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Coming Out of the Shadows of Sheltered Workshops and Subminimum Wage: Exploring the Exploitation of Disabled Workers Under Section 214(c) of the Fair Labor Standards Act

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Coming Out of the Shadows of Sheltered Workshops and Subminimum Wage

Exploring the Exploitation of Disabled Workers Under
Section 214(c) of the Fair Labor Standards Act

Introduction

Pedro, a twenty five year old intellectually disabled man from Providence, Rhode Island, spent three years sorting and packing buttons, and assembling jewelry in a sheltered workshop.¹ Pedro's employer "described him as an excellent worker who stayed on task and performed well." Nevertheless, Pedro only received forty-eight cents an hour.² Today, more than 425,000³ disabled workers just like Pedro are earning wages well below the federal minimum wage of \$7.25⁴ and it is legal. Section 214(c) of the Fair Labor Standards Act enables employers to pay disabled workers less than the federal minimum wage.⁵ Congress's clear intention with Section 214(c) "was to assure that workers who were not able to meet employer productivity standards, because of the impact of a disability on work performance, would not be excluded from earning a wage."⁶ However, the effects of this "well-intended legislation have been far more negative than positive" since its enactment in 1938.⁷ A lack of oversight and enforcement by the Department of Labor has allowed the sub-minimum wage waiver to become a corrupt, uncontrolled, and discriminatory subsidy for sheltered workshops.

Sheltered workshops and non-profits are using Section 214(c) of the Fair Labor Standards Act to employ individuals with physical and mental disabilities at wages as low as twenty-two

¹ *Integrating Workers with Intellectual and Developmental Disabilities in Rhode Island*, FACES OF OLMSTEAD, available at http://www.ada.gov/olmstead/faces_of_olmstead.htm

² *Id.*

³ See Michael Callahan, *The Productivity Fallacy: Why People Are Worth More Than Just How Fast Their Hands Move*, MARC GOLD & ASSOCIATES/EMPLOYMENT FOR ALL 4 (2010) available at <http://www.marcgold.com/Publications/White%20Papers/The%20Productivity%20Fallacy.pdf>; See also U.S. GOV'T ACCOUNTING OFFICE, GAO-01-886, *Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers with Disabilities, But Labor Should Improve Oversight* 1 (2001) available at <http://www.gao.gov/new.items/d01886.pdf>.

⁴ See 29 U.S.C. 206(a)(1)(C) (2012).

⁵ See 29 U.S.C. 214(c) (2012).

⁶ Callahan, *supra* note 3, at 1.

⁷ See *Id.*

cents, thirty-eight cents, and forty-one cents per hour.⁸ These wages are nearly thirty-three times lower than the federal minimum wage. Sheltered workshops and non-profits are exploiting disabled workers, because of antiquated misconceptions, prejudices and stereotypes of disabled workers and their value in the workplace. Part I of this paper examines the historical development of wage legislation and the various exemptions for disabled workers. Part II discusses the Section 214(c) Sub Minimum Wage Program and Part III highlights the Department of Labor's lack of oversight and regulation of the program as well as its negative impact on disabled workers in sheltered workshops. Part IV of this paper discusses the pre-textual arguments in favor of maintaining the Sub-Minimum Wage Program and Part V discusses how the Section 214(c) Sub Minimum Wage Program Violates Federal Anti-Discrimination Laws and Public Policy. Part VI discusses how the Sub-Minimum Wage Program invites discrimination, exploitation, and abuse of disabled workers while Part VII examines new federal legislation addressing the sub-minimum wage program and the push for wage equality for all workers by disability rights advocates. Finally, Part VIII discusses the critical need to repeal Section 214(c) and eliminate the funding of sheltered workshops and Part IX briefly concludes. Repealing Section 214(c) of the Fair Labor Standards Act, will enable disabled workers to come out of the shadows of sheltered workshops and non-profits and into more integrated work settings, which will offer disabled employees meaningful employment, meaningful participation along-side other non-disabled employees in the workforce and a meaningful wage at or above the federal minimum wage.

⁸ See Jillian Berman, *Some Disabled Goodwill Workers Earn As Little As 22 Cents An Hour As Execs Earn Six Figures: Report*, THE HUFFINGTON POST, June 21, 2013, updated June 25, 2013 available at http://www.huffingtonpost.com/2013/06/21/goodwill-workers-disabilities-low-wage_n_3478013.html.

I. Historical Development of Wage Legislation and the Impact on Disabled Workers

Federal minimum wage laws have always included exemptions for disabled workers.⁹

The discriminatory treatment permitting the payment of paying sub-minimum wages to disabled workers dates back to at least the 1930's with the enactment of the National Industrial Recovery Act of 1933-1935 (NIRA).¹⁰ Under NIRA, open market employers could apply for special certificates authorizing the payment of wages up to 75% of the industry minimum to disabled workers based on the individual employee's productivity rates.¹¹

Disabled workers working in sheltered workshops were at even more of a disadvantage as NIRA did not provide a wage floor for them.¹² Consequently, under NIRA, sheltered workshops could pay disabled workers any wage the workshop deemed appropriate.¹³ Sheltered workshops are "facility-based day programs attended by adults with disabilities as an alternative to working in the open labor market."¹⁴ Disabled men and women who work in sheltered workshops often spend hours doing menial tasks such as "assembling, packing...and sewing"¹⁵ and receive wages well below state and federal minimum wages. The original intent behind sheltered workshops was to provide educational opportunities and leisure activities "designed to assist the disabled with finding long-term employment or transitioning into the open labor market while allowing disabled workers to engage in "relatively simple work activities."¹⁶

However, according to Executive Director of the National Disability Rights Network

⁹ See Samuel R. Bagenstos, *The Case Against the Section 14(c) Subminimum Wage Program* 2 (2011). Available at http://thegao.org/wp-content/uploads/2012/09/14c_report_sam_bagenstos-1.pdf.

¹⁰ See William G. Whittaker, *Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act*, CORNELL UNIVERSITY ILR SCHOOL, Summary (Feb. 9 2005), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1211&context=key_workplace.

¹¹ See *Id.*

¹² See *Id.*

¹³ See *Id.*

¹⁴ Alberto Migliore, *Sheltered Workshops*, International Encyclopedia of Rehabilitation 1 (Ctr. Int'l Rehab. Research Info. & Exch. Ed., 2010), available at <http://cirrie.buffalo.edu/encyclopedia/en/article/136/>

¹⁵ *Id.*

¹⁶ Curtis L. Decker, Esq., A Letter from the Executive Director, *Segregated and Exploited*, National Disability Rights Center 2 (January 2011).

Attorney Curtis L. Decker, “sheltered workshops are not what they promised to be and sometimes serve as an unsettling example of how good intentions can lead to terrible outcomes.”¹⁷ The Executive Director also asserted in an introductory letter to the 2011 National Disability Rights Network Study on Sheltered Workshops and the Segregation and Exploitation of Disabled Workers that “people with disabilities can- and do- work in all areas of the American workforce. They thrive when they fully participate in their communities, and in turn, the nation thrives.”¹⁸ The only reason “sheltered workshops and the sub-minimum wage still exist today [is] because of self-interested employers and systematic neglect by federal agencies, buttressed by outdated stereotypes of people with disabilities and the low expectations held by the general public, lawmakers and...the disabilities rights community.”¹⁹

President Roosevelt “originally exempted workers with disabilities from NIRA’s minimum wage codes in 1934 in deference to concerns expressed by sheltered workshops claiming that they could not afford to pay their workers market wages.”²⁰ Sheltered workshops were “supported by private organizations and charitable donations [and] the emphasis was [placed more] on the rehabilitative and therapeutic function(s) of the program rather than the productivity of the individuals.”²¹ As a result, sheltered workshops contended they were “generally not self-sustaining”²² business entities able to pay disabled workers minimum wage.²³ In 1935, just two years after the enactment of the NIRA, the United States Supreme Court declared the Act unconstitutional.²⁴ However, just a few years later, Congress revived the

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Bagenstos, *supra* note 9, at 3.

²¹ Jessica Nettles, *From Sheltered Workshops to Integrated Employment: A Long Transition*, Lynchburg College 4 (2013).

²² *Id.*

²³ *See Id.*

²⁴ *See Whittaker, supra* note 10, at summary.

“certification system”²⁵ permitting employers to pay disabled workers less than non-disabled workers with the enactment of Section 14(c) of the Fair Labor Standards Act in 1937.²⁶

The provision of the Fair Labor Standards Act permitting payment of sub-minimum wage to disabled workers based on their productivity rates is rooted in an antiquated concept “that the Fair Labor Standards Act sought to replace – reliance on an absolute connection between pay and productivity.”²⁷ Prior to the Fair Labor Standards Act and the enactment of federal minimum wage laws, employers could establish pay rates contingent upon productivity rates that were nearly impossible for workers to meet.²⁸ “Theoretically, [employees] could make a decent wage, [if their] production [rates] were high enough, but workers would wear themselves out trying to meet impossibly high standards.”²⁹ Congress set out to address this conundrum of over-worked workers not working hard enough to earn a decent living.³⁰ Their solution was the establishment of a minimum wage.³¹ With one piece of legislation, the Fair Labor Standards Act of 1938,³² Congress simultaneously set “standards for basic minimum wage rates and overtime pay...and also created a special exemption authorizing employers to pay wages that were significantly lower than [the established] minimum wage to workers with disabilities.”³³

II. The Fair Labor Standards Act Section 214(c) Sub Minimum Wage Program

“Section 214(c) of the Fair Labor Standards Act was in many ways adopted to incentivize job creation opportunities for persons with disabilities in work settings where they otherwise

²⁵ *Id.*

²⁶ See 29 U.S.C. 214 (c) (2012).

²⁷ Callahan, *supra* note 3, at 1.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See 29 U.S.C. 201 et. seq. (2012).

³³ Nat’l Disability Rts. Network, *Segregated and Exploited*, 11 (January 2011), available at <http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf>; See also 29 U.S.C. 201 et. seq. (2012).

might not be hired.”³⁴ The original intent behind authorizing employers to pay sub-minimum wage rates to disabled workers was “to encourage the employment of veterans with disabilities in [the] manufacturing-centered economy”³⁵ of the 1930s and 1940s. Specifically, Section 214(c) of the Fair Labor Standards Act provides that the Secretary of Labor, “to the extent necessary to prevent curtailment of opportunities for employment, [may] provide special certificates permitting sub-minimum wages³⁶ [to] be paid to employees whose “earning or productive capacity is impaired by age, physical or mental deficiency, or injury.”³⁷ The statute also provides that the sub-minimum wages paid to disabled employees must “commensurate with those paid to non-handicapped workers employed in the vicinity [of the disabled workers] for essentially the same type, quality, and quantity of work”.³⁸ Sub-minimum wages paid must correlate to the disabled individual's productivity.³⁹ “Thus, if a handicapped worker's productivity is reported to be 65% of the normal productivity for a non-handicapped worker doing essentially the same kind of work, the handicapped individual's wage can legally be 65% of the prevailing wage for that job.”⁴⁰

When the Fair Labor Standards Act was enacted in 1938, Congress did not include a wage floor. This meant special sub-minimum wages could range from one cent per hour to wages at or above the proscribed minimum wage. Special minimum wage rates for disabled

³⁴ Melia Preedy, *Subminimum or Subpar? A Note in Favor of Repealing the Fair Labor Standards Act's Subminimum Wage Program*, SEATTLE UNIVERSITY LAW REVIEW, 37 Seattle U. L. Rev. 1097, 1104 (2014); See also Gerald Mayer & David H. Bradley, CONG. RESEARCH SERV., R42713, *The Fair Labor Standards Act (FLSA): An Overview* (2012) available at <http://www.hsdl.org/?view&did=725108>.

³⁵ Nat'l Disability Rts. Network, *supra* note 33 at 11; See also 29 U.S.C. 201 *et. seq.* (2012) citing William G. Whittaker, *Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act*, CORNELL UNIVERSITY ILR SCHOOL, 5 (Feb. 9 2005), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1211&context=key_workplace.

³⁶ See 29 U.S.C. 214(c)(1) (2012).

³⁷ 29 U.S.C. 214(c)(1) (2012).

³⁸ 29 U.S.C. 214(c)(1)(b) (2012).

³⁹ See 29 U.S.C. 214(c)(1)(c) (2012).

⁴⁰ James Gashel, *Sheltered Workshops and the Subminimum Wage: What Goes Around Comes Around*, BRAILLE MONITOR (Mar. 1986).

workers could be set at any rate the Department of Labor Wage and Hour Administrator deemed appropriate. The Wage and Hour Administrator “administratively set a wage floor of not less than 75% of the standard twenty-five cent federal minimum wage (i.e. 17 ½ cents per hour). However, fearing that 17 ½ cent rate might disrupt ‘the work of rehabilitation being carried on by...charitable groups’ he ruled the wages in sheltered workshops would be set ‘on the basis of earning capacity’.”⁴¹ Thus “a dual standard was established: a productivity wage in sheltered workshops [and] a specific minimum rate” for all other employers of disabled workers.⁴² In 1966, the Fair Labor Standards Act sub-minimum wage scheme changed. The Fair Labor Standards Act now prohibited disabled workers working in both sheltered workshops and the competitive business industry from receiving wages that were less than 50% of the federal minimum wage.⁴³ In 1966, the federal minimum wage was \$1.25 per hour, thus a disabled worker could not make less than 62 ½ cents per hour under federal law. However, in 1986, the Fair Labor Standards Act was amended once again. This time, the amendment eliminated any statutory proscribed wage floor for disabled workers and reverted the Fair Labor Standards Act back to its original state. Today the Fair Labor Standards Act does not have any wage floor for disabled workers receiving sub-minimum wages under Section 214(c). Presently, records show some disabled workers in sheltered workshops are making as little as twenty-two cents an hour.⁴⁴ That is less than 5% of the current minimum wage rate of \$7.25.⁴⁵

The U.S. Department of Labor is responsible for issuing Section 14(c) sub-minimum wage certificates to employers of disabled workers. The Secretary of Labor uses a number of

⁴¹ *Id.*

⁴² Whittaker, *supra* note 10 at 30; citing U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, *Press Release*, Oct. 12, 1938 and Nov. 10, 1938.

⁴³ Whittaker, *supra* note 10 at summary.

⁴⁴ Berman, *supra* note 8.

⁴⁵ See 29 U.S.C. 206(a)(1)(C) (2012).

criteria to assess whether or not to issue the certificate and permit an employer to pay its disabled employees at a rate below the federal minimum wage.⁴⁶ When issuing the certificate the Federal Department of Labor considers: “the nature and extent of the individual’s disability; the prevailing wages of experienced non-disabled employees who engage in comparable work; the productivity of the disabled workers as compared with the non-disabled; and wage rates to be paid to disabled workers comparable to that performed by experienced non-disabled workers.”⁴⁷ The Department of Labor, pursuant to 29 U.S.C. §214(c), may not issue a certificate permitting an employer to pay sub-minimum wages “unless the disability actually impairs the worker’s earnings or productive capacity for the work being performed”.⁴⁸ Physical disabilities, intellectual disabilities, and disabilities relating to age or injury all may influence an employee’s productivity and thus cause the employee to earn a sub-minimum wage rate under Section 214(c) of the Fair Labor Standards Act.⁴⁹ “Disabilities that may affect productivity include: blindness, mental illness, mental retardation, cerebral palsy, alcoholism, [and] drug addiction”.⁵⁰

Before the Secretary of Labor issues the certificate permitting the payment of special sub-minimum wages to disabled employees, employers must submit certain assurances in writing to the Department of Labor.⁵¹ Employers must pledge to review the sub-minimum wages paid to its disabled workers at least once every six months.⁵² Employers must also agree to adjust those special wages intermittently to reflect changes in either the employee’s productivity rate or changes in the prevailing wage paid to the non-disabled employees who are employed in the

⁴⁶ See 29 C.F.R. 525.9(a) (2012); See also 29 C.F.R. 525.9(b) (2012).

⁴⁷ *Federal Contractors May No Longer Pay Subminimum Wage to Workers with Disabilities*, 343 Fair Lab. Standards Handbook for States, Loc. Gov’t & Sch. Newsl. 4 . (April 2014).

⁴⁸ *Id.*

⁴⁹ *See When Can You Pay Special Wages to Workers With Disabilities?*, 2004 WL 6392932 (2004).

⁵⁰ *Id.*

⁵¹ See 29 U.S.C. 214(c)(2) (2012).

⁵² See 29 U.S.C. 214 (c)(2)(A) (2012); See also *FLSA Minimum Wage Exemption: Workers With Disabilities*, 2012 WL 5975098 (2012).

same location and performing the same or substantially the same work as the disabled employee.⁵³ Under the Fair Labor Standards Act, an employer is obligated to adjust the sub-minimum wages paid to disabled employees at least once a year.⁵⁴ Furthermore, federal regulations also require an employer to maintain accurate records of all disabled employees receiving special wages and provide them to both the Federal and State Departments of Labor upon request for inspection.⁵⁵ Some of the records that must be kept by an employer include: “verification of the workers’ disabilities; evidence of the productivity of each disabled worker; the prevailing wages paid for non-disabled workers who perform the same type of work in the vicinity as that performed by the workers under the certificate; and production standards for non-disabled workers for each job being performed by workers with disabilities.”⁵⁶

In addition to complying with the recordkeeping requirement established by federal law and federal regulations, employers are also obligated to notify each disabled employee about the sub-minimum wage certificate either orally or in writing.⁵⁷ Employers must explain to the disabled workers that instead of being paid minimum wage, they will receive a special sub-minimum wage rate and that rate will be contingent on each individual’s productivity rate.⁵⁸ In some instances, employers may also be required to notify the parent or guardian of a disabled employee and communicate to them the terms of waiver.⁵⁹ Employers who employ disabled workers at special sub-minimum wages are also required to display the Federal Department of Labor Wage and Hour Division poster “explaining the conditions under which special minimum wage rates may be paid. The poster...must be posted in a conspicuous place

⁵³ See 29 U.S.C. 214(c)(2)(B) (2012); See also *FLSA Minimum Wage Exemption: Workers With Disabilities*, 2012 WL 5975098 (2012).

⁵⁴ See *Id.*

⁵⁵ See *Subminimum Wages and Exemptions Under Special Certificates*, 2004 WL 5032731

⁵⁶ *FLSA Minimum Wage Exemption: Workers With Disabilities*, 2012 WL 5975098 (2012).

⁵⁷ See *Id.*

⁵⁸ *FLSA Minimum Wage Exemption: Workers With Disabilities*, 2012 WL 5975098 (2012).

⁵⁹ *Id.*

on the employer's premises where employees or the parents or guardians of workers with disabilities can readily see it.”⁶⁰

In an effort to prevent, the exploitation of disabled workers and employer abuse of the sub-minimum wage waiver, Congress built-into the Fair Labor Standards Act a procedure for review and redress.⁶¹ Disabled employees, or the parents or guardians of a disabled employee, may petition the Secretary of Labor to request an evaluation of the sub-minimum wage rate a disabled worker is receiving.⁶² Once a petition is filed, the Secretary of Labor has ten days to assign the matter to an administrative law judge for a hearing on the petition.⁶³ At this hearing, the employer has the burden of showing that the special sub-minimum wage rate “is justified as necessary in order to prevent curtailment of opportunities for employment”⁶⁴ as provided by the Fair Labor Standards Act.

Thus, the employer must present evidence to the administrative law judge showing that the payment of sub-minimum wage to this disabled individual is necessary, otherwise, disabled employees will not be afforded the same opportunities for employment because of the effect that disability has on his or her productivity. The employer must show that if he was required to pay the disabled individual minimum wage, it would affect his business in such a manner, the employer would no longer be able to employ this disabled worker. The administrative law judge then will assess the following factors: the productivity rate of the disabled individual, how the productivity of the disabled individual was measured, and the productivity rates of other non-disabled workers performing the same or substantially similar work in the same location.⁶⁵

⁶⁰ *Id.*

⁶¹ *See* 29 U.S.C. 214(c)(5) (2012).

⁶² *See* 29 U.S.C. 214(c)(5)(A) (2012).

⁶³ *See* 29 U.S.C. 214(c)(5)(B) (2012).

⁶⁴ 29 U.S.C. 214(c)(5)(C) (2012).

⁶⁵ *See* 29 U.S.C. 214(c)(5)(D)(i) (2012); *See also* 29 U.S.C. 214(c)(5)(D)(ii) (2012).

Within thirty days of the hearing, the administrative law judge will issue a final opinion.⁶⁶ Either the employer or the employee may request a review of the administrative law judge's ruling and within thirty days of receiving the request for review, the Secretary of Labor will make a final agency ruling as to the sub-minimum wages and the methods relied upon to determine that wage.⁶⁷

The “procedural safeguards,”⁶⁸ such as the review and wage hearing before an administrative law judge, insisted upon by Congress when the Fair Labor Standards Act was last amended are ironically failing the most vulnerable members of the workforce Congress intended to protect. There are systemic problems with the minimum wage waiver program and the review procedure established by the 1986 amendments to the Fair Labor Standards Act.⁶⁹ The structure of the current law is “stacked against the aggrieved person with a disability.”⁷⁰ Even though the law permits disabled workers to “challenge the sub-minimum wage in a hearing...they are almost certain to lose...”⁷¹ Disabled workers are at a disadvantage when they try to challenge the sub-minimum wages employers are paying them because there is no option for disabled workers to join together and bring a class action suit against an employer who is violating the wage and hour laws.⁷² Only the individual employee or an individual employee's parent or guardian may file the petition for review with the Secretary of Labor.⁷³ Since disabled workers cannot bring class actions under the Fair Labor Standards Act, disabled workers “are put at a tremendous risk of conflict with their employers under [already] difficult employment

⁶⁶ See 29 U.S.C. 214(c)(5)(E) (2012).

⁶⁷ See 29 U.S.C. 214(c)(5)(E) (2012).

⁶⁸ Whittaker, *supra* note 10 at 30.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Whittaker, *supra* note 10 at 30; citing U.S Congress, House Subcommittee on Labor Standards, Occupational Health and Safety, Committee of Education and Labor, *Section 14(c) of the Fair Labor Standards Act*, hearings, 103rd Cong., 2nd sess., Mar. 16, 1994 (Washington GPO, 1994) pp. 1-2

⁷² See 29 U.S.C. 214(c)(5) (2012).

⁷³ See 29 U.S.C. 214(c)(5)(A) (2012).

circumstances.”⁷⁴

Disabled employees or legal guardians of disabled employees rarely invoke the appeals process outlined in the Fair Labor Standards Act. The “unrealistic constraints of time for dealing with Section [214(c)⁷⁵] cases,”⁷⁶ “the need for evidence that, likely, neither the plaintiff nor his employer will have”⁷⁷, and the expensive cost of litigation make it nearly impossible for anyone, especially a person with a physical or developmental disability to successfully challenge sub-minimum wages paid by an employer.⁷⁸ To ensure timely review of any sub-minimum wages brought to the attention of the Secretary of Labor, Congress included in the Fair Labor Standards Act a provision requiring the Secretary to assign the complaint to an Administrative Law judge within ten days of its receipt.⁷⁹ The administrative law judge then had to hear the case within thirty days.⁸⁰ Former Secretary Elisburg testified before Congress that this process was “an illusion”⁸¹ and Representative Austin Murphy “termed the time constraints in the 1986 amendments as ‘the administrative equivalent to the speed of light’.”⁸² The evidentiary burdens and the hearing procedure overall make an already difficult process more taxing on aggrieved disabled employees, employers, and administrative law judges. Former Assistant Secretary of Labor Elisburg reported to Congress in 1994 that:

⁷⁴ Whittaker, *supra* note 10 at 31, *citing* U.S Congress, House Subcommittee on Labor Standards, Occupational Health and Safety, Committee of Education and Labor, *Section 14(c) of the Fair Labor Standards Act*, hearings, 103rd Cong., 2nd sess., Mar. 16, 1994 (Washington GPO, 1994) p. 20.

⁷⁵ *See* 29 U.S.C. 214(c) et. seq. (2012)

⁷⁶ Whittaker, *supra* note 10 at 31.

⁷⁷ *Id.*

⁷⁸ *See* 29 U.S.C. 214(c) et. seq. (2012)

⁷⁹ *See* 29 U.S.C. 214(c)(5)(B) (2012).

⁸⁰ *See* 29 U.S.C. 214(c)(5)(B) (2012).

⁸¹ Whittaker, *supra* note 10 at 31, *citing* U.S Congress, House Subcommittee on Labor Standards, Occupational Health and Safety, Committee of Education and Labor, *Section 14(c) of the Fair Labor Standards Act*, hearings, 103rd Cong., 2nd sess., Mar. 16, 1994 (Washington GPO, 1994) pp. 21-22.

⁸² Whittaker, *supra* note 10 at 31; *citing* U.S. Congress, House Subcommittee on Labor Standards, Occupational Health and Safety, Committee of Education and Labor, *Section 14(c) of the Fair Labor Standards Act*, hearings, 103rd Cong., 2nd sess., Mar. 16, 1994 (Washington GPO, 1994) pg. 2.

“sheltered workshop personnel and management had little understanding of the rules, the records they had were virtually nonexistent to support the exemption and they had little economic justification for the wages set. ...It was also clear...that the administrative law judges did not fully understand or accept the notion that the employer had the burden of establishing the data to defend the exemptions claimed.”⁸³

The Fair Labor Standards Act does not include a fee-shifting provision for disabled employee plaintiffs challenging sub-minimum wages.⁸⁴ This often leaves disabled workers with extensive legal costs and virtually no means to pay them.⁸⁵ Disabled employees and their employers are each responsible for their own legal fees, irrespective of the outcome of the hearing. “Congress has created a law that is ...extremely technical... insists that individuals pursue a claim on their own behalf and then [forces them to] pay legal fees even if the employer is at fault.”⁸⁶ Nearly twenty years ago, Secretary Elisburg posed the following question to Congress: “how in good conscience can we ask these workers to also foot the legal bill?”⁸⁷ He claimed, “to suggest that a worker earning \$2.05 an hour can afford counsel is likewise ludicrous.”⁸⁸ This unanswered question and sentiments still ring true today. Not only have the vital questions have gone unanswered, but the lack of enforcement and oversight has allowed sheltered workshops, and non-profits to exploit disabled workers.

⁸³ Whittaker, *supra* note 10 at 31, *citing* U.S Congress, House Subcommittee on Labor Standards, Occupational Health and Safety, Committee of Education and Labor, *Section 14(c) of the Fair Labor Standards Act*, hearings, 103rd Cong., 2nd sess., Mar. 16, 1994 (Washington GPO, 1994) pp. 21-22.

⁸⁴ *See 29 U.S.C. 214(c) et. seq. (2012).*

⁸⁵ *See* Whittaker, *supra* note 10 at 31-32.

⁸⁶ Whittaker, *supra* note 10 at 31-32.

⁸⁷ Whittaker, *supra* note 10 at 31-32, *citing* U.S Congress, House Subcommittee on Labor Standards, Occupational Health and Safety, Committee of Education and Labor, *Section 14(c) of the Fair Labor Standards Act*, hearings, 103rd Cong., 2nd sess., Mar. 16, 1994 (Washington GPO, 1994) pp. 21-25.

⁸⁸ *Id.*

III. The Department of Labor's Lack of Oversight and Regulation of the Section 214(c) Program and the Negative Impact on Disabled Workers in Sheltered Workshops

The Department of Labor has publically asserted for at least the last three decades, that it cares about the welfare of the workers in sheltered workshops and that it is committed to vigorous enforcement of fair labor standards in those workshops.⁸⁹ However, actions speak louder than words, and the Department of Labor's lack of action in the last thirty plus years has permitted and empowered sheltered workshops to abuse the Fair Labor Standards Act, exploit disabled workers and subsidize their enterprises with cheap labor. In 1980, there were approximately 4,000 sheltered workshops employing nearly 180,000 disabled workers⁹⁰ and the Department of Labor was only able to inspect 10% of these workshops properly.⁹¹ In effect, each employer paying disabled workers sub-minimum wages would only be inspected once every ten years.⁹² A proper inspection can take anywhere from 25-35 hours when done correctly.⁹³ That translates to roughly 3-4 full days for each sheltered workshop.⁹⁴ However, Department of Labor inspections today are routinely less comprehensive, less frequent, and significantly shorter than the estimated 3-4 full days required.⁹⁵ The Department of Labor is currently accountable for regulating nearly 5,600 employers who pay special sub-minimum wages to disabled workers.⁹⁶ Eighty-four percent of those 5,600 employers are sheltered

⁸⁹ Whittaker, *supra* note 10 at 31-32, *citing* U.S. Congress, House Subcommittee on Labor Standards, Occupational Health and Safety, Committee of Education and Labor, *Section 14(c) of the Fair Labor Standards Act*, hearings, 96th Cong., 2nd sess., May 14-15, 1980 (Washington GPO, 1978) pp. 3-12.

⁹⁰ *See* Whittaker, *supra* note 10 at 14.

⁹¹ *See* Whittaker, *supra* note 10 at 15.

⁹² *Id.*

⁹³ *See* Whittaker, *supra* note 10 at 15; *See also* U.S. GENERAL ACCOUNTING OFFICE, *Stronger Federal Efforts Needed for Providing Employment Opportunities and Enforcing Labor Standards in Sheltered Workshops*, Report to the Congress, Comptroller General of the United States, HRD-81-99, Sept. 28, 1981 (Washington: GPO, 1981) pp. 39-43.

⁹⁴ *See* Whittaker, *supra* note 10 at 15.

⁹⁵ *Id.*

⁹⁶ *See* Melia Preedy, *Subminimum or Subpar? A Note in Favor of Repealing the Fair Labor Standards Act's Subminimum Wage Program*, Seattle University Law Review, 37 Seattle U. L. Rev. 1097, 1105 (2014).

workshops.⁹⁷ Given the vast number of sheltered workshops and the more than 425,000⁹⁸ disabled workers with varying degrees of disabilities receiving wages under the Fair Labor Standards Act special sub-minimum wage provision, the Department of Labor cannot adequately oversee and properly regulate them all thus allowing exploited disabled workers to fall through the cracks of the system.

In May 1980, the House Subcommittee on Labor Standards conducted a two-day oversight hearing on Section 214(c) of the Fair Labor Standards Act and the results were appalling and inexcusable.⁹⁹ The hearing shed light on the Department of Labor Wage and Hour Division's failures and shortcomings and the consequences suffered by the disabled workers. The Department of Labor not only confirmed its oversight of the sub-minimum wage program up to that point had been inadequate, but it was also unable to offer any glimpse of substantive improvement moving forward.¹⁰⁰ The Department acknowledged sheltered workshops using this sub-minimum wage program had exploited disabled workers and pledged to prevent further exploitation and abuse moving forward.¹⁰¹ In addition to failing to conduct adequate investigations of the sheltered workshops, the Wage and Hour Division had also failed to train its site inspectors and department staff adequately.¹⁰² There had been a general failure of management at the Department of Labor and a lack of resources that routinely led to the approval of sub-minimum wage applications with little to no justification, or follow up.¹⁰³

⁹⁷ See *Id.*

⁹⁸ See Callahan, *supra* note 3 at 1; See also U.S. GOV'T ACCOUNTING OFFICE, GAO-01-886, *Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers with Disabilities, But Labor Should Improve Oversight* 1 (2001) available at <http://www.gao.gov/new.items/d01886.pdf>.

⁹⁹ See Whittaker, *supra* note 10 at 14.

¹⁰⁰ *Id.*

¹⁰¹ See Whittaker, *supra* note 10 at 15; See also U.S. Congress, House Subcommittee on Labor Standards, Committee of Education and Labor, *Oversight Hearings on Section 14(c) of the Fair Labor Standards Act*, hearings, 96th Cong., 2nd sess., May 14-15, 1980 (Washington GPO, 1978) pp. 17-21.

¹⁰² See Whittaker, *supra* note 10 at 14-16.

¹⁰³ *Id.*

In 2001, the U.S. Government Accountability Office (GAO) issued a report concluding the Department of Labor had continually failed to manage the special sub-minimum wage program for disabled workers and thus has been unsuccessful in preventing sheltered workshops from exploiting disabled workers.¹⁰⁴ The GAO consistently found the Department of Labor had placed a low priority on the sub-minimum wage program and the Department had not done all it could to ensure employers paying sub-minimum wages to disabled employees were in compliance with the Fair Labor Standards Act and other applicable wage and hour and laws.¹⁰⁵ The Department of Labor had routinely failed to maintain accurate records of both employers and employees, and had failed to follow up when employers did not respond to 214(c) subminimum wage certificate renewal notices.¹⁰⁶ The Department also failed to provide guidance, outreach, and education about the specific requirements of the minimum wage waiver to employers and employees.¹⁰⁷

IV. Pre-Textual Arguments in Favor of Maintaining the Sub-Minimum Wage Program

“Due to lack of regulation and evaluation from the Department of Labor, the effectiveness of the [Fair Labor Standards Act 214(c)] program and the benefits or problems associated with [it are] impossible to accurately evaluate.”¹⁰⁸ Nevertheless, proponents of the sub-minimum wage program contend that without section 214(c) of the Fair Labor Standards Act, employment opportunities for workers with a physical, mental, or other documented

¹⁰⁴ See Whittaker, *supra* note 10 at 34.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Gretchen Nye, *The Uncertain Future of Section 14(c) of the Fair Labor Standards Act*, George Washington University School of Public Health and Human Services, 6 (2013) available at <http://www.chimes.org/news/pdf/14c-news.pdf>.

disabilities would not exist, and disabled workers would not have a place in the workforce.¹⁰⁹

Advocates maintain that sheltered workshops “give people with disabilities the opportunity to learn key job skills before going [into] the open job market.”¹¹⁰ However, this is simply not the case. “Only about five percent of [disabled workers] receiving below-minimum wages under Section 214(c) work for open-market employers. The vast overwhelming majority [of disabled workers earning sub-minimum wages,] work for sheltered workshops.”¹¹¹ Employers in the open market are not only willing and able to hire disabled employees, but are willing and able to pay their employees, disabled and non-disabled at least the federal minimum wage.

“The ineffectiveness of sheltered workshops for helping individuals progress to competitive employment is well established.”¹¹² Most, if not all disabled workers in sheltered workshops will never leave the sheltered workshop, and enter the competitive workforce or earn wages at or above the federal minimum wage.¹¹³ Segregated and non-competitive “sheltered workshops, subsidized by Section 214(c), do a poor job of training people with disabilities for competitive employment...and are not setup to provide real, job-relevant skills.”¹¹⁴ Historically, “sheltered employment has been shown to be a much better medium for preparing people to continue sheltered work than to begin competitive work”.¹¹⁵

V. Fair Labor Standards Act Section 214(c) Sub Minimum Wage Program Violates Federal Anti-Discrimination Laws and Public Policy

Disabled employees, like all employees are entitled to meaningful employment.

¹⁰⁹ See Gretchen Nye, *The Uncertain Future of Section 14(c) of the Fair Labor Standards Act*, George Washington University School of Public Health and Human Services, 6 (2013) available at <http://www.chimes.org/news/pdf/14c-news.pdf>.

¹¹⁰ *Id.*

¹¹¹ Bagenstos, *supra* note 9, at 5-6.

¹¹² Bagenstos, *supra* note 9, at 7; *Citing Gary R. Bond, Supported Employment: Evidence for an Evidence-Based Practice*, 27 *Psychiatric Rehab. J.* 345, 353 (2004).

¹¹³ See Bagenstos, *supra* note 9, at 6.

¹¹⁴ Bagenstos, *supra* note 9, at 7.

¹¹⁵ Bagenstos, *supra* note 9, at 6; *citing* Stephen T. Murphy & Patricia M. Rogan, *Closing the Shop: Conversion from Sheltered to Integrated Work*, 20 (1995).

Meaningful employment includes not only meaningful participation in the workforce alongside both disabled and non-disabled employees but also at meaningful wages at or above the federal minimum wage. The law, however, does not afford disabled employees meaningful employment in sheltered workshops. The Section 214(c) program requires one class of individuals to “justify every penny of their paychecks by means of productivity ratings while working under conditions and with equipment over which they have no control”¹¹⁶ while another class of non-disabled workers is afforded an expectation of a minimum wage, regardless of individual productivity rates.

“Sub-minimum wage provisions of the Fair Labor Standards Act have resulted in the development and growth of a ‘separate but equal’ industry of alternative employers whose business it is to employ individuals with disabilities and use Section 214(c) as the centerpiece of their business model.”¹¹⁷ Paying disabled workers sub-minimum wages based on the pre-textual justification that they are not worth the minimum wage is an outdated, discriminatory practice that is contrary to public policy. Employing disabled workers in sheltered workshops at sub-minimum wages undermines the spirit of the Americans with Disabilities Act.¹¹⁸ Disabled employees are a vital part of the workforce and when Congress enacted the Americans with Disabilities Act in 1990, it intended to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹¹⁹ The Americans with Disabilities Act “specifically targets the elimination of discrimination, including segregation and ensures that individuals with disabilities are not prohibited from fully participating in all aspects

¹¹⁶ Bagenstos, *supra* note 9, at 9.

¹¹⁷ Callahan, *supra* note 3 at 1.

¹¹⁸ 42 U.S.C. 12101 et. seq. (2012).

¹¹⁹ 42 U.S.C. 12101(b)(1) (2012).

of society”¹²⁰ including employment. One of the goals of the Americans with Disabilities Act is to guarantee that disabled Americans have equal opportunities to participate fully in society, and the workplace, live independently, and be economically self-sufficient.¹²¹

Employing disabled workers in sheltered workshops at subminimum wages also violates the United States Supreme Court’s ruling in *Olmstead v. L.C.*¹²² In *Olmstead*, the United States Supreme Court affirmed the sentiment echoed in Americans with Disabilities Act.¹²³ The Court held “that the Americans with Disabilities Act required the removal of individuals with disabilities from institutional settings and into communities whenever possible,” including employment opportunities.¹²⁴ In the majority opinion for the Court, Justice O’Connor affirmed, “people with disabilities have a right to receive services in the most integrated setting appropriate to them.”¹²⁵ “Hailed as the *Brown v. Board of Education* of the disabled rights movement”, the Supreme Court in *Olmstead v. L.C.* determined that “unjustified isolation and segregation of disabled...individuals, constitute[ed] a form of discrimination.”¹²⁶

VI. The Section 214(c) Sub-Minimum Wage Program Invites Discrimination, Exploitation, and Abuse of Disabled Workers

The use of the Section 214(c) sub-minimum wage program by sheltered workshops to pay disabled workers wages significantly less than the federal minimum wage of \$7.25 invites discrimination, exploitation, and abuse of disabled workers. In 2009, an Iowa social worker arrived at Henry’s Turkey Service, a meat processing plant in Atalissa, Iowa to check up on

¹²⁰ 42 U.S.C. 12101(a) (2012).

¹²¹ See 42 U.S.C. 12101 et. seq. (2012)

¹²² See 527 U.S. 581 (1999).

¹²³ See *Id.*

¹²⁴ 527 U.S. 581 at 587 (1999).

¹²⁵ 527 U.S. 581 at 581 (1999).

¹²⁶ 527 U.S. 581, 597 (1999); See also 42 U.S.C. 12101(a)(2) (2012).

some of her disabled clients.¹²⁷ What she discovered was truly a house of horrors. Henry's Turkey Service employed thirty-two disabled adult men and had abused, neglected, and exploited them for more than thirty years.¹²⁸ The disabled men lived, worked, ate, and slept together in segregation and isolation.¹²⁹

Henry's Turkey Farm also acted as a proprietor to the disabled workers.¹³⁰ Henry's Turkey Farm rented a 106-year-old abandoned schoolhouse that the company used to house the disabled workers. Henry's only paid \$600 each month in rent for the property, yet charged the group of disabled workers nearly \$40,000 per month for rent and other fees.¹³¹ All thirty-two men lived in squalor, as the house was crawling with insects, cockroaches and rodents.¹³² The abandoned schoolhouse had a crumbling foundation, no heat, and windows that were boarded shut with plywood.¹³³ The men slept on soiled mattresses in rooms with overloaded electrical outlets, and a leaking roof.¹³⁴ The disabled workers were neglected, malnourished, "verbally and physically abused, taunted, and humiliated because of their disabilities."¹³⁵ Henry's Turkey service limited the worker's contact with family and friends and denied the disabled workers critical access to medical and dental care for years.¹³⁶ One worker reportedly wandered away from the house one winter day and froze to death when his body became tangled in a barbed wire fence. The employer never bothered to look for the

¹²⁷ See Dan Barry, *The Boys in the Bunkhouse: Toil, Abuse & Endurance in the Heartland*, The New York Times, Mar. 9, 2014, available at http://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html?_r=0.

¹²⁸ See *Id.*

¹²⁹ See Nat'l Disability Rts. Network, *supra* note 33 at 12.

¹³⁰ See *Id.*

¹³¹ See Nat'l Disability Rts. Network, *supra* note 33 at 12.

¹³² See *Id.*

¹³³ See *Id.*

¹³⁴ See Dan Barry, *supra* note 127.

¹³⁵ Nat'l Disability Rts. Network, *supra* note 33 at 12.

¹³⁶ *Id.*

missing man and his body was not recovered until the spring.¹³⁷

The thirty-two disabled workers were forced to work side by side with non-disabled workers, working the same grueling hours in the same demanding positions, yet the disabled men's net pay averaged forty-one cents per hour, while non-disabled co-workers earned between nine and twelve dollars per hour.¹³⁸ Non-disabled workers at Henry's Turkey Farm made an average of twenty five times more their disabled counterparts, for the same work at the same location.¹³⁹ Records from 2007 show disabled workers would work upwards of 163 hours per work period yet each disabled worker's net earnings "were always shown to be exactly 1,041.09 and [their] take home [pay] never exceeded sixty-five dollars".¹⁴⁰ Records also show, that same year, Henry's Turkey Services made more than \$500,000.¹⁴¹

Henry's Turkey Services operated this way for over thirty years, abusing and exploiting nearly sixty disabled men.¹⁴² Henry's Turkey Services never faced criminal charges, but was "cited for various wage violations by state and federal labor agencies."¹⁴³ Robert Canino, a regional attorney for the Equal Employment Opportunity Commission in Dallas, Texas agreed to represent the thirty-two disabled men rescued from Henry's Turkey Farm in a class action lawsuit.¹⁴⁴ Attorney Canino won a \$1.3 million judgment for two years of back wages for all of the disabled workers in a lawsuit alleging wage violations of the Americans with Disabilities Act.¹⁴⁵ He argued that "his 32 clients deserved to be paid the same as nondisabled colleagues

¹³⁷ Clark Kauffman, *Federal Jury Orders Defunct Turkey Plant to Pay 32 Workers for Abuse At Work*, The Des Moines Register (Iowa), May 1, 2013 available at <http://www.usatoday.com/story/money/business/2013/05/01/abused-disabled-iowa-plant-workers-awarded-240m/2126651/>.

¹³⁸ See Nat'l Disability Rts. Network, *supra* note 33 at 12.

¹³⁹ *Id.*

¹⁴⁰ See Dan Barry, *supra* note 127.

¹⁴¹ See *Id.*

¹⁴² See *Id.*

¹⁴³ *Id.*

¹⁴⁴ See Dan Barry, *supra* note 127.

¹⁴⁵ See *Id.*

doing similar work and [...was able to] prove emotional harm, in what the law calls the “loss of enjoyment of life.”¹⁴⁶ “The aggrieved workers could have enjoyed a good life...instead, they lost decades of healthy life experiences.”¹⁴⁷

Last year, an Iowa jury awarded \$240 million dollars to the disabled workers; \$7.5 million dollars to each worker.¹⁴⁸ The jury conferred 5.5 million dollars was in punitive damages and 2 million dollars in compensatory damages to the disabled men.¹⁴⁹ However, the law does not allow for such a high amount of damages when a business has less than 101 employees. The judge was forced to cap the damages at approximately \$1.6 million dollars.¹⁵⁰ In addition to the civil judgment, the Iowa Workforce Development Office also imposed a \$1.2 million dollar civil penalty against Henry’s Turkey Service for violation of state labor laws.¹⁵¹ “This is what happens when we don’t pay attention.”¹⁵² This is what happens when the law permits sheltered workshops to exploit disabled workers and pay sub-minimum wages to subsidize their enterprises.

VII. New Federal Legislation Addressing the Sub-Minimum Wage Program and the Push for Wage Equality For All Workers by Disability Rights Advocates

Advocates of disability rights and opponents of the sub-minimum wage program assert that the Henry’s Turkey Farm “case played a role in the ultimate inclusion of people with [disabilities] in [President] Obama’s executive order to raise the minimum wage to \$10.10 an hour for [all] workers employed under certain federal contracts.”¹⁵³ On January 28, 2014 during his State of the Union Address President Obama announced his plan to sign an executive order

¹⁴⁶ Dan Barry, *supra* note 127.

¹⁴⁷ *Id.*

¹⁴⁸ Kauffman, *supra* note 137.

¹⁴⁹ *Id.*

¹⁵⁰ *See* Dan Barry, *supra* note 127.

¹⁵¹ Kauffman, *supra* note 137.

¹⁵² Dan Barry, *supra* note 127.

¹⁵³ *Id.*

raising the minimum wage for employees of federal contractors' to \$10.10 per hour.¹⁵⁴ The President's initial plan however "did not include an increase for workers with disabilities who are paid a subminimum wage" under Section 214(c).¹⁵⁵ After the State of the Union Address, the National Council on Disability contacted the President and began to pressure him into including disabled workers in the final order.¹⁵⁶ The National Council on Disability expressed to the President that it believed "the Section 214(c) program [was] a relic from the 1930s, when discrimination was inevitable because service systems were based on a charity model, rather than empowerment and self-determination, and when...low expectations for people with [disabilities] colored policymaking."¹⁵⁷ President Obama signed the final Executive Order on February 12, 2014 and did include disabled workers.¹⁵⁸ Beginning in 2015, "federal contractors may no longer use a special provision of the Fair Labor Standards Act to pay workers with disabilities a wage below the federal minimum."¹⁵⁹

Despite President Obama's Executive Order, there is still more work to do to ensure disabled workers receive meaningful wages and are afforded meaningful opportunities to participate in an integrated workforce. Proponents of the sub-minimum wage program assert that President Obama does not have the authority to issue an Executive Order compelling federal contractors to pay disabled workers at least \$10.10 per hour.¹⁶⁰ Supporters of the sub-minimum wage program contend only Congress has the authority to amend the Fair Labor Standards

¹⁵⁴ See *Federal Contractors May No Longer Pay Subminimum Wage to Workers with Disabilities*, 343 Fair Lab. Standards Handbook for States, Loc. Gov't & Sch. Newsl. 4 . (April 2014).

¹⁵⁵ *Id.*

¹⁵⁶ See *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *Id.*

¹⁵⁹ *Federal Contractors May No Longer Pay Subminimum Wage to Workers with Disabilities*, 343 Fair Lab. Standards Handbook for States, Loc. Gov't & Sch. Newsl. 4 . (April 2014).

¹⁶⁰ *Id.*

Act.¹⁶¹ However, every time a legislator has proposed repealing Section 214(c) the proposal has died on either the House or the Senate floor.¹⁶² The two most recent proposals were Fair Wages for Workers with Disabilities Act of 2011 (House Resolution 3086) and the Fair Wages for Workers with Disabilities Act of 2013 (House Resolution 831).¹⁶³ Both proposals would have slowly phased out the use of the sub-minimum wage waiver gradually over a three-year period.¹⁶⁴ However, despite eighty-two co-sponsors and a significant backing from various disability rights groups, the Fair Wages for Workers with Disabilities Act of 2011 died on the floor of House of Representatives and the Fair Wages for Workers with Disabilities Act of 2013 has no current scheduled action in either the House of Representatives or the Senate.¹⁶⁵

In response to the lack of initiative on a federal level, individual states are joining forces with state and community resources such as the Department of Labor, the Justice Department and various disability advocacy groups, to phase out sheltered workshops and transition disabled employees into a more integrated setting. In an effort to comply with the United States Supreme Court ruling *Olmstead v. L.C.*¹⁶⁶ states like of New York and Rhode Island are slowly eliminating sheltered workshops, paying disabled workers at least minimum wage and encouraging employers to coach disabled employees on an as needed basis in the most integrated setting possible.¹⁶⁷ In 2013, the Office for People with Developmental Disabilities “eliminated funding for any new [sheltered] workshop admissions.”¹⁶⁸ The agency estimated in March of 2014 that half of the 8,020 adults in New York’s 113 sheltered workshops could move into

¹⁶¹ *See Id.*

¹⁶² *See* Melia Preedy, *Subminimum or Subpar? A Note in Favor of Repealing the Fair Labor Standards Act’s Subminimum Wage Program*, Seattle University Law Review, 37 Seattle U. L. Rev. 1097, 1108-1111 (2014).

¹⁶³ *See Id.*

¹⁶⁴ *See Id.*

¹⁶⁵ *See Id.* at 1098.

¹⁶⁶ 527 U.S. 581 (1999).

¹⁶⁷ Cara Matthews, *Sheltered Workshops for Disabled To Be Phased Out*, The Westchester County, N.Y. Journal News (New York) July 28, 2014.

¹⁶⁸ *Id.*

competitive jobs over [the next] six years.”¹⁶⁹ This past April, the Justice Department brokered a ten-year agreement with the state of Rhode Island in an effort to remedy violations of the Americans with Disabilities Act for 3,250 disabled workers in Rhode Island.¹⁷⁰ “The landmark... agreement is the nation’s first statewide settlement to address the rights of people with disabilities to receive state funded employment and daytime services in the broader community, rather than in segregated sheltered workshops and facility-based day programs.”¹⁷¹ This new arrangement will remove 2,000 disabled workers from sheltered workshops and place them into real jobs at competitive wages at or above the federal minimum wage.¹⁷² Acting Assistant Attorney General for the Civil Rights Division Jocelyn Samuels advocates for more agreements like this in other states in order to “bring people with disabilities out of segregated work settings and into typical jobs in the community at competitive pay.”¹⁷³

VIII. Repealing Section 214(c) and Eliminating the Funding of Sheltered Workshops

Terminating funding of sheltered workshops is a critical first step in repealing the sub-minimum wage program and stop sheltered workshops from abusing the waiver to subsidize their businesses. The Jarvitz-Wagner-O’Day Act enacted in 1938, requires federal agencies to purchase goods, services, and supplies from sheltered workshops staffed by individuals with severe disabilities.¹⁷⁴ Congress’s original intent behind the Jarvitz-Wagner-O’Day Act was to fund sheltered workshops, in order to increase opportunities for disabled workers entering the workforce.¹⁷⁵ Requiring federal agencies to purchase goods from sheltered workshops enable these workshops to continue operating, abusing the minimum wage waiver and exploiting

¹⁶⁹ *Id.*

¹⁷⁰ Press Release, Dep’t of Justice Office of Pub. Affairs (Apr. 8, 2014).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *See Id.*

¹⁷⁵ *See Id.*

disabled workers. Since sheltered workshops hold 95% of the sub-minimum wage waivers,¹⁷⁶ eliminating the funding of sheltered workshops, would force the workshops to close. As long as the doors to sheltered workshops remain open, and the Fair Labor Standards Act permits sheltered workshops to pay sub-minimum wages to disabled workers, the cycle of discrimination and poverty will perpetuate.

President Obama's Executive Order is a good start, but it is not enough. Since before the Great Depression sheltered workshops have proven they are a force to be reckoned with. Sheltered workshops have been brainwashing disabled employees, families of the disabled employees, and lawmakers for decades. President Roosevelt originally exempted disabled employees from the minimum wage first codified in National Industrial Recovery Act of 1933 in an effort to show "deference to concerns expressed by sheltered workshops, who urged that they could not afford to pay their workers market wages."¹⁷⁷ The justification offered to President Roosevelt was pre-textual. What sheltered workshops were really contending is that disabled workers are not worth minimum wage.

IX. Conclusion

The Section 214(c) sub-minimum wage certificate has become a corrupt, uncontrolled, and discriminatory subsidy for sheltered workshops. This prejudicial provision of the Fair Labor Standards Act is rooted in outdated an offensive stereotypes of disabled workers and their value in the workforce, and thus must be repealed. Section 214(c)¹⁷⁸ is contrary to public policy, contrary to the holding in *Olmstead v. L.C.*¹⁷⁹ and contrary to the spirit of the Americans with

¹⁷⁶ See Bagenstos, *supra* note 9, at 4-5.

¹⁷⁷ *Id.*

¹⁷⁸ See 29 U.S.C. 214(c) (2012).

¹⁷⁹ 527 U.S. 581 (1999).

Disabilities Act¹⁸⁰. States are slowly trying to bring disabled people out of the shadows of segregated and isolated employment in sheltered workshops; however, there is still a need for a groundswell of support in order to effect real change. As mentioned above, the first step is to stop funding sheltered workshops and repeal the Jarvitz-Wagner-O'Day Act.¹⁸¹ If sheltered workshops are not receiving funding and the government is not purchasing goods, the workshops will be forced to close their doors. The next step is a push for public education, awareness and action. Most Americans have no idea that these self-proclaimed rehabilitative and therapeutic workshops are actually abusing and exploiting some of the most vulnerable members of the American workforce. Public support, combined with public initiative to pressure state and federal legislators to stand up to the sheltered workshops who have been brainwashing and bullying disabled employees, and lawmakers for decades is the only way to outlaw this outdated and discriminatory practice. By repealing Section 214(c) of the Fair Labor Standards Act, disabled workers can finally come out from the shadows of sheltered workshops and non-profits and into more integrated work settings which will offer disabled employees meaningful employment, meaningful participation along-side other disabled and non-disabled employees in the workforce, and a meaningful wage at or above the federal minimum wage.

¹⁸⁰ 42 U.S.C. 12101 et. seq. (2012).

¹⁸¹ 41 U.S.C. 8502 (2012).

Appendix A: Specialized Wage Treatment of Workers with Disabilities¹⁸²

<u>Statute</u>	<u>Certified Employment Competitive Sector</u>	<u>Certified Employment Sheltered Workshops</u>	<u>Certified Employment Work Activities Centers</u>
National Industrial Recovery Act (NIRA) (1933-1935)	75% of minimum wage in the industry.	No specified wage floor.	N/A
Fair Labor Standards Act	75% of the statutory minimum wage.	No specified wage floor; the rate to be based upon productivity of the disabled worker.	N/A
The 1966 Fair Labor Standards Act Amendments	50% of the statutory minimum wage.	50% of the statutory minimum wage.	No statutory minimum wage; rate is to be related to worker's productivity.
The 1986 Fair Labor Standards Act Amendments (and forward)	No statutory minimum wage; a commensurate rate to apply.	No separate standard, a commensurate rate to apply.	No separate standard, a commensurate rate to apply.

¹⁸² William G. Whittaker, *Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act*, CORNELL UNIVERSITY ILR SCHOOL, 28 (Feb. 9 2005), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1211&context=key_workplace.

Appendix B: Pedro¹⁸³



The day after Pedro graduated high school in 2010, at age twenty-one, he found himself at home with no job prospects and no career direction. A native Spanish speaker with intellectual disabilities, Pedro was not prepared to enter the general workforce; instead, he was headed for a life of segregated employment and below-minimum wages in a "sheltered workshop." Sheltered workshops are places where people with disabilities spend the day typically doing repetitive manual work to fulfill contracts with private businesses. Workers in sheltered workshops generally have little or no contact with anyone without a disability and are often paid below the minimum wage.

Pedro attended a Providence high school where students with intellectual disabilities participated in an in-school sheltered workshop. In the workshop there were no students without disabilities. The students spent most of their school days sorting, assembling, and packaging items such as jewelry and pin-back buttons. They earned between 50 cents and \$2 per hour for their work. Rather than receiving the education and services needed to help them move into regular jobs, students were being prepared for segregated, below-minimum wage work in adult sheltered workshops. Indeed, in 2013, the U.S. Department of Justice found that Pedro's school-based sheltered workshop was a direct pipeline to a nearby adult sheltered workshop.

After graduating from the school's sheltered workshop, Pedro began working at the adult sheltered workshop. Staff described him as an excellent worker who stays on task and performs well. But Pedro was paid just 48 cents an hour. And, because people who enter the adult workshop often stay there for decades and are rarely offered help to move into real jobs in the community, Pedro's career outlook was dim.

That all changed in June 2013 when the department reached an Interim Settlement Agreement requiring Rhode Island and Providence to provide employment services to help workers at the adult workshop and students at the school's sheltered workshop move into community jobs. At the same time, the school closed its sheltered workshop, so students with disabilities can focus on education and preparing for real jobs.

Pedro was interested in the restaurant industry, and in the summer of 2013 he joined a culinary arts training program. Twelve weeks later, helped by a combination of federal and state services, Pedro began working in the kitchen at a restaurant in North Kingstown. He has excelled and forged strong working relationships with other employees. He says he loves his job and especially enjoys preparing coleslaw for customers.

¹⁸³ http://www.ada.gov/olmstead/faces_of_olmstead.htm#pedro

In December 2013, just three months after he started at the restaurant, Pedro was Employee of the Month. His manager said that Pedro was chosen for the award because "he has changed the culture of the company by inspiring everyone around him to reach higher; he has led by example." The company's owner describes Pedro as the heart of the business: "He has a great personality and loves working here – but more than just a personality, he does a great job."

Pedro started his job with a job coach, funded by the state and federal government, but because the restaurant was such a good job match for Pedro and natural supports developed quickly, Pedro no longer needs coaching service. In fact, Pedro is now helping the job coach train other employees with disabilities.

Pedro deeply values his job at the restaurant, where he gets to work with peers without disabilities, earn a competitive wage and benefits, and enjoy all the advantages of community employment. His supervisor says the company, too, has experienced major benefits. She describes the strong sense of pride that comes from hiring Pedro and giving him the opportunity to realize his capabilities and participate in the American workforce: "It's a very fulfilling experience to see Pedro mainstream himself, to show responsibility, and to see him getting an honest wage for his work." Pedro's life is on a new path – and for this young man, there's no looking back.