to the needs of qualified individuals" as "a setting that enables individuals with disabilities to interact with non-disabled persons to fullest extent possible."[20] Like the scope of Title II, courts have interpreted both the integration mandate and the scope of Title II's coverage expansively.[21]

2. The Supreme Court's decision in *Olmstead v. L.C.*

In *Olmstead,* the Supreme Court, after citing the integration regulation and the Attorney General's authority to promulgate it, plainly stated: "Unjustified isolation . . . is properly regarded as discrimination based on disability."[22] The Supreme Court reviewed the harm of segregation, declaring that it "perpetuates unwarranted assumptions that persons so isolated are incapable or trustworthy of participating in community life" and that it "severely diminishes the everyday life activities of individuals including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[23] The Court held that Title II requires States to provide services in the most integrated setting possible, including

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[16] *Barden v. City of Sacramento,* 292 F.3d 1073, 1076 (9th Cir. 2002) (sidewalk accessibility).
[17] *Lane v. Kitzhaber,* 841 F. Supp. 2d 1199, 1202 (D. Or. 2012).
[18] 28 C.F.R. § 35.130(d).
[19] 28 C.F.R. Pt. 35, App. B.
[20] Id.
[21] See, e.g., *Frederick L. v. Department of Public Welfare of Pennsylvania*, 422 F.3d 151, 157 (3d Cir. 2005) (nursing facility); *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 187 (E.D.N.Y. 2009) (adult homes); *Kerrigan,* 2008 WL 3562521 at *18-19 (voting booths); *Brantley v. Maxwell*-Jolly, 656 F. Supp. 2d 1161 (adult day health care); *V.L. v. Wagner*, 669 F. Supp. 2d 1106 (N.D. Cal. 2009) (in-home supportive services); *Oster v. Lightbourne*, 2012 WL 691833 *15-16 (N.D. Cal. Mar. 2, 2012) (public parks).
[22] *Olmstead v. L.C.,* 527 U.S. 581, 593 (1999).
[23] *Id.* at 600–01.

shifting programs and services from segregated to integrated settings, unless such a shift would result in a fundamental alteration to their service systems.[24]

3. *Olmstead* prohibits unnecessary segregation in employment

The DOJ Olmstead Guidance sets forth DOJ's official understanding and regulatory application of the Supreme Court's decision in *Olmstead*. The Olmstead Guidance describes the Supreme Court's *Olmstead* decision as prohibiting "the unjustified segregation of individuals with disabilities." It repeatedly refers to the prohibition on segregation throughout its six pages. Significantly, prohibited segregation is not limited to institutions or residential settings. Rather, the Olmstead Guidance defines segregated settings as those that have "qualities of an institutional nature." It then identifies segregated settings as including:

> (1) congregate settings populated exclusively or primarily with individuals with disabilities; (2) congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living; or (3) settings that provide for *daytime* activities primarily with other individuals with disabilities.[25]

The DOJ has interpreted its own Guidance broadly to include employment.[26] In fact, the Guidance specifically states that a sheltered workshop is a segregated setting for which an *Olmstead* plan is appropriate.[27] And, while an earlier DOJ Guidance noted that the ADA did not entirely prohibit separate schools, special programs, or sheltered workshops,[28] the more recent Olmstead Guidance makes clear that sheltered workshops are not consistent with the integration mandate of Title II.[29]

Moreover, as the *Lane* court has held, "the broad language and remedial purposes of the ADA," as well as the isolation and segregation occasioned by sheltered workshop, compel the conclusion that the integration mandate applies equally to employment, and requires the

[24] *Id.* at 607.
[25] See Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, *https://archive.ada.gov/olmstead/q&a_olmstead.htm* (June 22, 2011).
[26] See Questions and Answers on the Application of the ADA's Integration Mandate and *Olmstead v. L.C.* to Employment and Day Services for People with Disabilities, https://www.ada.gov/resources/olmstead-employment-qa/ (Oct. 31, 2023).
[27] *Id.* at 3.
[28] See Nondiscrimination of the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 8538-01, 8543, 1991 WL 311707.
[29] *Lane*, 841 F. Supp. 2d at 1204 (no conflict exists between the two DOJ Guidances, since both stress the need for integrated options and choice).

provision of employment services in the most integrated setting.[30] The court rejected arguments that the integration mandate was inapplicable to sheltered workshops because participants were not at risk of residential institutionalization or were not involuntarily confined in those settings.[31] While sheltered workshops are not precisely coterminous with 14(c) providers, the vast majority of such providers offer employment in segregated sheltered workshops.[32] And although the Department's Rule only applies to the payment of subminimum wage not to the nature of the employment setting, virtually all subminimum wage employment is provided in sheltered workshops.[33] As a result, the Proposed Rule will further compliance with the ADA and ensure that disabled people are not relegated to working in segregated settings.

B. Employment service reforms achieved in Oregon as a result of the Settlement Agreement have established a national model for system transformation.

Prompted initially by two Executive Orders,[34] and then subsequently by the *Lane* Settlement Agreement, Oregon created twelve distinct components of its integrated employment system including: (1) supported employment services; (2) outreach, in-reach, and informed choice; (3) assessment, career development plans, and service planning; (4) closing sheltered workshops; (5) transitioning individuals from sheltered workshops to integrated employment; (6) the role of vocational rehabilitation;[35] (7) the role of school districts; (8) training and technical assistance; (9) funding; (10) outcomes; (11) data and reporting; and (12) monitoring and coordination. These pillars constituted the critical infrastructure for Oregon to end subminimum wage employment and transform its service system to one that ensured employment at the State's minimum wage for all disabled persons previously working under a 14(c) certificate.

Two of these components were critical for this success and are especially relevant to the Proposed Rule. First, it established mechanisms to support 14(c) providers to transition to

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[30] *Id.* at 1205-06.
[31] *Id.* at 1206.
[32] Studies show that nationally, 84% of 14(c) special wage certificate holders operate sheltered workshops, that sheltered workshops employ 95% of all 14(c) workers, and that these workshops receive 46% of their funding from state and local governments. U.S. Gen. Accounting Office, *Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers with Disabilities, but Labor Should Improve Oversight* 26–34 (2001).
[33] *Id.*
[34] See *Executive Order. No. 15-01, Providing Employment Services to Individuals with Intellectual and Developmental Disabilities,* 2015. *See* Sec. III, retrieved from https://www.oregon.gov/gov/Documents/executive_orders/eo_15_01.pdf. The Executive Order, and then the Settlement Agreement, including numerical goals of transitioning 170 people per year from subminimum employment in sheltered workshops to work in CIE. The goals were regularly achieved and then exceeded when the State decided to close all workshops and transition all 2700 participants to CIE.
[35] Through its career counseling program mandated by Sec. 511 of the Workforce Innovation and Opportunity Act (WIOA), Oregon determined that between 80-90% of subminimum wage workers indicated an interest in working in competitive employment and were promptly referred to VR. Virtually all referred individuals were deemed eligible for VR and provided with Discovery and other related employment services.

organizations that ensured all participants were paid minimum wage. Early in its system transformation efforts and as required by the *Lane* Settlement Agreement, Oregon created a provider transformation initiative. It secured one-time state appropriations, and then used supplemental federal funds, to award grants to sheltered workshop and day habilitation providers that were interested in transforming their business models and shifting to integrated employment services. Each grant required a business plan, a transformation plan, and explicit transition goals for the number of sheltered workers who would achieve CIE. Incentive payments were made to providers if individuals also obtained a job working at least 20 hours per week. Each grantee was paired with a mentor agency that had successfully closed its sheltered workshop and converted to a supported employment model. Eventually the State issued three rounds of transformation grants that resulted in the transformation of all but one sheltered workshop provider to a supported employment program.

Second, it developed a pathway for disabled workers to work in preferred employment settings that paid at least minimum wage. Based in significant part on the Workforce Innovation and Opportunity Act ("WIOA") requirements, Oregon established CIE as the desired outcome for all employment services, including its requirement that all work must be in an integrated setting with equal access to non-disabled employees; the same conditions, benefits, and opportunities as similarly-situated non-disabled employees; compensation at the state minimum wage (gradually increasing to $15/hour; and a goal of working at least twenty hours per week.[36] All mandatory metrics and transition requirements in the Settlement Agreement are based upon those who achieve these outcomes.[37]

Significantly, Oregon achieved these outcomes for over 1,115 people with disabilities who were formerly segregated in sheltered workshops, for over 4,900 youth who have left school and begun working in CIE, and for hundreds of other individuals with IDD who were interested in working at real jobs for real pay.[38] In addition, over an eight year period, the number of people working in CIE increased almost 500% -- from 375 to 1750 – and the average hours worked per week increased more than 250% -- from seven to 17.[39]

C. *The Oregon model has been adopted and adapted by other states through employment transformation plans.*

While binding Settlement Agreements are limited to a few States, the identified components of successful integrated employment systems, and the effective implementation of those

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[36] See https://www.oregon.gov/dhs/EMPLOYMENT/EMPLOYMENT-FIRST/Policy/Worker-Guide-20%20hours-11-1-19.pdf.
[37] See Settlement Agreement, Secs. II.2, VI.3 and VII.1.
[38] See Employment First Data Report, February 2022, available at https://www.oregon.gov/dhs/EMPLOYMENT/EMPLOYMENT-FIRST/DataReports/2022-02-Lane-vs-Brown%20Report.pdf.
[39] Compare Employment First Data Report, January 2014 with Employment First Data Report, September 2019, https://www.oregon.gov/dhs/EMPLOYMENT/EMPLOYMENT-FIRST/Pages/data-reports.aspx.

components over the past six years, provide a valuable example of what is necessary and possible for transformation of employment service systems. Prompted by the enactment of WIOA, national and state Employment First policies, Oregon's success, DOJ's ADA compliance activities, and the work of local legislators, advocates, and stakeholders, other States have adopted employment transformation plans that will end subminimum wages, expand CIE, and support provider transformation. For instance, North Carolina entered into a Memorandum of Agreement that will terminate public funding for sheltered workshops and subminimum wage employment. Indiana has adopted a comprehensive transformation plan to achieve similar goals. Thus, the Proposed Rule reflects and formalizes what many States are already doing to transition individuals with disabilities from subminimum wage to integrated, supported employment services.

III. The Proposed Rule is consistent with long standing federal policy promoting CIE.

The Proposed Rule furthers the purposes of WIOA, a comprehensive federal law enacted in 2014 to improve workforce development and training services for groups including youth and workers with disabilities. WIOA amended the Rehabilitation Act of 1973 to state that one of its purposes is "to maximize opportunities for individuals with disabilities, including individuals with significant disabilities, for [CIE]."[40] WIOA established a federal definition of CIE, whose required elements preclude the payment of subminimum wages.[41] Disfavoring the payment of subminimum wage, it also included Section 511, which limited the ability of employers to pay such wages to workers with disabilities, even when the employer held a section 14(c) certificate, and included requirements intended to disrupt the pipeline by which youth with disabilities were referred directly from school to subminimum wage employment.[42] This section was also enacted to ensure that workers with disabilities who are currently paid subminimum wages were regularly provided with counseling and information about supports and resources that may support them in obtaining CIE. Additionally, WIOA highlighted the importance of ensuring that people with disabilities have access to the training providers and services and supports needed to succeed in CIE.[43] In phasing out 14(c) subminimum wage certificates, the Proposed Rule moves the nation even closer to ensuring fair and competitive employment opportunities for people with disabilities.

The Proposed Rule is also a logical extension of the U.S. AbilityOne Commission's final rule prohibiting the payment of subminimum wages in its program.[44] In its 2022 final rule, the Commission stated that "paying the same wage to individuals with disabilities and those without conveys a message of equality and a commitment to inclusion."[45] As the Commission

[40] See 29 U.S.C. § 701(b)(2).
[41] See 29 U.S.C. § 705(5).
[42] See https://www.federalregister.gov/d/2024-27880/p-205.
[43] 29 U.S.C. 794g; 34 CFR part 397.
[44] See 87 Fed. Reg. 43427 (July 21, 2022).
[45] See 87 Fed. Reg. 43428-43429.

recognized, societal expectations of people with disabilities have changed significantly over the years, as have the availability of reasonable accommodations and employment supports.[46] As of September 30, 2023, no employee on an AbilityOne contract was being paid subminimum wage.[47] The NPRM would extend this practice and policy of promoting wage equality.

In addition, the Proposed Rule is consistent with the goals of the Home and Community Based Settings ("HCBS") "Settings Rule"[48] issued by the U.S. Health and Human Services' Centers for Medicare and Medicaid Services ("CMS") in 2014, and States' ongoing implementation of final transition plans effectuating that Rule.[49] An underlying tenet of the Settings Rule is that individuals have free choice of providers for services, including employment services. In addition, under the Settings Rule, an HCBS "setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings . . . to the same degree of access as individuals not receiving Medicaid HCBS."[50] The NPRM aligns with this goal of promoting competitive and integrated work settings for people with disabilities.

Finally, the timing of the Proposed Rule coincides with federal incentive grants that provide resources and guidance for States seeking to transition individuals from subminimum wage work to expanded integrated employment services. In 2022, the U.S. Department of Education's Rehabilitation Services Administration ("RSA") made Disability Innovation Fund ("DIF") awards to 14 vocational rehabilitation agencies for that purpose. DIF grant projects have focused on improving the outcomes of individuals, including youth with disabilities, through career advancement programs, transition from subminimum wage to CIE programs, and improved interagency coordination.[51] With these grants, many States are already well on their way to transitioning individual out of what subminimum wage programs remain. The availability of these and other federal resources to effectuate employment transitions for 14(c) participants further demonstrates the appropriateness and feasibility of sunsetting these programs.

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[46] See 87 Fed. Reg. 43429.

[47] See U.S. AbilityOne Commission, "Fiscal Year 2023 Performance and Accountability Report, at 95, https://www.abilityone.gov/commission/performance.html.

[48] See 79 FR 2948 (Jan. 16, 2014).

[49] See Maiss Mohamed, Alice Burns, and Molly O'Malley Watts, *How are States Implementing New Requirements for Medicaid Home- and Community-Based Services* (Dec. 13, 2023), https://www.kff.org/medicaid/issue-brief/how-are-states-implementing-new-requirements-for-medicaid-home-and-community-based-services/.

[50] 42 CFR 441.530(a)(1)(i); see also https://www.federalregister.gov/d/2024-27880/p-220.

[51] See https://www.federalregister.gov/d/2024-27880/p-251; citing https://www.ed.gov/news/press-releases/education-department-awards-177-million-new-grants-increase-competitive-employment-people-disabilities; https://rsa.ed.gov/about/programs/disability-innovation-fund-pathways-to-partnerships). See also https://www.federalregister.gov/d/2024-27880/p-251.

IV. The Proposed Rule supports and builds upon state legislation and policy reforms prohibiting subminimum wage and promoting access to CIE for people with disabilities.

As the NPRM correctly notes, States throughout the country are engaged in Employment First initiatives based on the premise that all individuals, including people with the most significant disabilities, are capable of fully participating in CIE.[52] Currently, 31 states have passed Employment First legislation, 16 states have Employment First Executive Orders, and 32 states have State Agency Administrative policies/regulations in place.[53]

The administrative record also demonstrates that States are leading the way in reducing or eliminating reliance on subminimum wage for persons with disabilities, further evidence of the feasibility and appropriateness of the Proposed Rule. Vermont, New Hampshire, Maryland, Alaska, Washington, Texas, and Oregon no longer permit subminimum wage employment or have banned it entirely by statute, regulation, or policy. The Association of People Supporting Employment First ("ASPE") reports that as of July 2024, a total of 15 states have enacted legislation to eliminate subminimum wages, while similar bills are pending in other jurisdictions. The District of Columbia, Vermont, and Wyoming reported no active or pending certificates even in the absence of such legislation.[54]

The NPRM identifies this shift away from reliance on subminimum wages for people with disabilities, noting that nearly half of the States have prohibited or limited the use of subminimum wages.[55] In deference to these State laws, the Department has issued long-standing advisory letters stating that "[e]mployers paying subminimum wages to workers with disabilities under a section 14(c) certificate must pay these employees in accordance with both Federal and state laws. The issuance of a certificate under the provisions of section 14(c) of the FLSA does not excuse noncompliance with any state law establishing higher minimum wage requirements."[56]

Whether through Executive Order, legislative action, or federal grant partnerships, many States have accomplished or are currently engaged in employment transformation efforts. These system reforms are creating pathways for increased independence, financial self-sufficiency, and expanded access to supported employment services. The Proposed Rule is consistent with and furthers these transformation efforts. It also rightly acknowledges the ways in which States

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[52] See U.S. Dept. of Labor Office of Disability Employment Policy, *Employment First*, https://www.dol.gov/agencies/odep/initiatives/employment-first (last visited December 17, 2024)
[53] See Association of People Supporting Employment First (APSE), Employment First Map, https://apse.org/home-v2-2/employment-first/ (last visited December 16, 2024); see also, https://www.federalregister.gov/d/2024-27880/p-232.
[54] See Association of People Supporting Employment First, *Trends and Current Status of 14(c)*, updated July 2024; https://apse.org/wp-content/uploads/2024/08/APSE-14c-Update-REV-Jul24.pdf.
[55] See https://www.federalregister.gov/d/2024-27880/p-50.
[56] See Administrator's Interpretation No. 2016-2 (Nov. 17, 2016).

across the country have increased the availability of integrated employment opportunities for individuals with disabilities at or above minimum wage.

V. Professional research, national reports, and the Department's own data demonstrate that reductions in 14(c) certificates and expanded access to CIE have improved employment outcomes for individuals with disabilities.

As part of its rule-making process, the Department scrutinized a series of national data sources and public reports on employment for individuals with disabilities, including findings by non-partisan entities like the U.S. Commission on Civil Rights ("USCCR")[57] and the National Council on Disability ("NCD").[58] Data and analysis contained in these reports was considered by the Department and found to validate its finding that the issuance of subminimum wage certificates is no longer necessary under the curtailment clause.[59] For instance, USCCR's 2020 report observed that the rate of employment for workers with intellectual and developmental disabilities ("I/DD") in Vermont rose from 35.8 percent to 42 percent, more than double the national average employment rate in 2016-2017, following that State's decision to eliminate 14(c) certificates.[60] Additionally, both USCCR and NCD recommended a phased end to subminimum wage certificates, accompanied by services designed to support workers' transition to integrated employment.[61]

The Department also relied on data collected by the General Accounting Office ("GAO") on issues ranging from the population of individuals paid subminimum wage (overwhelmingly persons with I/DD), the wages paid to those workers, and the steady decline in utilization of 14(c) certificates around the country. For example, the GAO estimated that in 2001 "approximately 424,000 workers with disabilities were paid subminimum wages while working for 5,612 employers holding section 14(c) certificates."[62] As of May 1, 2024, the number of workers with disabilities being paid subminimum wages has dropped by 90% to approximately

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[57] See https://www.federalregister.gov/d/2024-27880/p-271, citing USCCR's 2020 report titled "Subminimum Wages: Impacts on the Civil Rights of People with Disabilities."

[58] See, e.g., National Council on Disability (NCD), "Has the Promise Been Kept? Federal Enforcement of Disability Rights Laws (Part 1)," (October 2018), https://www.ncd.gov/report/has-the-promise-been-kept-federal-enforcement-of-disability-rights-laws-part-1-october-2018/(2018 *NCD Progress Report"*); NCD, "Report on Subminimum Wage and Supported Employment" (2012), https://www.ncd.gov/report/national-council-on-disability-report-on-subminimum-wage-and-supported-employment/ ("2012 NCD Report").

[59] See https://www.federalregister.gov/d/2024-27880/p-444, referencing NCD and USCCR reports concluding that "the payment of subminimum wages is unnecessary to create employment opportunities for individuals with disabilities, including individuals with I/DD, and that section 14(c) certificates may actually be detrimental to the population they are intended to help."

[60] See https://www.federalregister.gov/d/2024-27880/p-416.

[61] See https://www.federalregister.gov/d/2024-27880/p-457.

[62] U.S. Gov't Accountability Office, GAO-01-886, "Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers with Disabilities, But Labor Should Improve Oversight" (2001) (2001 GAO Report) at 10, 18.

40,579 people nationwide, and only 801 employers still hold or are seeking renewal of section 14(c) certificates, representing a decline of almost 86 percent."[63] Given the size and consistency of this trend, and supporting national data and professional research, it is reasonable to expect that applications for 14(c) certificates will continue to decline over the next three years. These aspects of the administrative record provide further compelling evidence that 14(c) certificates have diminishing relevance in state employment systems, are impacting fewer and fewer provider entities over time, and are no longer necessary for people with disabilities to pursue their employment goals.

In addition to these external sources, the Department analyzed its own national data showing that the number of workers being paid subminimum wages under section 14(c) certificates has steadily declined over the last decade, that the vast majority of workers with disabilities, including individuals with I/DD, do not rely on subminimum wages to gain employment opportunities, and that the rate of unemployment for people with disabilities in 2023 was the lowest ever recorded.[64]

To supplement this information, the Department reviewed studies on the impacts of CIE for persons with disabilities, while considering potential impacts of the Proposed Rule on existing 14(c) certificate holders and their clients. As noted in the NPRM, these studies highlight the benefits of integrated, community employment for persons with disabilities, including higher wages, better career prospects than individuals in sheltered workshops or non-work activities, and positive health outcomes such as quality of life, self-determination, personal independence, locus of control, autonomy, and reduced support needs.[65]

Importantly, the Department also examined national data on the employment preferences of transition age youth with disabilities, citing National Longitudinal Transition Study-2 ("NLTS2") findings that among the 70 percent of secondary school students with disabilities who identified employment as a goal for the post-school years, 62 percent had a goal to work in competitive employment, while only 3 percent wished to work in "sheltered" employment.[66] This evidence bolsters the Department's finding that 14(c) certificates are no longer designed to facilitate

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[63] See https://www.federalregister.gov/d/2024-27880/p-535.
[64] See U.S. Dep't. of Labor, Bureau of Labor Statistics, "Economic News Release: Persons with a Disability: Labor Force Characteristics Summary," Feb. 22, 2024; https://www.bls.gov/news.release/pdf/disabl.pdf (noting that the unemployment rate for individuals with a disability was 7.2 percent in 2023, and also stating that "[i]n 2023, 22.5 percent of people with a disability were employed—the highest recorded ratio since comparable data were first collected in 2008"); see also https://www.federalregister.gov/d/2024-27880/p-155.
[65] See https://www.federalregister.gov/d/2024-27880/p-586.
[66] Mary Wagner, Lynn Newman, Renee Cameto, Nicolle Garza, and Phyllis Levine, "After High School: A First Look at the Postschool Experiences of Youth with Disabilities. A Report from the National Longitudinal Transition Study-2 (NLTS2)," SRI International, April 2005, pp. 5-3 to 5-4, https://www.nlts2.org/reports/2005_04/nlts2_report_2005_04_complete.pdf.

meaningful access to integrated employment opportunities for individuals with disabilities,[67] and are inconsistent with the employment goals of the vast majority to young people with disabilities.[68] Lastly, as detailed above, the administrative record demonstrates that there are clear models for States and existing 14(c) providers to transform their service delivery in ways that enable the transition of individuals from segregated, subminimum wage work to integrated supported employment.[69]

This compilation of objective evidence gathered from sources around the country strongly supports the Department's key factual findings, including: 1) the dramatic decrease in the utilization of 14(c) certificates; 2) the substantial reduction in 14(c) providers; 3) the increasing numbers of people with disabilities gaining integrated, minimum wage employment; and 4) the experiences of other States in expanding access to supported employment services without 14(c) certificates. The resulting administrative record amply supports the Department's determination that the benefits of the Proposed Rule far outweigh any potential negative impacts, and that the three-year sunset period can be effectively used to address potential concerns like work hour reductions, the need for benefits counseling, or changing roles for employment support staff.[70]

VI. Any extension beyond the proposed three-year sunset of 14(c) certificates should be narrow in scope, time-limited, and dependent upon a showing of active transition planning to minimum wage employment services.

Based upon the experiences of several other States, the Department's proposed three-year sunsetting period for existing 14(c) certificates provides ample notice and opportunity for certificate holders to adjust their business model[71] and to support transition planning activities for individuals interested in exploring more integrated employment options.[72] For example, after closing new admissions to sheltered workshops in 2015, Oregon determined in 2017 that it would end all funding for sheltered, subminimum wage employment by 2020. Oregon met that deadline, with a short extension (6 months) for one large provider.

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[67] See https://www.federalregister.gov/d/2024-27880/p-433 (noting that "the issuance of section 14(c) certificates may be self-reinforcing, with the continued use of certificates facilitating workers continuing to only receive subminimum wages despite thel potential to engage in other full-wage employment opportunities, which is contrary to the statute's intent of providing for certificates only when necessary.")
[68] See https://www.federalregister.gov/d/2024-27880/p-156.
[69] See https://www.federalregister.gov/d/2024-27880/p-578 (citing a 2022 report on employment outcomes in Oregon following the 2016 Settlement Agreement in *Lane v. Kitzhaber*, including the elimination of reliance on sheltered work and the transition of 1,138 individuals from subminimum wages into CIE. As the Department correctly observed, "[t]his data shows that it is possible, with the right supports, for large numbers of workers with disabilities earning the subminimum wage to transition to full-wage employment opportunities").
[70] See, e.g., https://www.federalregister.gov/d/2024-27880/p-548.
[71] See https://www.federalregister.gov/d/2024-27880/p-552 (noting in its cost analysis that current certificate holders will be relieved of administrative, operational, and reporting costs associated with compliance under Section 14(c), including prevailing wage surveys and individual time studies).
[72] See https://www.federalregister.gov/d/2024-27880/p-463.

Should any further extension period be contemplated as part of the Proposed Rule, that exception should be available only to programs that demonstrate extreme hardship to client participants, including unavoidable program closure with no access to alternative community-based services and supports. No extension period should exceed 12 months. Entities granted the maximum 12-month extension period should be reassessed at six months and required to demonstrate measurable progress towards mitigating identified harms.

Finally, in order to be considered for any exception, the requesting entity should be required to demonstrate the following as part of its application:

1) It is actively engaged in efforts to expand access to integrated supported employment for program participants;
2) It is facilitating individual informed choice regarding opportunities for CIE, in addition to options counseling required by Section 511 of the WIOA; and
3) Program participants are transitioning to integrated employment services at or above state minimum wage following this informed choice process.

VII. Conclusion

In the 80 years since the 14(c) program was created, changes in federal law, expanded employment options and services for people with disabilities, reductions in utilization of subminimum wage programs, and dramatic shifts in state and federal policy all demonstrate that this exception to federal minimum wage standards is no longer necessary to "prevent the curtailment of opportunities for employment" for people with disabilities. The Proposed Rule is timely, amply supported by objective evidence, and consistent with the Department's delegated authority to interpret the FLSA. For these reasons, and because of its potential to further expand opportunities for CIE for people with disabilities, CPR supports the Proposed Rule.

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