

**State and International Efforts to Reform or Eliminate the Use of
Sub-Minimum Wage for Persons with Disabilities**

Developed for the Wisconsin Departments of Workforce Development
and Health and Family Services

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Table of Contents

Executive Summary	i
Introduction.....	1
Sub-minimum Wage – History and Background.....	2
Current Use of Special Minimum Wage.....	3
14(c) Oversight: Increasing Concerns	4
Policy Implications	6
Conclusion	9
State Statutes and Regulations Governing Sub-Minimum Wage	10
Economic and labor force impact of changes in the minimum wage in the USA	13
The effects of increasing the minimum wage.....	13
Conclusions.....	15
Elimination of Sub-Minimum Wage in Arizona Background and Current Status.....	17
Initial Post-Election Activity	17
Attorney General Ruling – No Exemption	20
ICA Proposal and Policy Statement.....	20
Reaction to ICA Policy Statement	23
Lawsuit Immunity Issue.....	24
Possible Future Actions	25
Analysis of Arizona Actions	25
The effects of enforcing the minimum wage in sheltered workshops: British Columbia and New Zealand	29
British Columbia.....	29
New Zealand	33

Efforts to Reform or Eliminate the Use of Sub-Minimum Wage

State Initiatives to Limit Funding for Services that Support Sub-Minimum Wage	36
Introduction.....	36
Example #1: Vermont.....	36
Example #2: New Hampshire.....	38
Example #3: Washington.....	39
Example 4: Tennessee.....	41
Conclusion	43
References.....	46
Appendix A Key Indicators for Identifying Employment Activities in British Columbia ..	54
Appendix B Additional resources.....	57
Appendix C State Sub-Minimum Wage Policy Matrix.....	59
Appendix D Industrial Commission of Arizona Substantive Policy Statement.....	148

Executive Summary

This report assesses state and international efforts to reform or eliminate the use of sub-minimum wage for persons with disabilities as a potential policy for increasing economic self-sufficiency and access to integrated employment for individuals with disabilities. This report has been prepared in part as a resource for Wisconsin's Department of Work Force Development Sub-Minimum Wage Advisory Council, which is considering whether to recommend the establishment of a floor and time limit for Wisconsin's sub-minimum wage program, in addition to making other recommendations for quality improvement of Wisconsin's sub-minimum wage licensing program.

Background

Sub-minimum wages were introduced in the United States in 1938 with the passage of the Fair Labor Standards Act (FLSA), which established the federal minimum wage. The purpose of establishing a special or sub-minimum wage (also known as 14(c) certificates), was to contain the possible negative effects of enforced minimum wages on specific categories of workers such as employees with disabilities. Currently there are approximately 5,600 employers nationwide who hold 14(c) certificates, employing approximately 425,000 individuals with disabilities at sub-minimum wage. The majority of these individuals are employed in sheltered workshops.

Minimum and Sub-Minimum Wage: Economic Assumptions and Debate

The sub-minimum wage is based on the assumption that the ability to pay workers in certain categories a lower wage according to their productivity will result in employment opportunities that they would not otherwise have. Given the wide number of criteria that can define employee performance today, and the general debate about the impact of wage rates on employment, this assumption is at least questionable. Employers use a broad range of criteria, beyond or in lieu of productivity or work pace, to define what they consider to be a "quality" or "valued" employee. Such criteria are dependent on the nature of the job and employment. Examples include reliability, ability to work well with co-workers, and customer service skills, which are often much more valued than productivity or work pace. In addition, economists have continually debated the impact of the minimum wage on employment rates without reaching any clear consensus, and it is reasonable to apply this lack of consensus to the sub-minimum wage as well (i.e., given that it is unclear that the existence of and raising the minimum wage impacts the employment rate of the general population, it is reasonable to assume that the impact of the sub-minimum wage on the employment rate of people with disabilities is similarly unclear.) In addition, the regulations regarding sub-minimum wage clearly indicate that it is intended to be contextual in nature, and that even if an individual is paid sub-minimum wage for a particular type of job at a particular time there should be no assumption that the individual is incapable of earning minimum wage or higher in a different position, or in the same position, with the benefit of experience. In practice, it appears that the contextual nature of sub-minimum wage has often been ignored. Anecdotal evidence and observation indicates that when an individual is incapable of working at a rate to meet the requirements of the prevailing wage for a certain position, this is often used as evidence by service providers that the individual is incapable of working in the

community at minimum wage or higher. However, many individuals with low production rates in sub-minimum wage positions have demonstrated their ability to work successfully in the community at the prevailing wage, when placed in positions that were a better match for their skills, abilities, and interests.

The debate regarding the necessity and impact of sub-minimum wage is essentially a sub-set of long-standing assumptions and debate regarding the economic impact of the minimum wage itself, as well as the impact of changes in the minimum wage. At the level of the general labor market, the socio-economic effects of the minimum wage are not fully clear. According to classic economic theory, for instance, increases in the minimum wage result in reduced employment rates. Theories developed in more recent years, however, contend that increasing the minimum wage might lead to higher levels of employment, depending on the initial level of the minimum wage and market conditions. Research on the impact of increases in the general minimum wage on labor market participation and individual economic circumstances provide mixed conclusions. Therefore, increasing the minimum wage does not appear to automatically result in reduced employment rates, and it may also be the case that placing restrictions on sub-minimum wage will not automatically result in reduced employment among people with disabilities.

Sub-Minimum Wage: The Role of States

In addition to the federal requirements regarding minimum wage, many states have their own regulations, requirements, and policies regarding minimum and sub-minimum wages. A review of states' codes and regulations shows a significant difference in the level of detail and restrictions regarding authorization of sub-minimum wages across states, with some states simply mirroring the federal requirements, and with others placing higher restrictions on the use of sub-minimum wage (e.g., allowing their use only by sheltered workshops). States adopting policies which go beyond the federal requirements and place higher restrictions on the use of sub-minimum wage is not uncommon.

Sub-Minimum Wage: Increased Scrutiny and Concern

Starting in the 1990's, the sub-minimum wage came under increasing criticism from disability and labor organizations. Self-advocacy groups in particular, became increasingly vocal about what they saw as the misuse and unfairness of the sub-minimum wage. Labor unions began to criticize the sub-minimum wage as a mechanism for keeping overall wages lower and as a general worker's rights issue. Some businesses also raised the issue of sheltered workshops and workers making sub-minimum wage as unfair competition. An outgrowth of this criticism over the last several years has been increasing indications of concerns regarding both the oversight and practices of employers holding 14(c) certificates. Investigations by the US Department of Labor and the General Accounting Office (now Government Accountability Office) have found major shortcomings in the level of oversight of 14(c) certificate holders. In recent years a number of 14(c) certificate holders have been required to pay back wages to workers, and there is evidence that despite increased oversight by the US Department of Labor over the last few years compliance issues are ongoing.

Efforts to Limit and Eliminate Sub-Minimum Wage

Over the last several years, there have been various efforts to reduce or eliminate reliance on sub-minimum wage for workers with disabilities. The impact of these efforts has been mixed, often resulting in unintended consequences, in large part it seems because of the way the changes were implemented. The most long-standing change is in British Columbia (BC), Canada, which in the mid 1990's eliminated policies that exempted sheltered workshops from complying with labor regulations and obligated them to pay at least minimum wage. The policy change was enacted in response to complaints that adults with disabilities in sheltered workshops were engaged in work activities without the protection of labor regulations. The policy change took place over an initial three-year transition period, which was further extended to March 2000 for a total of four years. The primary reaction by sheltered workshop operators to this policy change was not to see this as opportunity to enhance the integrated employment opportunities available to people with disabilities, but to instead make every effort to maintain the status quo of facility-based and segregated programs through reclassification of individuals and the types of activities they were engaged in. With the policy change, BC allowed extended periods for individuals in sheltered workshops to work under the classification of trainee rather than employee so they would not have to pay minimum wage. In the approximately 10 years since the implementation of the BC policy change, research indicates that sheltered workshops have primarily either converted their former work activities into non-work activities or have simply continued to do business as usual. Only a relatively small number of organizations have developed initiatives that allow adults with disabilities to earn at least minimum wage in either sheltered workshops or integrated settings.

A more recent example is in Arizona where, like BC, the complete elimination of sub-minimum wage resulted in similar efforts aimed at maintaining the status quo rather than using it as an opportunity for change. In Arizona, a November 2006 ballot initiative established a general minimum wage higher than the federal rate, and did not provide the option for employers to pay sub-minimum. What was initially seen by many advocates as a victory for people with disabilities ultimately resulted in a significant public outcry, particularly among service providers. As a result, the potential for positive effects from this policy change have been minimized by guidelines allowing sheltered workshops to avoid paying minimum wage if individuals are classified as trainees rather than employees.

New Zealand (NZ) offers an even more recent example of a change in government policy intended to largely eliminate the use of sub-minimum wage. Beginning in November 2007, following a three year transition period following passage of the Disabled Persons Employment Promotion (Repeal and Related Matters) Act of 2004, sheltered workshops in NZ will no longer be exempted from complying with the general labor laws including the obligation to pay at least a minimum wage. Sheltered workshops, however, will have the option of requesting labor inspectors to assess productivity on an individual basis and grant an individual a lower minimum wage. Although it is still too early to assess the effects of the policy change in NZ, there are indications that sheltered workshops might either apply for individual exemptions for the majority of their employees with disabilities or scale back to performing non-work activities.

In all three of these examples the government initiated a complete or virtually complete elimination of sub-minimum wage. These approaches led to a number of unintended consequences that reduced employment opportunities, either through the reclassification of workers as trainees or through the conversion of workshops to non-work programs. The implication is that changes should be planned in coordination with a broad emphasis on disability policy that supports employment creation for persons with disabilities, and a more gradual and planful implementation of change.

Role of a Disability Services Systems Change Approach

Based on the experience of Arizona, British Columbia, and New Zealand, the swift elimination of sub-minimum wage will not result in increases in integrated employment and employment at minimum wage for people with disabilities. In addition changes or reforms might not result in positive outcomes if such changes are not part of a larger policy and strategic initiative designed to increase earning potential and access to employment that offers such potential. Guidance about the elements necessary for such an initiative is provided by the states of Vermont, New Hampshire, Washington, and more recently Tennessee. The experiences of these states illustrate that a solid values base at the funding and state policy levels, a network of stakeholders who embrace the values base, and clarity about the involved state agencies' goals are critical elements in promoting the expansion of integrated employment opportunities that offer the opportunity to earn meaningful wages. Such an approach can be effective even in absence of specific policy or rule changes targeting sub-minimum wages in sheltered workshops. As a result of such multi-faceted efforts, in FY 2004, Vermont, Washington, and New Hampshire reported that at least 45% of individuals with developmental disabilities received day and employment services in integrated employment, which is significantly above the national average.

Summary and Conclusions

The existence and use of sub-minimum wage is a reflection of viewing people with significant disabilities as incapable of being fully integrated into the typical labor force society, a view that is at odds with the disability policy framework that has emerged over the past quarter century or so. This framework is a result of a multitude of legislative and policy developments (particularly the Americans with Disabilities Act and the IDEA), and has made it very clear that the public policies of the United States should be based on viewing disability as a natural part of human experience that in no way diminishes a person's right to fully participate in all aspects of life (Silverstein, 2000). However, while changes in policy regarding sub-minimum wage may be intended to reflect this framework, it seems clear that the swift and complete elimination of sub-minimum wage in isolation from other strategies will not realize positive outcomes. As well, without other efforts and incentives to change the values and supports offered by the disability service system, even less dramatic and incremental changes to sub-minimum wage may result in actions that only reinforce the concepts of exclusion and segregation.

Changes to policies regarding sub-minimum wage must be integrated into a state's overall systems change efforts and commitment to community employment at meaningful wages. Such

efforts must include improvements in the funding mechanisms for day and employment supports, as well as support to community rehabilitation providers in the form of training, technical assistance, and support for organizational change. Evidence to date indicates that implementing dramatic changes in policy regarding sub-minimum wage as the primary mechanism for systems change, is likely to result in a multitude of unintended consequences, with service providers in particular focusing on maintaining the status quo, rather than seeing this as an opportunity for change. The experiences of Arizona and British Columbia also suggest that in the absence of a clear policy intent, individuals may in fact lose the legal protections and benefits of an employer-employee relationship when activities are redefined as training or service activities rather than employment.

In contrast to British Columbia, Arizona and New Zealand, where changes to sub-minimum wage involved complete elimination with little notice, it may be possible to make less radical changes with an adequate period of notice so that impact can be assessed and providers can be offered the necessary technical assistance and support to determine how they will respond. Unfortunately, there were no examples of this we could draw on for this report. For example, the establishment of a modest floor (not an elimination of sub-minimum wage) coupled with a period of notice (rather than an immediate implementation) could create a positive impact that the strategies used in BC, AZ and NZ did not. In Wisconsin, the availability of Medicaid Infrastructure Grant resources to assist sheltered workshops in ensuring that positive outcomes result for those impacted could also contribute to the success of such a strategy.

In addition, particularly given the major problems regarding oversight and compliance of 14(c) certificate holders that have been identified in recent years, consideration of closer monitoring at the state and local level in order to ensure that the rights of people with disabilities are respected may also be prudent at this time.

State and International Efforts to Reform or Eliminate the Use of Sub-Minimum Wage for Persons with Disabilities

Introduction

This project was commissioned by the Wisconsin Departments of Workforce Development and Health and Family Services with primary support from Wisconsin's Medicaid Infrastructure Grant (MIG) with the goal of assessing state and international efforts to reform or eliminate the use of sub-minimum wage for persons with disabilities. The Wisconsin MIG asked that the project identify and describe state level reforms, assess the decision making process used by states in making reforms, describe the impact of reforms on state fiscal investment in services, employers and individuals, and identify lessons learned that Wisconsin should consider in contemplating changes to its own sub-minimum wage program.

To date there have been limited attempts to reform sub-minimum wage laws, regulations and policies, and this lack of experience constricted the ability of this study to respond to all of the questions identified by Wisconsin staff. Within the United States the primary experience has been in the State of Arizona with the passage in November 2006 of Proposition 202, the "Raise the Minimum Wage for Working Arizonans Act." Established as a citizen's initiative, Proposition 202 raised the state minimum wage and did not include provisions for sub-minimum wage for persons with disabilities. There was no transition period and implementation was scheduled to occur soon after the Proposition was passed into law. This outcome was not anticipated by many in the state, leading to a need for policy interpretation and response on a very short timeframe. Longer term changes in the application of sub-minimum wage policies are in place in British Columbia, Canada. In addition, New Zealand is currently implementing new legislation that eliminates authorization for sheltered workshops to pay sub-minimum wage except on an individual exception basis, an outcome of a lengthy debate on this issue.

This manuscript seeks to provide background on state and federal law related to the minimum wage and sub-minimum wage. The manuscript begins with an overview of sub-minimum wage policy and a review of state level statute and regulation. One of the major questions regarding changes in sub-minimum wage regards the potential economic repercussions and impact on employment opportunities for people with disabilities. Because the limited experience of states with changes in sub-minimum wage policy makes it difficult to predict the likely impact of policy change on state systems and individuals with disabilities, this manuscript also provides a brief review of research on the impact of increases in the minimum wage on the general labor market. Detailed reviews of the response to Arizona Proposition 202 and the implementation of policy in British Columbia and New Zealand are also provided. Finally, a review of state agency level initiatives to limit funding for services that include sub-minimum wage employment is provided as a complementary or alternative path to reducing participation in and reliance on sub-minimum wage employment.

Sub-minimum Wage – History and Background

Sheltered workshops have existed in some form since the mid-1800's. They were initially created in response to the perceived need to provide employment and other services to individuals with severe disabilities (primarily physical) and other conditions. Over time, the types of individuals with disabilities served by sheltered workshops expanded, and they evolved eventually into organizations that today primarily serve individuals with developmental disabilities.

Initially sheltered workshops were typically operated by churches and other quasi-religious organizations, operating outside the sphere of government control. In 1938, however, the Fair Labor Standards Act (FLSA) created a federally mandated minimum wage. With the establishment of the minimum wage, FLSA also created an exemption for “handicapped workers” (Morris, Ritchie, & Clay, 2002, p. 6). This exemption, as currently enacted under section 14(c) of the FLSA, permits employers to pay special minimum wages – wages less than the federal minimum wage – to workers with disabilities.

In order to pay the special minimum wage, typically referred to as the sub-minimum wage, employers must obtain a special certificate from the United States Department of Labor's (DOL) Wage and Hour Division. The intent of section 14(c), as stated in the statute, is “to prevent curtailment of opportunities for employment” of individuals whose earning or productive capacity is impaired by physical or mental conditions. Wages paid must be in proportion or commensurate to the individual's productivity compared to workers without disabilities who are employed in the same geographic area, for essentially the same type, quality, and quantity of work (“U.S. Code Collection,” n.d.). Wages must also be related to the individual's productivity level, and there are detailed regulations regarding how wages are to be calculated by 14(c) certificate holders (United States Department of Labor, 1989). Individuals being paid under 14(c) certificates may be paid a commensurate wage either on an hourly basis or at a piece rate. Typically, hourly rates are most common for service jobs, whereas piece rates are most common for assembly or manufacturing jobs. The statute also requires regular review and adjustment of wage rates (at least once per year), to ensure they are keeping pace with prevailing wage rates (“U.S. Code Collection,” n.d.).

DOL guidance states that disabilities that may affect productive capacity include blindness, mental illness, mental retardation, cerebral palsy, alcoholism, and drug addiction. However, payment of sub-minimum wage is contextual and not simply based on the presence of disability. In order for an individual with a disability to be paid sub-minimum wage, the individual's disability must actually impair their capacity to earn wages or impair their productivity *for the specific work being performed*. The mere fact that an individual has a disability is insufficient to permit the payment of a sub-minimum wage (United States Department of Labor, 2007a). Furthermore, while an employer may have the right to pay an individual with a disability sub-minimum wage for one type of work, the statute and regulations clearly state that a blanket assumption of sub-minimum wage for all types of work is not permitted, and that there may be other types of work or other employment settings where the individual could earn the minimum or competitive wage (“U.S. Code Collection,” n.d.).

The statute also states that individuals receiving sub-minimum wage have the right to appeal at any time for a review by DOL regarding whether or not an employer has a right to pay sub-minimum wage. When such a review occurs, the employer has “the burden of demonstrating that the special minimum wage rate is justified as necessary in order to prevent curtailment of opportunities for employment” (United States Department of Labor, 1989).

Current Use of Special Minimum Wage

There are approximately 425,000 individuals employed by a total of about 5,600 employers who hold 14(c) certificates. Almost all of these individuals (94.5%) are employed in sheltered workshops and similar settings operated mainly by non-profit organizations. The remainder are employed primarily in hospitals and other residential facilities (about 4.5%), with less than 1% employed by businesses and schools. Approximately three-quarters of all workers receiving sub-minimum wage in sheltered workshops have mental retardation or some other developmental disability. Based on the methodology of paying individuals in terms of their production rates, more than half (54%) of workers in sheltered workshops earn less than \$2.50 per hour, with 23% earning less than \$1.00 per hour (United States General Accounting Office, 2001). According to Wisconsin Bureau of Labor Standards data, 39% of individuals being paid sub-minimum wage were earning less than \$1.00 per hour.

The work offered by sheltered workshops is mostly assembly work (generally uncomplicated one or two step processes performed by hand), or service-related work. The service-related jobs include basic tasks such as mopping floors, picking up trash, and simple landscaping. Over 80% of work performed under 14(c) certificates held by community rehabilitation providers is performed on-site in a sheltered workshop facility, with 12% performed off-site where the majority of workers do not have disabilities, and 5% off-site in environments where most of the workers have disabilities. Via a GAO survey of 14(c) certificate holders in 2000, sheltered workshops claimed that on an annual basis about 5% of all individuals with disabilities they employ leave for jobs in the community (United States General Accounting Office, 2001). At the same time, data indicates that over the last several years there has been no overall reduction in the number of individuals in facility-based services, at least among individuals with developmental disabilities, and in fact the number served in facility-based and non-work programs has continued to grow (Boeltzig, Gilmore, & Butterworth, 2006).

When GAO conducted its survey of 14(c) certificate holders in 2000, they indicated that a bit less than half of the funding for sheltered workshops (46%) came from government agencies, with 35% from production contracts, 9% from retail sources, and the remainder from other sources (donations etc.). Sheltered workshops varied in their reliance on production revenue to fund programs and services, with some indicating that they relied extensively on this revenue, while others either simply broke even on production operations or actually lost money. The holders of 14(c) certificates have indicated that any requirement to pay minimum wage would significantly increase their costs. For example, in 2001 a sheltered workshop in New York indicated that its wage costs for 14(c) workers would increase from \$77,000 to \$289,000 annually if forced to pay minimum wage (United States General Accounting Office, 2001).

14(c) Oversight: Increasing Concerns

Over the last several years there have been increasing indications and concerns regarding both the oversight and practices of employers holding 14(c) certificates. These include a March 2001 DOL Inspector General's Report, the September 2001 GAO report, and increases in findings by DOL that 14(c) certificate holders have underpaid workers, requiring the payment of back wages.

DOL Inspector General's Report. In March of 2001, the U.S. Department of Labor's Office of Inspector General issued a report that was highly critical of DOL's Wage and Hour Division's (WHD) oversight of 14(c). Within this report, the Inspector General noted that:

- WHD placed a low priority on 14(c) oversight and enforcement (for example, DOL had just 6 employees nationally administering the program at the time of the report, and there were no requirements for district offices to conduct regular compliance reviews with certificate holders)
- The management information system (MIS) for 14(c) was unreliable and could not provide sufficient data for oversight of the system
- There was "little assurance that employers are complying with program requirements" and that "numerous problems were noted with employers who did not understand or were not following Section 14(c) requirements when determining commensurate wages paid to employees." Employers also automatically assumed they were in compliance with program requirements because they had been issued certificates by DOL (United States Department of Labor, 2001).

Within the report, the Inspector General made several recommendations including increased onsite monitoring and enforcement, improvements to the MIS system, increased technical assistance to 14(c) certificate holders to ensure compliance with DOL regulations, and stronger alliances with DOL's workforce development and other government employment programs to enhance employment opportunities for individuals with disabilities currently being paid sub-minimum wage (United States Department of Labor, 2001, p. 24). It was noted in the conclusion of the report, that DOL had already begun to take steps to address the issues noted within the report, but that there was a need for ongoing oversight in ensuring that the recommendations within the report were implemented (United States Department of Labor, 2001, p. 26).

GAO Report. The Inspector General's report was followed shortly thereafter in September 2001 by a report issued by the United States General Accounting Office (now known as the Government Accountability Office), entitled "Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers with Disabilities, But Labor Should Improve Oversight." Basing its findings on the previously discussed survey of 14(c) certificate holders, as well as site visits, this report echoed the findings of the Inspector General's report. This report noted that DOL:

- Is not able to provide accurate counts of the number of employers and workers participating in the special minimum wage program
- Did not track the resources it devotes to overseeing the 14(c) program
- Had not, in most cases, "verified the accuracy of employers' assessments of 14(c)

- workers' productivity levels on which their special minimum wages are based.”
- Did not compile information on the results of its efforts to ensure employer compliance
 - Did not adequately ensure employer compliance with the 14(c) program's requirements because it did not systematically conduct self-initiated investigations of 14(c) employers.

This report contained a series of recommendations similar to the Inspector General's report including improved enforcement and oversight, improvements to data systems, etc. (United States Department of Labor, 2001, pp. 3-5).

CRP Investigation-Based Compliance Baseline Survey. As a result of the Inspector General and GAO reports, DOL increased its monitoring of 14(c) certificate holders, as well as its issuance of technical assistance information. Part of this increased monitoring included a random sample survey of sheltered workshops by DOL, published in 2005. The results of this survey showed that:

- Only 37% of sheltered workshops properly compensated their consumers, although 77% of consumers were paid in compliance with the FLSA and the Service Contract Act (SCA; i.e., most workshops were improperly compensating some consumers, but as a whole the majority of consumers were being properly compensated – although 23% of consumers were still not being properly compensated).
- Eleven of every 100 workers (both consumers and staff) were due back wages.
- Special minimum wage violations “were the most common violation effecting consumers. Most involved piece rate issues like the use of an incorrect prevailing wage rate” (United States Department of Labor Employment Standards Division, 2005).

Payment of Back Wages. With DOL's strengthened enforcement, sheltered workshops have increasingly been forced to pay back wages. From 1999 to 2005, DOL ordered 14(c) certificate holders to pay \$5.6 million in back wages to about 58,000 workers with disabilities (Denson & Kosseff, 2006). As an additional indicator of the growing attention paid to this issue, just this past June, 21 current and former workers of a sheltered workshop in Indiana filed suit claiming they were owed back wages for not being paid the prevailing wages for providing janitorial services at two state rest areas (Brady-Lunny, 2007).

Law, Health Policy & Disability Center Policy Report. In the midst of these various findings and reports, the Law, Health Policy & Disability Center at the University of Iowa College of Law issued a policy report which included a series of potential options regarding the future of 14(c) (Morris et al., 2002, p. 27). The following chart summarizes these options, along with the challenges that were identified regarding each option.

Possible Options	Challenge
Improve Program Administration and Oversight	<ul style="list-style-type: none"> • Would data collection on key performance indicators that compared 14(c) certificate holders improve informed choice? • Would increased oversight improve wage status and transition to inclusive settings?
Reduce Utilization of 14(c)	<ul style="list-style-type: none"> • Would time limits in 14(c) status improve or restrict opportunities for economic well-being? • Would time limits be effective only if other policy developments open up new choices for support of employment at equal or better wages in inclusive settings?
Build Systems Capacity For Change	<ul style="list-style-type: none"> • What financial incentives are needed to capture the interest of current providers to expand employment support choices?
New Strategies to Support Employment and Asset Development	<ul style="list-style-type: none"> • Will creation of nontraditional Employment Networks make the Ticket to Work a viable option for persons with the most significant disabilities? • What agreements need to be resolved among federal agencies (Social Security Administration, Centers for Medicare & Medicaid Services, Department of Labor) to support individual person directed budgets and a lifting of asset limits to encourage savings?
Eliminate Sub-Minimum Wage Option	<ul style="list-style-type: none"> • Without changes to allowable activities under the Medicaid waiver, have choices for the individual been restricted or expanded?
Work Incentives For Employers	<ul style="list-style-type: none"> • Can tax policy be further developed to embrace the principles of the Disability Policy Framework? • What political support can be developed for such policy changes with significant increased costs?

This chart makes the case that in theory any changes in sub-minimum wage present both opportunities and challenges. It is quite apparent from the experiences of jurisdictions that have undertaken such changes (i.e., British Columbia, New Zealand, Arizona discussed elsewhere in this paper), that there are complexities involved in actually undertaking such changes beyond those indicated in this chart.

Policy Implications

The history of DOL's special minimum wage, and in particular the increased scrutiny it has been under over the past several years, raises a number of issues for policymakers as they examine options for the sub-minimum wage and strive to enhance integrated community employment for individuals with significant disabilities. The following section outlines these various policy implications.

Lack of Oversight: Do State and Local Entities Need to Take a Closer Look? State and local government entities overseeing programs for individuals with disabilities have typically presumed that DOL is ensuring that sheltered workshops are complying with all necessary regulations, and that sub-minimum wage is an area where they need not get involved. This appears to be a false presumption. It is abundantly clear from the Inspector General and GAO findings, as well as the recent DOL rulings regarding payment of back wages by sheltered workshops, that the implementation and monitoring of sub-minimum wage provisions by service providers is often in violation of the law, and that the rights of people with disabilities are being consistently violated. Given the inadequacy of monitoring by DOL, state and local government entities may wish to consider whether they need to take a closer look at how their service providers are managing the use of sub-minimum wage and whether these government entities should supplement DOL's monitoring to ensure the rights of individuals with disabilities are being respected.

Right to Appeal: Are People with Disabilities Aware? The regulations clearly indicate that individuals with disabilities have the right to appeal a determination that they should be paid sub-minimum wage. It is unclear how aware people with disabilities are of this provision or how much it is utilized. It is suggested that policymakers and government entities overseeing programs for individuals with disabilities ensure that individuals with disabilities, their families, and service providers are well aware of this provision, and that there is the opportunity to exercise this right to appeal, in order to ensure the rights of an individual with a disability are not violated.

Contextual Aspects of Minimum Wage: Is Lack of Recognition Restricting Opportunities? The statutes and regulations clearly state that payment of sub-minimum wage is strictly contextual and that: a) the fact that an individual has a disability in and of itself is not sufficient for determination of payment of a sub-minimum wage; b) payment to an individual of sub-minimum wage is based on the requirements of a particular task or job, and does not in any way indicate or allow that an individual should be paid sub-minimum wage for any or every task or job. The contextual aspect of sub-minimum wage raises implications regarding the service provider and consumer perspective:

- Should there be concern that because an individual earns sub-minimum wage for a particular task or job, the service provider is assuming that the individual is not qualified to earn the minimum or prevailing wage for any task or job?
- Similarly, because a determination has been made that an employer can pay an individual sub-minimum wage, does the individual with a disability (and possibly their family) automatically assume that they are not capable of working in a position that pays the minimum or prevailing wage?

Is The Issue Disability or Just a Poor Job Match? DOL guidance states that the sub-minimum wage can be utilized for individuals “whose earning or productive capacity is impaired by a physical or mental disability.” This definition explicitly indicates that the reason for a reduction in the individual's earning or productive capacity, and thus the rationale for paying sub-minimum wage, must be due to the person's disability. However, what if the job is simply a poor match for the individual's skills, abilities, and interests

irrespective of disability? Given the narrow market segment and types of jobs within which most sheltered workshops operate, there is no doubt that for many people with disabilities this is the case. The many anecdotal examples of individuals who were producing at a low rate within a sheltered workshop, who in turn become successfully employed in the community at prevailing wages certainly indicate this. The contextual nature of 14(c) requirements also clearly imply that DOL believes that employment opportunities may exist where an individual who is being paid sub-minimum wage could be paid the minimum or prevailing wage. The question therefore is whether service providers should be more focused on identifying appropriate community employment opportunities rather than dealing with the mechanisms and requirements for paying an individual sub-minimum wage for positions for which they may be poorly matched. Dale DiLeo, a disability advocate, summarized this view in an April 2007 piece: “Workers with disabilities aren’t always slower by 50%, 80%, or 90% on all work tasks – it depends on the task, the person, and the job fit. When there is a gap, the first solution is to re-analyze the job, not reduce the pay. We should work to try to figure out how to obtain work supports and match job tasks so that the employer gets a productive worker. It is not a question of disability, it is a question of support and job matching” (DiLeo, 2007).

Reliance on production revenue – A real issue? As documented within the GAO report, many service providers consistently claim that the revenue from production in sheltered workshops is essential to maintain their services. The veracity and underlying assumptions within such claims are not always clear. At the same time, the report also indicates that government funding is often being utilized to subsidize and support production work. (Interestingly, a recent report on the social enterprise movement, a parallel to sheltered workshops, has clearly indicated that when government and other external funding sources and subsidies are accounted for, the vast majority of such ventures operate at a loss; Kleiman & Rosenbaum, 2007). A fundamental question is whether a complete and accurate financial analysis of a sheltered workshop would show that through elimination of production work, resources could be re-deployed to support individuals in community employment with little change in the cost to government for these services. There have certainly been numerous examples of service providers across the country that have undertaken such a transformation and found this to indeed be the case. It is suggested that as part of their efforts to expand community employment, state and local oversight bodies may wish to consider a thorough financial analysis of sheltered workshops to accurately make such a determination. (It should be noted that obtaining the full range of accurate financial information necessary to undertake such an analysis, which would require very specific wage, production, facilities, and revenue information, could be a challenge.)

The effect of the changing economy. It is interesting to note that within the review of the literature on sub-minimum wage and 14(c), that while a wide range of issues are covered, there is little discussion regarding the fundamental assumptions and concept of the sub-minimum wage. Only recently, such as the April 2007 piece by Dale DiLeo, have such discussions begun to take place.

At the time of the initiation of the sub-minimum wage in 1938, the United States was primarily a production economy, and the idea of paying an individual based on their rate of production may have made sense (although one could certainly have argued even at the time, that

such a simple measurement of employee value was not really valid). The United States is now primarily a service economy and so the idea of paying an individual based only on how much they produce has limited application. In addition, the concept of employee value has evolved in the last 70 years. Individuals are valued as employees for a wide range of abilities, gifts and talents, and employers explicitly or implicitly understand that. The argument that the value of an employee should be solely based on a “production rate” is a simplistic argument, particularly given the realities of the 21st century economy. Employees are valued for many reasons: their customer service skills, their ability to get along with co-workers, their reliability, the quality of work, etc. In fact, most employee evaluations cover a wide range of categories, with productivity only one of a multitude of variables that are considered as criteria for a “good employee.”

For example, a company may have two employees, one of whom does high quality work but has difficulty getting along with others, and another employee who is not a stellar performer in terms of work quality, but is much easier to deal with on a personal basis and considered more of a team player. Which individual is the more “productive” employee? There is no simple or right answer. Another example regards reliability and longevity. An employee may not be particularly quick at the tasks of their job as compared to others, but the employee is highly reliable and the employer can count on the employee’s duties being fulfilled day-in and day-out and year-to-year. The employee is valued not because they are highly productive in terms of day-to-day output, but because they are easy to manage and the employer does not have to deal with the problems and cost of turnover in the position.

Beyond the vast number of definitions of a valued employee, it needs to be recognized that in the typical workplace there is significant variation in employee performance among employees in the same job category earning the same wage. Also, individual employees vary in their performance, effectiveness, and productivity on a day-to-day basis depending on how they feel, external distractions in their personal life, and general motivation. The general population is not typically subject to their pay being dependent on their level of production on a day-to-day basis.

Conclusion

For policymakers there are a multitude of considerations regarding the sub-minimum wage and its historical context. These include whether the sub-minimum is being implemented in a way that is compliant with the legal requirements and respectful of the rights of individuals with disabilities. .

A second issue is whether the sub-minimum wage is restricting employment opportunities for people with disabilities because the narrow context within which it is used implies that there are limited employment opportunities available for an individual. Finally, there needs to be consideration of whether the concept of sub-minimum wage in and of itself continues to be a valid way to determine employee value, particularly given the realities of today’s economy.

State Statutes and Regulations Governing Sub-Minimum Wage

As part of the examination of issues related to the sub-minimum wage, a review was conducted of the various state regulations and codes regarding the minimum wage and special or sub-minimum wage. If a state has its own minimum wage law, in order for employers to pay the sub-minimum wage, legislation, regulations, or some other type of mechanism must be in place that allows for payment of sub-minimum wage under the state law. Currently only five states (Alabama, Tennessee, Louisiana, Mississippi, and South Carolina) do not have minimum wage laws. The intent of this review was to examine whether major differences existed in how states addressed the issue of sub-minimum for individuals with disabilities. While this review was significant, it was intended as a “snap shot” of how various states address this issue. Given the multitude of mechanisms that state’s use for regulating wages (legislation, regulations, state labor department policy directives, etc.), and the limitations in scope of this review, this analysis should not be considered as an absolutely comprehensive and complete review of every mechanism in every state for addressing sub-minimum wage issues. The analysis did identify examples from 34 states of codes and regulations pertaining to the sub-minimum wage. Within these parameters, this analysis identified the following:

- There is significant difference in the level of detail regarding authorization of sub-minimum wage that is contained within state codes and regulations. This detail varies from a simple statement that the commissioner of the state department of labor has the right to authorize sub-minimum wages for individuals with disabilities to prevent curtailment of employment (e.g., Alaska, North Carolina), or language mirroring the FLSA requirements that individuals may be paid sub-minimum wage under special certificates (e.g., Idaho), to fairly detailed information regarding the specifics of how the sub-minimum wage is to be calculated and paid, and restricting its payment further than the federal government requires (e.g., Texas, New Mexico).
- Six states were identified (Connecticut, Maine, New Jersey, Arkansas, California, and North Dakota) that allow individuals to apply for authorization of payment of sub-minimum wage on their own personal behalf (so that they can personally be paid sub-minimum wage) in addition to allowing employers to also apply for certificates. It is assumed that the underlying intent of such a regulation is that this allows individuals to take advantage of an employment opportunity that might not otherwise be available and/or allow the individual more direct control over payment of sub-minimum wage. The level of use of individual applications for sub-minimum wage is not known.
- Many states, including Wisconsin, permit payment of sub-minimum wage by any employer who applies for a special certificate. Maryland, New Mexico and Texas were three states identified where a sub-minimum wage can be paid to an individual with a disability only if the individual is participating in a sheltered workshop or similar entity specifically designed to meet the needs of individuals with disabilities. Three additional states also restrict employer applications for payment of sub-minimum wage to sheltered workshops, but do allow individuals who work for any employer to apply individually (California, North Dakota, and Arkansas).

- Some state codes and regulations (e.g., California, New Jersey) specify authorization time limits with options for renewal for sub-minimum wage. Even without such a provision, states are subject to requirements under FLSA in this regard.
- A number of state codes and regulations (e.g., Arkansas, Missouri, Rhode Island) contain specific rights regarding public hearings, at which any individual may be heard, in order to authorize payment of sub-minimum wage by an employer.
- States vary in the discretion that the head of the state department of labor has in terms of administering sub-minimum wage, with Alaska, Connecticut, and North Dakota as examples of states where the labor commissioner determines specifics in terms of the rules and policies of how the sub-minimum wage is administered (New York's wage board has similar discretion). Other states appear to limit or not allow such discretion, requiring strict compliance with legislation and regulations.
- Some state codes and regulations contain what appear to be relatively unique requirements regarding sub-minimum wage. Noteworthy examples include:
 - Ohio, which specifically notes that payment of sub-minimum wage may not conflict with the Americans with Disabilities Act.
 - Pennsylvania, which requires that the application for payment of sub-minimum wage be signed by both the employer and employee.
 - Hawaii, which allows the director of the state department of labor to issue rules ensuring that payment of sub-minimum wage does not restrict the full-time employment of other individuals who are not subject to the sub-minimum wage.

In summary, there is a broad continuum regarding state regulation of sub-minimum wage. At one end of the spectrum are those states either with no minimum wage laws or which simply defer to or mirror the FLSA requirements on sub-minimum wage. On the other end are states that provide significant requirements and restrictions in terms of sub-minimum wage, beyond the federal requirements. As changes in sub-minimum wage are considered by states, in an effort to ensure that the rights of people with disabilities are respected and to encourage increased employment in the community, the following should be considered:

- As detailed elsewhere in this report, there have been significant shortcomings in terms of the federal government's oversight of sub-minimum wage. Therefore, if a state wishes to ensure that the rights of people with disabilities are being respected and enforced, it behooves states to have their own detailed regulations, requirements, and policies regarding sub-minimum wage which allows not only for closer oversight, but also sends a clear message to entities paying sub-minimum wage about the state's interest in this issue.
- One of the most significant state requirements is limiting payment of sub-minimum wage only to sheltered workshops. Such limits help ensure proper oversight and limit the potential abuse in use of sub-minimum wage. Others may argue that such limits also limit opportunities for community employment for people with disabilities (i.e., if employers in the community can't pay sub-minimum wage, they may not consider hiring people with disabilities). However, as discussed elsewhere in this paper, such assumptions are subject

to endless debate by economists with no real conclusions, and are based on narrow assumptions regarding the definition of a “productive” employee.

- Only a few states, Pennsylvania being the most noteworthy, involve the individual in approving the authorization of sub-minimum wage (although all individuals are entitled to appeal a determination of sub-minimum wage under the FLSA). It is suggested that as part of the overall efforts towards self-determination and choice within the disability movement, states may wish to consider instituting and strengthening such requirements for individual approval of payment of sub-minimum wage. Although individual employers/service providers may consider such a requirement a burden, from an individual rights perspective such a requirement seems reasonable and may result in more judicious use of the sub-minimum wage and greater understanding by individuals of their rights in this regard.
- It is suggested that states consider codes, regulations, and policies that ensure that individuals with disabilities are fully informed of their rights regarding payment of sub-minimum wage (including their rights to appeal), which go beyond simply posting of such rights in a public area, particularly given the limited reading skills of many individuals with significant disabilities. It is suggested that such a policy could include: a) authorization by the individual on an annual basis of payment of sub-minimum wage; b) a requirement for a complete verbal review of the individual’s rights in a format and manner which ensures their awareness of their rights (i.e., simply having an individual sign a reauthorization on an annual basis is not acceptable); c) at the individual’s discretion, a right to have an advocate of their choosing attend a meeting where their rights and circumstances regarding payment of sub-minimum wage are reviewed.
- Finally, it is important to note that the burden of government rules and regulations can be a significant tool for public policy – i.e., if government wishes to restrict or limit the use of a certain program, it can create significant administrative burdens for its use. Therefore, if a state wishes to limit and reduce the reliance on sub-minimum wage, it should in turn consider increasing the regulatory burden and requirements (i.e., limit and increase the administrative burden to access sub-minimum wage, rather than making access simple).

Economic and labor force impact of changes in the minimum wage in the USA

One of the fundamental questions in discussions regarding sub-minimum wage for people with disabilities is whether changes or elimination of sub-minimum wage will impact the labor market participation rate or individual economic circumstances of people with significant disabilities. The experience to date with entities making such changes, detailed in later sections, provides limited context for determining the impact in this regard. However, in theory, studies of the impact of changes in the general minimum wage may provide some parallel information to inform discussions regarding changes in the sub-minimum wage. The intent of this section is to provide a summary of research that addresses the economic and labor market impact of changes in the general minimum wage.

According to the International Labor Organization (International Labor Office, 2006), 90% of countries globally have minimum wage laws. In the US, the federal minimum wage has been recently increased from \$5.15 to \$7.25 to be achieved in three steps by the summer of 2009. The last time that the federal minimum wage was increased was in 1997 when it was increased from \$4.75 to \$5.15 per hour. States may also pass laws that set a minimum wage and currently there are only 5 states (Alabama, Tennessee, Louisiana, Mississippi, and South Carolina) that do not have their own minimum wage law. Whereas the federal minimum wage has been the same since 1997, state minimum wages have changed about 40 times in 17 states and the District of Columbia between 1997 and 2005 (Wolfson, 2006). Currently, there are 30 states, the District of Columbia, and the U.S. Virgin Islands that have a minimum wage at a level above the federal standard. The highest minimum wage is currently \$7.93 per hour in Washington State (United States Department of Labor, 2007b). In cases where the federal and state minimum wage applies, the minimum wage most favorable for workers prevails.

The effects of increasing the minimum wage

Traditionally, debate about the effects of increasing the minimum wage has been based on classic economic theory. More recently, however, a more articulated interpretation of economic theory as well as evidence-based data have reopened debate about the effects of the minimum wage on socio-economic parameters. This section summarizes the economic theory, the evidence-based approach, and the reasons why drawing solid conclusions is not easy.

Economic theory. The core of classic economic theory maintains that increases in the minimum wage have negative effects on employment. Specifically, in order to restore the economic equilibrium between the offer and demand of labor, increases in wages need to be compensated by reductions in the number of people employed (Brown, Gilroy, & Kohen, 1982; Ghellab, 1998). This theory, however, has been challenged by the notion that the economic equilibrium could have been already altered by industries who managed to keep the wages below the natural economic equilibrium. When this is the scenario, a minimum wage would have the effect of restoring the demand and offer of labor closer to the natural economic equilibrium and, therefore, increasing the level of employment. This theory is known as “monoposonistic” (Brown et al., 1982).

The evidence-based approach. The evidence-based approach challenges classic economic theory by investigating the effects of increasing the minimum wage in actual labor markets. Most of the literature based on the evidence-based approach revolves around two streams of research that lead to opposing results. In October 1992 the journal *Labor Relations Review* dedicated an entire issue featuring articles from both sides of the dispute.

One of the first studies to challenge classic economic theory compared employment rates, wages, and prices in 410 fast-food restaurants located in New Jersey and Pennsylvania (Card & Krueger, 1994). The comparison took place before and after the minimum wage in New Jersey increased from \$4.25 to \$5.05 while it remained the same in Pennsylvania. Findings showed that the levels of employment in the two states remained constant, respectively, even after the minimum wage in New Jersey increased. However, prices did increase in New Jersey's restaurants indicating that part of the cost of increased wages was transferred to the consumers (Card & Krueger, 1994). Card and Krueger (2000) later revisited their results and found that the increase of minimum wage was also associated with a decrease in work hours. This finding showed that employers sought to compensate for the increased labor cost with an increase of productivity. However, they confirmed that overall the unemployment level did not increase.

In another study, Card (1992) investigated the effects of an increase of the minimum wage in California, in 1988, from \$3.35 to \$4.25. Using the Current Population Survey (CPS) and comparing California to other states where the minimum wage did not increase, Card found that teenagers enjoyed a 10% increase in their income without any loss of employment. Another study investigated the effects of the minimum wage in Texas when, in the spring of 1990, it rose from \$3.35 to \$3.80 and then again to \$4.25 in 1991 (Katz & Krueger, 1992). The researchers interviewed about 300 managers of fast-food restaurants before and after the increases in the minimum wage. The results showed no correlation between the increased minimum wage and unemployment or price levels. In fact, this study showed that a number of employers increased wages to levels above the minimum wage. Moreover, only a minority of employers were paying sub-minimum wage to young workers despite this option being available to them.

On the opposite side of this stream of research, a number of studies concluded that increasing minimum wage had negative effects on employment levels and other socio-economic parameters. For instance, Neumark and Wascher (2000) sampled fast food restaurants in the same ZIP codes as the Card and Krueger study. Differently from Card and Krueger, however, administrative payrolls were analyzed as opposed to collecting information through telephone interviews. Moreover, Neumark and Wascher measured the equivalent number of full time employees whereas Card and Krueger did not differentiate whether an employee worked full time or part time. Results showed that employment computed this way decreased by about 4% in New Jersey after the increase in the minimum wage compared to Pennsylvania. In another study, Neumark and Washer (2004) investigated 17 countries that participated in the Organization for Economic Cooperation and Development (OECD) and found that increasing the minimum wage had negative effects on the employment level for youth unless a sub-minimum wage was available for this category of workers.

In a study on the effects of minimum wages on poverty, Neumark, Schweitzer, and Wascher (2005) found that the percentage of families who lived with an income at or close to the poverty

line increased in association with increases of the minimum wage. According to Lang and Kahn (1998), although minimum wage increases do not necessarily have an effect on the overall employment levels, they do alter the composition of the workforce. For instance, Lang and Kahn found that increasing the minimum wage lead to an increased percentage of teenagers and students working in the food industry. Although the reason of such effect is not clear, the authors suggest that better wages might attract students who seek financial support for their studies and, in some cases, better wages might even convince some teenagers to drop from school and enter the labor market.

Lehmann (2006) focused on the effects of the minimum wage on workers with disabilities. Using data from the Current Population Survey, the author investigated the effects of the minimum wage on the Labor Market Activity Rate (i.e. number of individuals working at least 52 hours in the previous calendar year out of the total population) in 19 states during the period 1980-2001. Findings showed that whereas increasing the minimum wage was not associated with variation in unemployment in the general population, it was negatively associated with the labor market Activity Rate of people with disabilities. In other words, increases of the minimum wage were associated with a decline in the number of people with disabilities working at least 52 hours in a year.

Conclusions

There is not currently a clear theoretical or evidence-based understanding of the impact of increases in the minimum wage on the labor market. The biggest limitation of the evidence-based approach is the difficulty of isolating the effects of the many intervening variables that may also have a role in determining the performance of economic systems (Neumark, Schweitzer, & Wascher, 2005; Ghellab, 1998; Wolfson, 2006). For instance, industries that compete in a domestic market are more protected than industries that operate on the global market. Also, industries that can quickly transfer the increased labor cost to customers may react differently than businesses that do not have such option because their prices are determined by long term contracts. It is important to note that many of the studies of minimum wage have been focused on particular business sectors (e.g., restaurants), which are not necessarily representative of the entire economy.

Effects of minimum wage increases appear to be better controlled by countries that have regulations protecting the labor market including, for instance, sub-minimum wages for youths, job search assistance, or subsidies to employers (Neumark & Wascher, 2004). Finally, according to the OECD, the effects of increasing the minimum wage depends on a number of factors such as the amount of the increase and the distribution of skills across workers (New Zealand CBC Cabinet Business Committee, 2006; Neumark & Wascher, 2004; Organisation for Economic Co-Operation and Development, 1997).

It is interesting to note that the debate about the effects of the minimum wage might be ideologically loaded. On the one hand, advocates of social justice tend to emphasize findings that support increases in the minimum wage. On the other hand, corporate advocates have an interest in supporting research that shows negative effects of increasing of the minimum wages. For instance, according to Rampton and Stauber (2001) the Economic Policy Institute (EPI), an organization that has a reputation of being on the progressive side of economic policies, tends to

produce research that proves no effects on employment due to increasing the minimum wage. In contrast, the Employment Policies Institute (EPI), an organization that is sponsored by the restaurant lobby, promotes research that demonstrates negative effects of increasing the minimum wage. Given this ideological subtext, combined with the extensive number of potential variables that surround the impact of minimum wages, it is difficult to come to any clear conclusions regarding the impact of wage on the labor market, and in turn how this applies to people with disabilities and the sub-minimum wage.

Elimination of Sub-Minimum Wage in Arizona

Background and Current Status

As previously noted, there are no requirements for states to have their own minimum wage laws. If a state chooses not to have its own minimum wage law then, by default, the state's residents are covered under the federal Fair Labor Standards Act (FLSA), including the provisions under section 14(c) of that act allowing individuals with disabilities to be paid a special minimum wage (commonly referred to as a sub-minimum wage). However, at their option, states are permitted to have their own minimum wage laws that establish higher wage rates than the federal minimum and expand the criteria of workers entitled to receive the minimum wage beyond what is required under FLSA. States must comply with the strictest standard that is most advantageous for the worker, whether federal or state law.

Until 2006, Arizona was one of a handful of states that did not have its own minimum wage law. However, in November 2006, the voters of Arizona overwhelmingly passed Proposition 202, the "Raise the Minimum Wage for Working Arizonans Act," which for the first time in the state's history established a minimum wage higher than the federal rate. This act raised the minimum wage to \$6.75 per hour as of January 1, 2007. In addition, the law allowed for annual cost of living increases based on the federal consumer price index ("Proposition 202," 2006). Typically, when states enact their own minimum wage legislation, among the exemptions included is language similar to FLSA section 14(c) that exempts individuals with disabilities from the state's minimum wage and allows individuals with disabilities to be paid a commensurate wage based on productivity. However, in Arizona, Proposition 202 did not include such language, and was required to be implemented just two months after passage. The end result has been a flurry of attention and activity over the last several months to determine whether entities in Arizona paying sub-minimum wage to workers with disabilities could and should continue to do so. This activity and its end result provide an interesting case study with implications for other states as they attempt to consider reforms to the sub-minimum wage.

Initial Post-Election Activity

According to Peri Jude Radecic, Executive Director of the Arizona Center for Disability Law, the fact that the law did not contain an exemption for people with disabilities "came out of the blue" for most people (Personal communication, July 11, 2007). The major exceptions to this were the unions that had drafted and been among the major backers of Proposition 202, and which were well aware and intentional about the lack of inclusion of a sub-minimum wage exemption. In December 2006, as the date for implementation of Proposition 202 approached, there was increasing awareness that the new law potentially did not allow for payment of a sub-minimum wage to people with disabilities, and increasing concerns regarding whether or not organizations that paid individuals a sub-minimum wage could continue to do so after January 1, 2007. Underlying this question were a number of issues:

- Despite the lack of specific language, does Proposition 202 still allow for payment of a sub-minimum wage to individuals with disabilities?
- Was the lack of such an exemption the specific intent of voters or an oversight?

In an effort to clarify the issue, legislative leaders asked the state's Attorney General to take a look at the issue and issue a ruling as soon as possible.

The fight to restore the sub-minimum wage was lead primarily by the Arizona Association of Providers for People with Disabilities (AAPPD), a service provider's trade group consisting of approximately 70 organizations. As the end of December approached, there was increasing alarm expressed by entities that paid sub-minimum wage. Beverly Harmon, the Executive Director of AAPPD stated that the requirement to pay \$6.75 an hour could kill employment opportunities for an estimated 3,500 to 5,000 Arizonans who, due to the nature of their disability, would not be employable without the wage exemption (Pitzl, 2006b).

A number of operators of sheltered workshops echoed these concerns. Typical were the comments of Randy Gray, president and chief executive officer of the MARC Center in Mesa, who in explaining the rationale behind the sub-minimum wage stated, "Why would someone want to hire someone who works at 10 percent and pay them 100 percent?" (Pitzl, 2006b). Dave Cutty, president and chief executive officer of The Centers for Habilitation claimed that paying the full \$6.75 per hour would cost his organization an extra \$425,000 per year, which was unaffordable. Sheltered workshops indicated that they would be forced to lay off workers and close programs if they were required to pay the new minimum wage and advocated for some type of regulatory action, clarification, or amendment to the legislation that would allow them to continue to pay sub-minimum wage.

On the other side, a number of individuals and entities came out strongly in favor of paying workers with disabilities minimum wage and not allowing an exemption to the new law. Among these were Rebekah Friend, president of the Arizona AFL-CIO, who stated, "These are workers. Whether they're disabled or not, they're workers," adding, "Someone who gets up and, against those odds goes to work every day deserves the minimum wage" (Pitzl, 2006b). The Governor's Council on Developmental Disabilities and the ARC of Arizona both came out strongly in favor of uniform application of the new law and were among the primary advocates for not restoring the sub-minimum wage (Pitzl, 2006a).

Entities in favor of maintaining an exemption that would allow payment of sub-minimum wage initially lobbied for quick legislative action to alter Proposition 202. The Arizona Republic issued an editorial on December 20, 2006 supporting such action stating, "The moral pieties of labor activists will not keep such desperately needy people [with disabilities] employed. Their options are not between one mandated minimum wage and another. Their sole option is between compensation that reflects their severely restricted productivity or no job at all." This was the first of several editorials over the next six months from the Republic on this issue, all in favor of restoring some form of the sub-minimum wage.

On December 26, the Industrial Commission of Arizona (ICA), the agency appointed by the Governor to implement Proposition 202, issued a ruling advising programs that had section 14(c)

certificates that they could continue to pay sub-minimum wage until the ICA had the opportunity to address concerns about how the new law applied. Programs were also advised that they would not be penalized for not paying the new wage (Industrial Commission of Arizona, 2006).

The state's Division of Developmental Disabilities (DDD) in turn issued a directive to its vendors on the issue on December 29, 2006. Within this directive, DDD indicated that it had surveyed most of its employment service vendors and that some vendor agencies had chosen to conduct business as usual under the federal sub-minimum certificate (per the ICA directive), some were choosing to provide work at the new minimum wage, and others were looking at non-paid, work related services for the immediate future. Vendors choosing not to continue their current employment program or planning on reducing the hours of an individual's employment activity were directed to engage consumers in non-paid work activities and training related to generic work skills and appropriate work habits. It was also noted that, for the short-term, consumers would stay in their current services and environments and that vendors could continue to bill the Center-Based Employment (CBE) rate for units of service provided (Brent, 2006b). A similar letter was sent to families.

When the sub-minimum wage went into effect on January 1st, according to Peri Jude Radecic, as indicated by the DDD vendor survey, some providers increased their wages to the new minimum wage. Other programs just continued to do business as usual per the ICA's directive. This variation in approach appears to have been based on individual program discretion and considerations of the risks and various issues involved (including availability of resources and impact on the individuals served). However, the issuance from the ICA did not alleviate the concerns of all the sheltered workshop operators, as they expressed fears that the ICA ruling did not protect them from possible audits by the US Department of Labor that found them in violation of the law, resulting in heavy fines and payment of back wages. As a result, some programs stopped paying participants and had them participate only in non-work activities, while other programs shut down ("Low-Wage Exemption," 2007). According to the Arizona Center for Disability Law, it was difficult to ascertain whether such actions (particularly shutting down programs and laying off workers), while well-publicized, were isolated in nature or whether they were wide-spread despite the ACDL's efforts to get data from the service providers regarding the impact of the law change.

During January, a series of meetings and discussions began to occur among entities on both sides of the issue in an effort to develop a compromise proposal for addressing concerns regarding the elimination of the sub-minimum wage. The intent was to develop a proposal which the ICA could then use as the basis of a policy on this issue. Among the entities participating in these discussions were representatives from the ARC, Governors' Council on Developmental Disabilities, the ACDL, the Arizona Association of Providers for People with Disabilities, and service providers. The intent of these discussions was to develop a solution to the issue that would work for everyone. Through these discussions, by late January a draft proposal was developed that would allow individuals with disabilities to enter a time limited training track that would not require payment of minimum wage.

While these discussions were taking place, a bill was introduced in the Arizona House (HB 2318) that would have exempted the Arizona Minimum Wage Act from applying to employees

covered by a 14(c) certificate. A hearing was held for the bill on January 31, 2007 by the Committee on Commerce. The hearing was attended by over 60 individuals, whose views were approximately evenly split in regards to the proposed legislation. Despite the significant public opposition to the bill expressed at the hearing, the bill was unanimously passed by the committee (Arizona House of Representatives, 2007). However, even at the hearing, concerns were expressed by legislators that this proposed exemption might not be constitutional. The Arizona Voter Protection Act (Proposition 105), passed by voters in 1998, forbids the legislature from tampering with any voter approved legislation unless it “furthers the purpose” of the initiative, and then only by a three-fourths vote in both the House and Senate. It seemed at best questionable whether HB 2318 met the “furthering the purpose” test.

Attorney General Ruling – No Exemption

The issue was clarified on February 7th, when Arizona Attorney General Terry Goddard issued his opinion in response to the request of legislators back in December. The opinion was clear and unequivocal, stating that “developmentally disabled workers are not exempt from the state’s new minimum wage that voters approved last November in Proposition 202;” Goddard, 2007a). In his ruling Goddard stated that the “special certificate minimum wage authorized by the federal Fair Labor Standards Act (FLSA)...which allows employers to pay a special minimum wage to disabled individuals, was not incorporated in Proposition 202 and is therefore inapplicable” (Goddard, 2007b). In his ruling, Goddard noted that the drafters of Proposition 202 did ignore all FLSA exemptions, which “supports the conclusion that the drafters of the Proposition made a conscious decision regarding the FLSA exemptions the Proposition would adopt and those the Proposition would omit, e.g., the special minimum wage exemption for disabled workers.” In his concluding remarks, Goddard noted that “developmentally disabled workers formerly earning a sub-minimum wage under the FLSA ‘special certificate’ are entitled to earn the new state minimum wage of \$6.75 per hour if they are employees subject to the new law.”

Goddard’s opinion was viewed as bad news for HB 2318 by Representative Michele Reagan, (R-Scottsdale), who sponsored the bill, which would have exempted individuals covered under 14(c) from the new minimum wage law. "If it doesn't meet the intent of the law, it won't get out of the Rules Committee," commented Reagan at the time of the ruling. "Why pass something that will get overturned in court?" (Pitzl, 2007b). As a result of Goddard’s ruling, there was no further action on HB 2318.

ICA Proposal and Policy Statement

On March 1, the Industrial Commission of Arizona issued a Staff Proposal to address the concerns that had been raised regarding the inability to pay sub-minimum wage to individuals with developmental disabilities (Industrial Commission of Arizona, 2007a). This proposal was based on the draft document developed by the work group that began meeting in January. The issuance of this Staff Proposal was the first step in creating a Permanent Rule to address the sub-minimum wage issue. The proposal was forwarded on to the ICA for review and public comment. A public hearing was held on the proposal in late March. On March 29, 2007, the ICA

issued a Substantive Policy Statement, indicating that this approach was advisory only but was the next step towards development of a permanent rule on this issue:

(This) is the Industrial Commission of Arizona's substantive policy statement regarding the applicability of the Arizona Minimum Wage Act to individuals that have developmental, cognitive, mental or physical challenges. It is the intention of the Commission to rely on this substantive policy statement until such time that it is assured that the policy is doing what it is supposed to do. If issues arise that were not contemplated or are not addressed in this policy statement, the Commission asks that the issues be brought to our attention as soon as possible. We are committed to keeping the affected community informed and will continue to do so as we progress towards establishing permanent rules, which process we will begin at some point down the road (Industrial Commission of Arizona, 2007b).

The substance of this policy centered on the definition of “employee.” The ICA noted in its opinion that if someone met the definition of an “employee,” under the Arizona Minimum Wage Act the business was required to pay the new minimum wage, and that the ICA did not have the legal authority to authorize payment of a sub-minimum wage that would be a violation of the Act (per the 2/7/07 opinion of Attorney General Goddard). Therefore, the ICA’s policy outlined parameters whereby individuals with disabilities would not be deemed “employees” and in turn would not be subject to the requirements of the Arizona Minimum Wage Act, stating in the policy statement: “An individual does not meet the definition of employee...if that individual performs work activities for the primary or personal benefit of the individual (as opposed to the employer) without an agreement for compensation.”

The Policy Statement then went on to indicate that the ICA had determined that these non-employee “work activities” could be performed as a component of two types of programs: a Vocational Training Program, or a Service Recipient Program. In both programs there is no expectation of compensation, but payment of a stipend is allowed for work performed.

Vocational Training Program. The Policy Statement describes a Vocational Training Program as consisting of a maximum of 3 cycles of 2,520 consecutive service hours for a total of 7,560 hours. The Policy Statement does not provide a specific definition of service hours, but assuming an average of 25 to 30 service hours per week, each cycle would consist of 1½ to 2 years, or a total 4½ to 6 years.

The parameters of the Vocational Training Program are defined as follows:

In this program, an individual has received an independent evaluation of their physical, mental, cognitive, and functional abilities, and is determined to be temporary incapable of employment, even with assistance. However, with training, this individual may be capable of meeting the minimum qualifications for a position in employment.

The Policy Statement in turn detailed that an individual support plan (ISP) or similar plan be used for the evaluation, and that the plan:

- i. Be developed by an interdisciplinary planning team that includes the individual and the individual's parent or guardian (if any);
- ii. Be in the best interests of the individual served;
- iii. Be based upon formal and informal evaluations and assessments;
- iv. Consider and include the input and preferences of the individual and individual's parent or guardian (if any);
- v. Include a statement or description of the individual's vocational goals, outcomes, and training or services recommended;
- vi. Include supporting documentation.

It is interesting to note that while the input and preferences of the individual and their parent/guardian are considered, they are certainly not the driving force behind the plan development and there appears to be a tone of deference to professional opinion within these parameters. However, there is a requirement that the plan be reviewed on a regular basis, including when there are changes in the individual's preferences, providing some element of choice and individual control.

The Policy Statement requires that services under the Vocational Training Program be provided by a certified provider (an entity providing rehabilitative or employment services to people with disabilities under a government contract) "with the ultimate goal of equipping the individual with skills that lead to integrated employment at a salary that meets or exceeds the minimum wage, with long-term support if necessary."

The Policy Statement then goes on to describe the circumstances where an individual's participation in the Vocational Training Program would end:

- The individual is offered a job in integrated community employment, with or without support.
- The individual reaches the 7,560 consecutive service hour limit.
- The individual elects to participate in a new Training Program or Service Recipient Program, and has developed an amended plan. The Policy Statement notes that participation in a new Training Program may occur at any time, including after placement into integrated community employment that ultimately fails or is considered unsuccessful.

Service Recipient Program. If an individual leaves the Vocational Training Program without a job in the community, they can be served under the Service Recipient Program option. As noted in the Policy Statement, "This program is, by its very nature, a long-term program providing work activities from a certified provider that are primarily therapeutic, but which assist, as well, in the development of job skills." The statement goes on to state, "While the work activities primarily serve a therapeutic purpose, the ultimate goal of this program is to continue to develop job skills for integrated community employment."

As with the Vocational Training Program, an independent evaluation is conducted at least annually through an ISP or similar process. The Policy Statement indicates that while in the Service Recipient Program, a service recipient and/or their guardian may elect to start a new Vocational Training Program. There are no specifications within the Policy Statement regarding

the number of hours an individual would be in a Service Recipient Program before beginning a new Vocational Training Program.

Underlying Legal Analysis. The Policy Statement contained a legal analysis to support the rationale for considering individuals with disabilities as “non-employees” and the establishment of the Vocational Training Program and Service Recipient Program. The basis of this rationale was a series of court rulings that indicated that individuals were not considered to be employees under the FLSA if they performed activities without promise or expectation of compensation, but solely for their personal benefit as opposed to the employers. In addition, within this legal analysis, the following six part test from the FLSA was cited. These criteria determine whether an individual is considered a trainee, not an employee, under the FLSA.

1. The training, even though it includes actual operation of the employer’s facilities, is similar to training that would be given in a vocational school;
2. The training is for the benefit of the trainee;
3. The trainees do not displace regular employees but work under close observation;
4. The employer that provides the training derives no immediate advantage from the trainees’ activities and at least on occasion, its operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the completion of the training period;
6. Both the employer and the trainees have an understanding that the trainees are not entitled to wages for the time spent in training.

Essentially, the ICA indicated that the Vocational Training Program and Service Recipient Program were intended to be delivered in such a way that would meet this six part test and that these programs’ options would be operated strictly for the benefit of the individual, not that of the service provider. (A copy of the full ICA Substantive Policy Statement is included in Appendix D.)

Reaction to ICA Policy Statement

The opinions expressed publicly indicated broad based support for this policy from entities on both sides of the issue. Jeffrey Battle, president and chief executive officer of Scottsdale Training and Rehabilitation Services, which had advocated for reinstatement of the sub-minimum wage, stated, "We are thrilled and delighted because it preserves the option of remunerative work." Those who were against reinstatement of the sub-minimum wage also stated their support, primarily because the policy potentially could be a catalyst for increasing community employment for individuals with developmental disabilities. Rebekah Friend, president of the Arizona AFL-CIO, commented that by redefining terms instead of creating blanket exemptions there is hope for the disabled worker to advance. Ms. Friend noted, "I think we have a heavy lift in Arizona, as society goes, to find opportunities for these people to earn minimum wage." Amina Donna Kruck, chairwoman of the Arizona Disability Advocacy Coalition expressed the hope that, "In some cases, people will be able to work up to minimum wage with a job coach" (Pitzl, 2007b). Interestingly, the state’s independent living organization,

while keeping its members aware of the issue through its newsletter, did not formally endorse or oppose the ICA policy (Pangrazio, 2007).

Lawsuit Immunity Issue

The issuance of the Substantive Policy Statement did not resolve all of the issues regarding sub-minimum wage. A remaining concern was potential lawsuits and damage claims against sheltered workshops and day programs for paying less than minimum wage in violation of the Arizona Minimum Wage Act and the FLSA. Such lawsuits and claims could result in treble damages. Reinforcing this concern was a statement in the ICA's March 29, 2006 Substantive Policy Statement which stated that, "The Commission's interpretation has no application to, nor is it intended to affect or change, the policies, rules, and statutes enforced by other state or federal agencies that apply to 'employees' under those respective polices, rules, and statutes, including the FLSA."

As a result, service providers sought immunity from the Legislature to protect them from potential lawsuits and claims if, despite the ICA's Policy Statement, they were found to be liable for back wages and damages. A bill was proposed to that effect. The essence of this bill was that employers who rely on an administrative rule or regulation issued by the Industrial Commission to determine wages for disabled workers cannot be held liable for not paying proper wages. The bill was approved by the House Commerce Committee in mid-February 2007, but then became stuck in the Rules Committee due to two primary concerns: a) the possible liability and burden to the state over lawsuits resulting in treble damages; and b) the restrictions mentioned earlier (Proposition 105) on making changes in voter passed referendums that do not advance the purpose of the law (Pitzl, 2007a).

As a result of these concerns, the immunity legislation languished for a few months. In the interim, the Arizona Republic published two editorials urging action on the legislation, along with at least three additional articles profiling service providers and discussing the possible consequences of the immunity bill not being passed. The bill was resurrected in June as HB 2245. Per a June 15, 2007 memo by the Arizona State Senate Research Staff the basis of this bill was that "Under federal law, no employer is liable for failure to pay the minimum wage if the employer proves that the act or omission was in good faith, in conformity with and in reliance on any administrative regulation, order, ruling, approval or interpretation of the Secretary or any administrative practice or enforcement policy of the Department of Labor (29 U.S.C. 259)." The bill:

- Exempted from liability an employer or other entity that failed to pay the minimum wage if the omission was in good faith, and conformed with policy or other issuances of the ICA.
- Barred "action or proceedings" regardless of whether the ICA policy was modified or rescinded, or determined by judicial authority to be invalid.

The bill also provided coverage retroactively to January 1, 2007. Despite the concerns expressed a few months before, the research memo stated that there was no anticipated fiscal impact associated with the legislation (Birk, 2007). The concern regarding possible violation of Proposition 105, which prohibits the state legislature from making changes in voter passed

referendums that don't advance the referendum's purpose, was not addressed. The immunity legislation was passed by the state Senate and House and signed into law by the Governor on July 2, 2007.

Possible Future Actions

While the primary issues regarding sub-minimum wage for individuals in Arizona appear to be resolved for now, various efforts are likely to continue regarding remaining issues and concerns. These could include a ballot initiative that puts the Industrial Commission's final rule on the state ballot (helping to ensure it cannot be overturned due to a ruling that it does further the intent of the voter-passed Arizona Minimum Wage Act (Pitzl, 2007c), or possibly legislative action or a ballot initiative for full reinstatement of the sub-minimum wage. According to Peri Jude Radecic, Executive Director of the Arizona Center for Disability Law, she fully expects that the Arizona Association of Providers for People with Disabilities will continue to push these issues, although she feels the compromise that has been worked out lessens the potential for a ballot initiative reinstating the sub-minimum wage.

In addition, after a period of time operating under the parameters of the ICA's Substantive Policy Statement, a permanent rule will be issued by the ICA. Whether this permanent rule will be similar or substantially different from the Policy Statement remains to be seen, and this will certainly be dependent on the results and impact of operating under the Policy Statement. The experience of Arizona service providers operating under the ICA Policy Statement, under parameters different than the typical sub-minimum wage, should provide interesting findings, particularly regarding whether such an approach focused on training leads to increases in community employment.

Analysis of Arizona Actions

The parameters of the ICA's Substantive Policy Statement contains some interesting philosophical, operational and legal implications.

Issue # 1: Is the policy truly a catalyst for increased community employment?

For both the Vocational Training Program and Service Recipient Program, there is clear language in the Policy Statement that indicates the ultimate goal of developing job skills for integrated community employment. The limitation on the number of training hours reinforces this concept. However, given the large number of hours permitted, training can occur for several years. In addition, the Policy Statement appears to allow for fairly simple mechanisms (change in status to Service Recipient Program, beginning in a new Training Program, etc.) that will relatively easily allow individuals to remain in sheltered workshops and day programs on essentially a permanent basis.

Issue # 2: Does the policy reinforce an antiquated service model?

Research indicates that traditionally there has been little movement from sheltered employment into integrated community employment (Bellamy, Rhodes, Bourbeau, & Mank, 1986; Metzel, Boeltzig, Sulewski, Butterworth, & Gilmore, 2007). Anecdotal observation also indicates that many activities in sheltered workshops consist of tasks that have relatively little application in today's modern workplace, and that the "training" that occurs consists primarily of performing production tasks under supervision with the assumption that through repetition skill development will occur rather than actual active skill development. In fact, the supported employment model was developed as a reaction to the fact that there was little movement out of sheltered workshops, and given the challenges individuals with developmental disabilities face in transference of knowledge as well as the relationship between behavior and the setting in which it occurs. It was thought that a more successful approach may result from placement of individuals in the community and then training them at the worksite to the specific requirements of that job and work culture. The success of the supported employment model over the last 20 years demonstrates the merits of this "place and train" model, and it has been reinforced by the research and findings regarding the use of natural supports and the critical role of work culture in terms of successful placement. However, despite the increasing skepticism and evidence regarding the ability of sheltered workshops to truly prepare and train individuals for community employment, the ICA's Substantive Policy Statement clearly reinforces this notion that individuals can be trained in such programs for community employment.

Issue # 3: Will the policy result in operational changes to encourage community employment?

Putting aside the question of whether it is even possible to prepare individuals for community employment in a sheltered workshop or similar setting, another interesting operational question is whether the type of programming that will occur will change now that it has been made very explicit that individuals are trainees who are being prepared for jobs in the communities. The fundamental question is whether the ICA Policy Statement was intended to result in substantial changes in how the providers deliver services, with stronger emphasis in skill training and other changes in operational practices leading to better community employment outcomes, or whether the Policy Statement was simply a change in semantics to allow the providers to continue to do business as usual. Initial indications are that service providers are continuing to operate as they always have and that the underlying intent of the ICA Policy Statement was simply a change in semantics to ensure that would be possible (in fact an editorial in the Arizona Republic endorsing the policy statement clearly implied this was indeed the intent; Pitzl, 2007a). Despite the hope expressed by the head of the AFL-CIO that the ICA guidelines would result in increased community employment opportunities for people with disabilities, it will be interesting to see what impact there is over time, if any, in regards to changes in program operations and increased movement of individuals into community employment.

Issue # 4: Loss or limitation of the employer-employee relationship and the right to wages for people with disabilities

Unlike the 14(c) sub-minimum wage provision, which required at least a minimal wage payment, the Policy Statement appears to completely free the service providers from any obligation to pay wages and blur the fundamental protections of an employer-employee relationship for many individuals, although stipends are permitted. There is the assumption that individuals with disabilities will continue to be paid a similar rate as they were under 14(c). However, they no longer have any legal right to such wages (minimal as they might be), and the payment of a stipend is completely at the discretion of the service provider. The irony is that people with disabilities are actually worse off in terms of their right to be paid for work than they were under 14(c). The service providers have also been freed from the various administrative burdens, including time study requirements, which are required under 14(c).

Issue # 5: Does the policy or practices resulting from it meet the USDOL test for “non-employee” status?

From a legalist standpoint, one of the fundamental questions is whether the ICA Substantive Policy Statement and the practices that result from the ICA’s guidelines truly conform to the parameters of non-employee status as required by FLSA. Examining the ICA Policy Statement itself, clearly efforts have been made to conform to USDOL requirements regarding non-employee trainee status, although the extended period of training of several years seems counter to what would be a typical training period for a paid job.

A larger issue is how this policy will be operationalized. As noted previously, there is a fundamental question regarding whether this policy is just a change in semantics or is truly requiring that sheltered workshops and similar programs conduct their operations in a different way. In examining the specifics of the FLSA’s six criteria for trainee status there are concerns whether programs will be able to meet these requirements. Based on observation in typical sheltered workshops, the requirement that training be similar to that given in a vocational school is a potential issue. More problematic are the requirements that the training be for the benefit of the trainee and that the employer derive no immediate advantage from the trainees’ activities. These requirements appear to be counter to the typical production requirements of a sheltered workshop. Sheltered workshop operators in Arizona in fact implied that they had concerns over whether operating within ICA Policy Statement guidelines will meet the test for classification of individuals as trainees (thus their push for liability protection). This is particularly a concern if their intent is to continue to operate production-based facilities as they always have instead of transforming their facilities into more training-oriented entities that fully conform to the six FLSA criteria. It will be interesting to see that if and when the operations of the sheltered workshops operating under the ICA Policy Statement are reviewed by the US Department of Labor, whether DOL finds that the operations are properly conforming to the requirements for classifying individuals as trainees. It appears at least questionable whether this Policy Statement and its implementation will hold up under DOL scrutiny without significant changes to traditional sheltered workshop operations.

Issue # 6: The Force of Public Opinion

Beyond the operational and legal questions, a lesson for other states regarding making changes in sub-minimum wage was the major public discussion and outcry that occurred over this issue. The issue received significant media coverage, with the views of those in favor of reinstating some form of the sub-minimum wage dominating this coverage. According to Peri Jude Radecic, Executive Director of the Arizona Center for Disability Law, the Arizona Association of Providers for People with Disabilities (AAPPD) was extremely effective in their public relations on this issue, creating a strong public perception that people with disabilities would have no place to go if sheltered workshops were forced to pay minimum wage, and that something had to be done. The Arizona Republic, the largest newspaper in the state, extensively covered the issue with over 30 mentions of the controversy from December 2006 to July 2007. The Republic also was an incredibly strong voice in favor of maintaining some form of sub-minimum wage, with at least 4 editorials on the issue. Although it is hard to gauge the specific impact of this media coverage, it certainly played a factor.

In retrospect, it appears that the unions that pushed Proposition 202 were naïve in assuming that the lack of sub-minimum wage exemption in the law would easily result in payment of minimum wage to workers with disabilities in sheltered workshops and elsewhere. Coordination with disability legal and advocacy groups may have helped to reduce the backlash that occurred and allowed them to be more pro-active in anticipating the response of the AAPPD. Such coordination may have also called more attention than the union wanted to the lack of a sub-minimum wage exemption, but the end result could not have been any worse from the perspective of those looking to eliminate the sub-minimum wage.

As states contemplate changes in sub-minimum wage they must be prepared for possible public backlash based on misperceptions of the capability of people with disabilities to work in the community, and old stereotypical views of people with disabilities as “charity cases”.

Issue # 7: Lack of Discussion Regarding Use of Production Rates as a Measure of Value

One of the fundamental questions in terms of the sub-minimum wage is whether paying individuals on the basis of their production rate even makes sense, particularly in today’s service-oriented economy. Relatively few positions in today’s economy are based on the concept of maintaining a consistent production rate. There is also wide variation within the workforce in terms of speed and efficiency, and wage rates are typically not linked to productivity. The public comments of those in favor of reinstating the sub-minimum wage, however, clearly indicated a view that some individuals with developmental disabilities are unable to provide sufficient value to employers, and that a wage rate based on production was the only way they could be employed. Over the course of the several months that the issue was debated there was virtually no public comment that could be found disputing the merits of paying individuals according to production rate, despite the realities of today’s economy, and no citation of examples of people with significant disabilities working in the community at minimum wage or higher who previously had been considered to have low production rates in sheltered work settings.

The effects of enforcing the minimum wage in sheltered workshops:

British Columbia and New Zealand

The experience of Arizona provides one example in the United States of the results of efforts to eliminate sub-minimum wage and the resultant need for policy interpretation, response and implementation on a very short timeframe. The experiences of British Columbia (BC) in the mid 1990s and New Zealand (NZ) in the early 2000s provide additional examples, both of which have occurred in a more deliberate fashion over a period of time. Through policy and legislative changes BC and NZ required sheltered workshops to pay people with disabilities at least a minimum wage. This section reviews the impetus that prompted such policy change, the new law, the effects of the policy change, and areas of concern.

British Columbia

BC is one of the six provinces of Canada and has a population of about 4.1 million people with density of 11.4 people per square mile. In BC there are slightly over 300,000 adults aged 19 to 64 who have been identified with disabilities (“Canada – British Columbia,” 2006).

Impetus for policy change. In the early 1990s advocacy groups raised complaints about the fact that people in sheltered workshops were involved in profitable working activities and yet they were paid less than the minimum wage. As a result, the Employment Standard Branch, an organ of the Ministry of Labor and Citizens’ Services, began a process of revision of the exemptions to the labor regulations. The Ministry of Children and Families and the Ministry of Health were also engaged to coordinate the policy change. The guiding principle of the Employment Standard Branch was the notion that a person who works must be paid, regardless of whether or not he or she has a disability (Personal communication, July 10, 2007).

As the Executive Director of a sheltered workshop explained, the complaints were justified by the fact that among the clients of sheltered workshops some people with disabilities may produce enough to earn at least or even above the minimum wage. However, because sheltered workshops did not have an obligation to pay minimum wages, the profit typically either was redistributed across all clients or it was used to cover the operational costs of the organization as a whole (Personal communication, July 11, 2007).

The impetus for changing the policy about minimum wages and sheltered workshops came also from recommendations issued by the report “Rights and Responsibilities in a Changing Workplace” in the mid ‘90s. The report was the product of appointing a commissioner to review the employment standards in British Columbia regarding the general labor market. Consultations obtained through public hearings that involved several hundred people, as well as comments or questions submitted by over 600 individuals and organizations, made the basis for this report’s conclusions (Thompson, 1994).

The law. In 1996 an amendment to the Employment Standard Act required sheltered workshops to pay at least the minimum wage and to comply with other labor regulations when

engaging people in an employee-employer type of activity. To assist determining when employee-employer relationships were in place, the Employment Standard Branch developed a matrix highlighting four categories of activities: Support, Preparation, Training, and Employment.

The “Support” and “Preparation” activities differed from the other two categories because they did not entail any expectations about quantity or quality of individuals’ performance as well as economic gain. Both categories looked at work activities as means for instruction as opposed to means for production. Some of the goals of both these categories of activities included relationship-building, exploring options, and building trust. The “Preparation” category, however, different from the “Support” category, entailed an expectation about participants’ attendance. In addition, it included life skills and pre-vocational skills training. All activities falling in these two categories were considered non-work activities and, therefore, compliance with minimum wage was not required.

The “Training” category was considered intermediate between “Preparation” and “Employment.” “Training,” different from “Preparation,” entailed a number of features typical of the “Employment” category and an expectation to result in actual employment. Sheltered workshops could engage people with disabilities in training activities for one year without any obligation to pay at least minimum wage. After one year plus two more years of exemptions, however, people engaged in the “Training” category were to be considered entitled to the protection of the labor laws, including minimum wage. Alternatively, they had to be engaged in non-work activities as described under the “Support” and “Preparation” categories.

The “Employment” category was defined by the existence of an employer-employee relationship between adults with disabilities and supervisors in the workshops. Typically, an employee-employer relationship was defined by the following general principles: 1) the power of the "employer" to select the "employee," 2) the payment of wages or other remuneration, 3) the right of the "employer" to control the method of doing the work, and 4) the right of the "employer" to supervise and dismiss the "employee" (Queensland Consulting Ltd., 2000). The Employment Standard Branch used the following criteria to define the “Employment” category: how an individual was selected for the program; how his/her activities were evaluated; what expectations were in place about hours of activity, types of activities, and attendance; what type of supervision was exercised; what rights of discipline applied; and how the assignment of work was determined (British Columbia Ministry of Labour and Citizens, (n.d.a); British Columbia Ministry of Skills Development and Labour, 2001). (Appendix A shows the complete matrix of key indicators developed to identify the categories of “Support,” “Preparation,” “Training,” and “Employment.”)

The amendment allowed three years of transition for sheltered workshops to adjust to the new policy. The transition was then further extended until March 2000 (Queensland Consulting Ltd., 2000). It is important to note that compliance with the new policy was complaint-driven. Moreover, an exemption to the minimum wage regulation applied to workers with or without disabilities if they did not engage in work before November 15, 2001 and they had 500 or less hours of work experiences even if not continuative or with the same employer (British Columbia Ministry of Labour and Citizens, n.d.b).

The effects. Unfortunately, there has not been any comprehensive evaluation of the effects of the policy change. The information described in this section is based on a partial evaluation carried out in 2000 by Queenswood Consulting Ltd. and personal communications with key informants.

Based on the information collected, the main effect of the policy change was that sheltered workshops tended to replace existing work activities with non-work activities that qualified as “Support” or “Preparation.” This was also the typical advice that the experts of Queenswood Consulting Ltd. (2000) gave to the sheltered workshops. Significantly less emphasis was placed on converting the sheltered workshops to organizations providing supported employment services.

Queenswood Consulting Ltd. (2000) reported on the changes that took place in 21 organizations based on data collected between December 1999 and April 2000. Of about 900 people with disabilities served in these organizations, 48% of the individuals were still engaged in traditional sheltered workshop activities, 30% of the individuals were engaged in non-work activities in sheltered workshops, 9% of the individuals were engaged in supported employment, 6% were involved in non-work activities in the community, 5% of the individuals left the organizations, and 2% were engaged in work-activities in sheltered workshops paid with at least minimum wage (Queenswood Consulting Ltd., 2000).

According to an informant, at the time of writing this report most of the 60 sheltered workshops affected by the policy change made the required changes. However, approximately 25 organizations still operate as traditional workshops. Although legal actions were initiated against some workshops, overall that was not perceived as an imminent risk by the majority of organizations (Personal communication, July 4, 2007).

A representative of an organization running services for adults with disabilities reported that out of 120 adults with disabilities who were attending a sheltered workshop before the policy change, about 40 individuals were placed in employment in the general labor market, about 60 individuals were attending non-work day activities in a facility-based program, and about 30 individuals were placed in non-work activities in the community. This organization still provides these three types of services. The informant reported that initially families opposed the transformation. However, after having seen the transformation of the services, families were satisfied. From a financial point of view, the conversion added costs mainly due to the fact that before the conversion the ratio of staff to individuals with disabilities was 1 to 10-15, whereas during the conversion process the ratio dropped to 1 to 3-4. The added costs, however, were compensated by both an increase in government funding for services and a temporary halt in taking new referrals that reduced the number served for a short time. The informant highlighted two recommendations that other organizations embarking on this type of transformation might want to consider. The first recommendation is not to rush into transitioning to the new organizational structure. This organization took three years to complete the conversion. The second recommendation is to develop educational classes for people with disabilities who are interested in pursuing integrated employment during the conversion process of the organization.

The purpose of running the classes is to make the transition from a facility-based to an integrated environment smoother (Personal communication, July 3, 2007).

A representative from another organization was less positive about the effects of the policy change. His main concern was that the change resulted in preventing sheltered workshops from doing any productive activities without offering meaningful alternatives, saying, "... For many participants, their day is now made up of visits to the library, walks on the beach, videos and jig saw puzzles..." This informant represents an organization serving over 60 adults with disabilities in a day program defined as "...a mix of production and recreation..." where participants are paid an "attendance fee" of 50 cents per hour. The organization also has provided supported employment services since 1968 to some of its clients.

Similarly, a third organization reported that, after the policy change, few of its 30 clients left the workshop for work in the community. In order to comply with the new regulations, the organization discontinued contracts with local businesses and developed non-work activities. Over the years this organization grew significantly as a provider of non-work activities with about 100 adults with disabilities attending four day centers at the time of this report. From a financial point of view, the organization did not suffer any significant consequences because the revenues of the contracts had not been used to pay the operations of disability-related services. According to the informant, other sheltered workshops that relied on their revenues to support the overall organizations' operations could not afford to make any changes, despite the risk of legal consequences. More recently, the organization started a co-operative involving 15 individuals with disabilities in community jobs classified as "Training" and, therefore, paid less than minimum wage. Moreover, the organization was planning on starting a new supported employment service. Four individuals had been placed in community paid jobs at the time of writing this report.

The representative from this organization reported that the policy change was a step in the right direction because it acknowledged the rights of those adults with disabilities in sheltered workshops who have high productivity compared to the average clients. However, this informant felt that the policy change did not address the needs of the majority of individuals with disabilities whose work skills are not sufficient for earning a minimum wage, but who enjoy being involved in productive work. Their main recommendation for other states that plan on embarking on a similar policy change is to develop a clear and transparent process for assessing individuals' performance and paying people based on their actual productivity (Personal communication, July 11, 2007).

Areas of concern. Overall, the main concern expressed by the informants was that the policy change in BC required that a person with a disability be either engaged in a fully productive work activity or not engaged in work at all. In their opinion, however, denying exposure to work activities to people who cannot make it to earn a minimum wage is limiting. For instance, a representative of the "Parent Support Group for Families of Mentally Handicapped Adult Society" made the following statement:

"...People ... were suddenly left without any viable 'work' options to replace an integral part of their daily routine. ...People....now

spend their days in recreational activities, such as, swimming, bowling, hiking, and aimlessly wandering in the malls...”

The informant described frustration as a parent of an adult with autism “...Now, his days are spent in a ‘day program’ without any sense of purpose or goals. Without a structured daily routine of work and play, he is gradually retreating into his own world. It is both frustrating and heartbreaking for me to think of his hard-learned work skills being eroded...” (Personal communication, July 5, 2007)

This organization was one of the 6 authors of a document sent to the Ministry of Skills Development and Labour and expressing concerns about the policy change (British Columbia Ministry of Skills Development and Labour, 2001).

Other informants expressed concern because the policy change missed a great opportunity for really improving the life of people with disabilities and their families in BC. According to these observers, most sheltered workshops reorganized their structures to comply with the policy change by replacing productive work with recreational activities as opposed to pursuing integrated employment initiatives.

“...For the most part their response has been ‘how can we get around the changes’ rather than looking at opportunities to develop strategies for both labour market integration and transition...” (Personal communication, June 19, 2007)

Another concern expressed by an informant was that a considerable amount of funding that was intended to support initiatives to promote integrated employment was spent by the organizations to operate their day services. The data available through the Queenswood report and the comments from informants showed that introducing the minimum wage in sheltered workshops in British Columbia did not result in an increased participation of people with disabilities in employment in the general market, nor it resulted in better earnings for the majority of people attending sheltered workshops. Instead, the major outcome of the policy change was to eliminate most work activities from the range of activities performed in sheltered workshops.

New Zealand

New Zealand has a population of about 4.1 million people and a density of 39 people per square mile. Estimates indicate that there are about 43 providers of sheltered workshops serving over 3,700 adults with disabilities. The pay in sheltered workshops is approximately 17 to 50 NZ dollars (\$13 to \$39 US currency) per week (New Zealand Parliament, 2004; New Zealand CBC Business Cabinet Committee, 2006).

Impetus for policy change. The approach of the NZ government in managing services for people with disabilities took a turn in the mid 1970s in favor of community oriented types of services. The new policies were the result of applying the social model of disability. The social model of disability is based on the notion that the environment, not the person, is the source of

disability for people who experience impairments. Therefore, changes in the environment are key components for enhancing the potential for integration of people with disabilities. It was within this cultural context that the NZ government carried out a formal review of the vocational services for people with disabilities and released the report “Pathways to Inclusion” (New Zealand Department of Labour, 2001). The “Pathways to Inclusion” report promoted a change of course for vocational services and, in specific, recommended the repeal of the Disabled Persons Employment Promotion Act of 1960, including the provision that allowed sheltered workshops to pay sub-minimum wages (New Zealand Department of Labour, 2001; New Zealand Ministry of Disability Issues, 2002). The New Zealand Public Health and Disability Act of 2000 mandated that the Minister for Disability Issues prepare a Disability Strategy with an obligation to annually report to the parliament about the progress. The final goal of the policy was to make sure that people with disabilities enjoyed the same rights of the citizens without disabilities (New Zealand Office for Disability Issues, 2001), including being “...paid according to the work they do rather than the place where they work” (Dyson, 2005; New Zealand Parliament, 2004, p. 1). The New Zealand Disability Strategy was launched in April 2001 with the goal of redesigning the system of disability services (New Zealand Department of Labor, 2001). The strategy was developed with the support from advocacy groups, including the Society for the Intellectually Handicapped (Collins, 2005) and contributions obtained through over 60 meetings held across the country and over 700 submissions of comments or questions (New Zealand Office for Disability Issues, 2001).

The law. The Disabled Persons Employment Promotion (Repeal and Related Matters) Bill (DPEP) in 2000 repealed all the regulations that exempted any organizations, including sheltered workshops, from complying with the general labor laws when engaging people with disabilities in work activities. According to the new law, therefore, sheltered workshops had to pay adults with disabilities at least the minimum wage, which, since April 1st 2007, was 11.25 NZD (US\$8.81). Alternatively, sheltered workshops need to demonstrate that an employment relationship is not in place with the people they serve. The new regulation allowed a period for sheltered workshops to adjust to the new requirements. This adjustment period was initially scheduled to expire on June 30, 2007 and then was extended to November 30, 2007 (New Zealand Parliament, 2004; New Zealand Ministry of Disability Issues, 2002).

According to the new regulations, labor inspectors have the power to lower the minimum wage on an individual basis. This may occur on a case-by-case basis after concluding that an individual with disability does not meet the work requirements even if accommodations are provided. The lower minimum wage and its period of applicability are stated in a work permit. Based on the evolving circumstances, however, labor inspectors can change the prescriptions stated on the work permit (New Zealand Department of Labor, 2007; New Zealand Legislature, 2007).

The effects. Not much information is available about the effects of the DPEP Act Repeal Bill. As the representative of an advocacy group reported, “...there hasn't been any information put together yet about the impacts of the repeal as it is so new...” (Personal communication, July 9, 2007). Although there are concerns that some people with disabilities might lose their jobs, it is not clear whether or not the policy change will in fact force sheltered workshops to close. This is because sheltered workshops have the option of applying for individual exemptions for each one

of their clients who, after assessment, show that their productivity level is not comparable to productivity in the general market. For instance Workforce Auckland, the biggest sheltered workshop in NZ with a surplus of over 600,000 NZDs in 2006 (about US\$468,000) and almost 200 individuals placed in the workshops, has no plans to close or even reduce its activities (“Workforce Auckland,” 2006). Workforce Auckland has developed a Wage Assessment Tool and is in the process of evaluating all its clients. Based on the results of the assessment, Workforce Auckland will apply for exemptions in the cases of individuals who, based on their productivity, are eligible to be paid less than minimum wage. The organization will keep paying a flat 50 NZD (\$39) per week to the individuals who do not show meaningful productivity and, moreover, it will provide tax assistance to individuals whose income becomes subject to taxation (“Workforce Auckland,” 2006).

Areas of concern. Overall, concerns about the policy change in NZ revolve around fear that the new system will not work and people with disabilities and their families will experience reduction of services. For instance, some families fear that higher wages might be insufficient for allowing independent living, yet the new income might trigger a loss of disability benefits and, ultimately, an increased financial burden on families. Moreover, some families fear that their sons and daughters will have no place to go if they cannot earn the minimum wage or, alternatively, they will be involved in non-work activities which are considered less appealing. Also, some families feel that the type of work performed at the sheltered workshops was sufficient for providing a meaningful life to their sons and daughters with disabilities (Collins, 2005; Miller, 2007). In contrast, according to Newman (2005) and Miller (2007), integrated employment has been a failure for a number of people with disabilities because they could not cope with the increased pressure for results. Also, some families are concerned about the possible increased psychological pressure on their sons or daughters from the routine assessments performed by labor inspectors who know little about the day-to-day lives of people with disabilities (Collins, 2005; Newman, 2007).

Organizations running sheltered workshops opposed the policy change because, among other reasons, paying higher wages would erode their competitiveness against businesses that operate in countries where the cost of labor is lower (Collins, 2005; Newman, 2007). Finally, some of the critics focus on the challenges for the system to function given that the number and resources of labor inspectors may not be enough to routinely assess all individuals with disabilities who attend sheltered workshops.

Although there are mixed reactions to the policy change, “People First New Zealand Inc.,” an advocacy organization, reports that people with disabilities have been involved in the debate and that it is important to support people with disabilities “...to come to understand their rights in negotiating work agreements and contracts...” (Personal communication, July 9, 2007).

The policy change in New Zealand is taking place while writing this report. No data, therefore, is available for drawing conclusions about the effects of introducing the minimum wage in sheltered workshops.

State Initiatives to Limit Funding for Services that Support Sub-Minimum Wage

Introduction

Recent data from the Institute for Community Inclusion (n.d.) indicates that the majority of services provided by state agencies that support individuals with intellectual and developmental disabilities are facility-based (56.5%) and that the expansion of integrated employment has slowed. Nationally, states reported only about 19.5 % in integrated employment in FY 2004.

Although as a nation resources and priorities have not realigned to expand employment, individual states have progressed. In FY 2004, states such as Vermont, Washington, and New Hampshire reported that at least 45% of individuals receive day and employment services in integrated employment. Washington and New Hampshire reported only 14% and 12.5% respectively in facility-based work, and Vermont no longer offers facility-based work as a service option.

This report provides detailed case examples from VT, NH, and WA that illustrate their commitment to the expansion of community employment. Tennessee, a state that has more recently begun efforts to increase employment is also included to profile a system that is at a preliminary stage but continues to gain momentum.

Example #1: Vermont

Regulations in Vermont gradually restricted and eventually prohibited the use of state funds for sheltered workshops or enclaves. Concurrent with a change in funding regulations, the state worked with providers to convert the sheltered workshops in Vermont. The elimination of congregate and group employment happened over time as part of the agency's priority-setting process. Developed every three years and updated annually, Vermont's state *System of Care* plan outlined the priorities of the state Division of Disability and Aging Services (DDAS). Because DDAS had a clear commitment to individualizing supports, the goal was to convert to a system that would not allocate resources to congregate settings. The 1999 plan stated that DDAS funds could not be used to increase the capacity of sheltered workshops (or congregate residential settings). The 2002 plan went a step further by stating that state funds could not be used to increase the capacity of group employment settings such as enclaves or work crews. These initial steps stopped the growth in sheltered workshop placements.

DDAS, the Division of Vocational Rehabilitation, the University of Vermont and provider management worked successfully together to convert workshops to individualized supports. Between 1987 and 2004, DDAS and VR collaborated with four providers to close down their workshops and move people into community supports, providing both technical support and extra funding. An important part of the conversion process was the change in funding rates from group to individual supports. Individualized budgeting expanded, and many whose budgets were previously based on a group rate needed to be increased to allow 1:1 individual supports. A combination of individualized funding from Vermont's DDAS (under the Medicaid Home and Community-Based Services waiver) and funding for ongoing services from Division of

Vocational Rehabilitation (supported employment funding) helped create individualized supports for people leaving the workshop.

Various stakeholders were involved in the conversion process. One provider organization held ongoing parent and family meetings and "family forums." These meetings provided an important opportunity for family members to raise concerns and influence the process. Moreover, DDAS worked with providers to convert all remaining workshops before actually setting a policy directive that funding could no longer be used for congregate settings. By doing this, the state avoided "pulling the rug out" from under providers by eliminating congregate funding all at once.

Once all existing sheltered workshops had been successfully closed in 2005, the *System of Care* plan stated that DDAS funds could not be used to fund sheltered workshops at all. Currently there are no state-funded sheltered workshops in Vermont. Supports are tailored to the individual. Most individuals receive 1:1 day supports for employment and/or other day activities, although the number of hours of support an individual receives per week varies widely. In the "wrap-around" model, instead of spending a full week in a sheltered workshop, an individual may receive 10 hours of individualized day supports, and the residential provider would receive additional funds for the provision of community-based day supports (Sulewski, 2006). As individuals moved out of sheltered workshops, there has been an increase in the number of people who are in community based non-work activities (volunteer work, recreation, going to appointments, running errands, and visiting family and friends; Institute for Community Inclusion, n.d.).

Table 1: Vermont service trends

Year	Total served	Total IE	% IE	Total CBNW	% CBNW	Total FBW	%FBW
FY 1999	1663	577	34.5%	1048	63%	38	2.5%
FY 2001	1831	723	39.5%	1081	59%	27	1.5%
FY 2004	2007	998	50%	1313	65.5%	0	0%

Table Notes:

Data provided from the ICI National Survey of State MRDD Agencies as reported on www.StateData.info

IE: Integrated Employment; CBNW: Community-based non-work; FBW: Facility-based work

Total served was reported by states separately from the total in specific services. The individual services (IE, CBNW, and FBW) may not add up to the total served both because some services have not been included in this table and because a state may report an individual in more than one service.

Available data suggest that the impact of these changes has not had a dramatic impact on overall spending for community services in Vermont. Data on total spending for MRDD services grew by 55% between 1992 and 2002 in the US, while the total cost of MRDD services in Vermont grew by 59% for the same period (Rizzolo, Hemp, Braddock & Pomeranz-Essley, 2004). A review of data collected from state MRDD agencies for the Institute for Community Inclusion's 2004 survey of MRDD agency day and employment services suggests that the average cost of employment and day services is similar to that of other states. In 2004 the mean cost per person across all employment and day services was \$10,332 in Vermont compared to

\$9,946 across all reporting states. The mean cost for integrated employment was \$6,053/person in Vermont compared to \$6535 across all reporting states.

Example #2: New Hampshire

Between 1988 and 2001, New Hampshire's Division of Developmental Services transformed the state's day and employment services from a facility-based model, with 61% of individuals supported in sheltered workshops or facility-based day habilitation programs, to an inclusion model that supports 94% of its individuals in the community. The state has significantly limited funding for facility-based services, including sheltered employment. This change was gradual and came about as services became more consumer-directed. One provider talked about how families and individuals felt as they transitioned from spending time in the workshop to looking for a job in the community. She said, "With the closure of the workshop [the time] until somebody found a job might have been quite a while. [For] some people it was a long time and that was difficult for some families. That was difficult for us but we believed in what we were doing." The agency helped families and individuals understand that becoming connected to the community could only be done over time.

The state's values and philosophies have provided the direction in promoting community employment. Driven by the Laconia State School class action lawsuit, the state invested heavily in values-based training as the transformation to a community-based service system began. This has remained the primary focus of state level training initiatives, reflecting a belief that the primary goal is a quality life and full participation in the community. Consistent with the state's political philosophy, New Hampshire has emphasized local control and opportunity for innovation in the design of its service system. DD services are managed by 12 area agencies that are independent nonprofit corporations. Area agencies and local providers are important sources of creativity and commitment to integrated employment. The state encourages these ideals, but assumes that services are best organized at the local level.

New Hampshire's focus on flexibility is reflected in a strong emphasis on self-determination and individual control over financial resources. Beginning with early demonstration activity developed at the area agency level and funded by the Robert Wood Johnson Foundation, New Hampshire has invested heavily in supporting self-determination including implementation of self-directed funding models. Flexible implementation of funding nurtures innovation at the individual level. Despite implementation challenges, the Medicaid HCBS Waiver has been used to foster considerable flexibility in the design and implementation of services.

Person-to-person quality improvement has made a difference in individual outcomes. In the mid 1990s New Hampshire shifted from a formal program review structure for quality assurance to a more community-based approach. Their Quality Assurance office was disbanded to shift the investment of state program specialist time to more informal program and individual contact. Six program specialists spend most of their time in the field working with local providers to facilitate change.

In addition, in the late 1990s the state hired the director of a small innovative employment provider for targeted technical assistance to expand employment. He provided hands-on support over an extended period of time to encourage provider capacity development. One provider with

whom he worked described the experience of finding “one job at a time, that’s it. And we discontinued one contract work site at a time and then we just made do.” This was a challenge for some of the individuals working in the sheltered workshop. This provider was very honest in discussing the barriers and went on to say:

Are they excited about it, [initially] no. Do they get excited, yes. We see the transformation very quickly, which is interesting. We take them out of a contracted work site... and we kind of talk them into getting this job and getting promoted and they are ready to be out in the community without staff and they look at you like, ‘really, do you really think so?’ And they take a job and then we transition them and a month later they are running in here saying I don’t know if I like that kind of job. I think I would like a different kind of job when I am ready for a job next time. And we look at them like, ‘Wow’” All of a sudden they have voiced their independence, they are feeling like we are giving them choices and if they can comfortably think that yah I would like to change, I would like to try that. And they never had that experience in contracted work sites, we never asked. For years we never asked.

While New Hampshire has not emphasized specific goals on a statewide or provider contract level, providers describe the employment outcomes data collection system as an important factor in the state's focus. The state collects outcome data every six months from providers. There are regular conversations about employment outcomes using these data at both a statewide and local level. The broad focus on community integration is reflected in the growth between 1999 and 2004 in community-based non-work services at the expense of continued growth in integrated employment.

Table 2: New Hampshire service trends

Year	Total served	Total IE	% IE	Total CBNW	% CBNW	Total FBW	%FBW
FY 1999	1816	900	49.5%	558	31%	104	6%
FY 2001	1870	1009	54%	861	46%	120	6.5%
FY 2004	2100	947	45%	1036	49.5%	117	12.5%

See explanatory notes at Table 1

Example #3: Washington

Stakeholders attribute the roots of the state's focus on employment to values-based training based on the Program Analysis of Social Services (PASS 3) model that began in the late 1970s. Widely attended over several years, many of today's key players in state and county services participated as leaders in the PASS training. This period produced the first edition of the County Guidelines, a document that guides contracting with counties and service providers. The clear emphasis on employment established in the guidelines has been nurtured by a system of management that allows a clear focus on employment at the county level.

A long-standing network of stakeholders in state and county government, providers, and the advocacy community grew out of the early values-based training and development of the county guidelines. These stakeholders have continued to share information and collaborate, and innovations have spread rapidly through the state. The state was an early laboratory for innovation in employment opportunities. Strong linkages with researchers at the University of Oregon and the University of Washington provided a platform for developing alternative models for employment support.

Day supports are managed at the county level, while case management and living supports are managed at the state level. This has helped County Coordinators to focus their efforts on supporting local, community-based employment opportunities. Some counties have explicit goals to reduce or eliminate sheltered employment within their service areas. This county structure has also provided a source of innovation. County property tax dollars, representing a small percent of the county DDD office budget, provide a flexible resource that counties have used for demonstration projects and technical assistance activities. One successful initiative that has spread across the state is a robust program of developing jobs for supported employees in county, state and city government.

In addition to the early investment in values training, the state has maintained a strong investment in employment-related training and technical assistance. The state contracts with two entities to provide and broker training activities, and maintains active relationships with a wide variety of external consultants. For many years the state has hosted the well-known Ellensburg conference as a chance for all levels of staff, from front-line day and employment staff to agency administrators, to learn about innovations in the field. Collectively these activities provide ongoing opportunities for networking, debate, and sharing innovations.

The state has recently issued a new policy that went into full effect on July 1, 2006. This policy “designates employment supports as the primary method of furnishing state-financed day services to adult participants.” The policy further states that: “[s]ervices for persons under the age of 62 that do not emphasize the pursuit or maintenance of employment in integrated settings can be authorized only by exception to policy” (WA DSHS, DDD, “County Services for Working Age Adults” Policy 4.11). Initially adopted in 2004, this policy does not eliminate sheltered employment or community access services; rather, it focuses supports towards gainful employment.

Although full implementation is recent, county and state level staff are already beginning to see the impact of the policy. She noted that, increasingly, families and self-advocates have greater expectations about work. Provider capacity is improving, as is partnership with Vocational Rehabilitation and the education system. Moreover, many providers are developing improved strategies for working with individuals with the most significant disabilities.

Preliminary state-level data demonstrates progress. There has been some movement of individuals from community access (non-work) supports to community employment. In March of 2004, 1817 individuals were in community access supports, and in 2007, this number decreased to 321. During that same time period, the number of people in individualized

employment increased from 2992 to 3410. The largest increase can be observed in the number of people “on the path to employment” which grew from 840 to 2650.

Table 3: Washington service trends

Year	Total served	Total IE	% IE	Total CBNW	% CBNW	Total FBW	%FBW
FY 99	6937	4015	58%	1945	28%	1638	23.5%
FY 01	7319	4079	56%	2306	31.5%	1408	19%
FY 04	8043	3684	46%	2381	30%	1142	14%

See explanatory notes at Table 1

Example 4: Tennessee

Tennessee is currently making strides in reducing the number of individuals in sheltered employment and increasing its capacity for support employment services. The Tennessee Division of Mental Retardation Services (DMRS) implemented the *Employment First* initiative in 2002. The goal of *Employment First* is to make employment the first day service option for adults receiving supports funded by DMRS, Medicaid, or the state.

The policy was a collaborative initiative that grew out of the work of several advocacy groups, including the Tennessee Council on Developmental Disabilities (DD Council) and the Arc of Tennessee as well as stakeholders in the state's settlement of several federal lawsuits. The Arc and DD Council developed and submitted separate position papers to DMRS to make employment the preferred day service option. Additionally, the DD Council offered a grant to DMRS challenging the agency to increase integrated employment outcomes across the state. *Employment First* defines employment as a job in an integrated community setting that provided the opportunity to earn competitive wages and benefits equal to the job's responsibilities, and that encouraged a person to work to their maximum potential. The initiative assumed that both formal job supports (employment provider staff, technology, etc.) and natural supports (co-workers, friends, family, etc.) should be available on an ongoing basis to meet individual support needs, and that all jobs should be developed as part of a larger career plan. As part of the initiative, the state requires periodic community-based work assessments at least every three years for all individuals served by DMRS who do not work in the community.

To support the policy, DMRS reevaluated the rate paid to providers for day services and moved from an hourly rate to a daily rate for all day services. The hourly rate was found to discourage providers from expanding employment services because it did not allow people to easily transition between sheltered and integrated employment, or between short- and long-term employment supports. Additionally, to encourage community rehabilitation providers to expand

integrated employment activities, DMRS established a higher rate of payment for integrated employment than for other day services.

The state has developed benchmark goals to track its progress. Providers report data on the number of people in integrated employment, hours worked, wages earned per hour, and job title. Since 2002, the number of adults in day services employed in competitive jobs in the community has increased by nearly forty percent.

Table 4: Tennessee service trends

Year	Total served	Total IE	% IE	Total CBNW	% CBNW	Total FBW	%FBW
FY 99	6115	735	12%	910	14%	4468	73%
FY 01	5981	859	14.4%	1434	24%	*	*
FY 04	6102	1457	24%	*	*	*	*

* Data not provided by state. In 2001 TN reported that 4273 individuals were in facility based nonwork services.

See explanatory notes at Table 1

Conclusion

The experiences of Arizona, British Columbia and New Zealand provide some guidance for states considering changes in sub-minimum wage policy. These three examples of policy change were driven by different priorities and precipitated a wide range of compromises and unanticipated outcomes.

Policy change in Arizona, for example, was not implemented as part of a planned process, and implementation has been largely a crisis response to a sudden and unexpected policy change. As a result, a compromise policy position was adopted that provides for a lengthy period of training that could be used to support sub-minimum wage employment for many years as long as the focus of the training program is modified. In addition, the Industrial Commission of Arizona's substantive policy statement confuses rather than clarifies the status of an employee by defining a "vocational training program" and "service recipient program," neither of which require wage payment. In some ways what was initially seen as an enhancement of the rights of people with disabilities, the elimination of the sub-minimum wage, has actually resulted in a loss of rights. While there remains the possibility that the changes that Proposition 202 has fostered will increase attention to expanding integrated and full wage employment opportunities, it is unclear if this will occur. Given how recently the various activities in Arizona have occurred (all within the last year), it may be some time before the full implications of these various policy changes can be evaluated.

The results of the policy change in British Columbia are even more mixed. The Employment Standards Branch drove the actual change in policy with little connection to disability policy. Grounded in a clear general labor market based value for a full and fair wage, there is little evidence of coordination with disability policy or funding. As a result, the limited evidence available suggests that providers responded in a large part by either moving individuals to non-work services or continuing to pay sub-minimum wage at the risk of legal action. The actual policy established a confusing list of four activities that include support, preparation, training, and employment. Only employment falls under the minimum wage requirement, despite the fact that work activities may occur under any of the categories. Organizations varied in their response to the policy change, and no data are available on the overall impact of the policy change on access to integrated employment in the province. It is also clear that the cost of funding services increased for many providers as individuals moved from the workshop to community-based non-work services that were provided at higher consumer-to-staff ratios.

Finally, in New Zealand the policy change is just being implemented, but the new legislation does still allow for sub-minimum wage payment on an individual case review basis. The law does establish an external review process for these decisions, but at least one organization, Workforce Auckland, anticipates limited change.

In all three cases, changes in policy have lead to compromise and complex definitions that make it difficult to clearly identify when an individual is in an employment relationship with an employer. In Arizona and British Columbia policy guidance has defined trainee and service delivery relationships that do not fall under the guidelines and protections of an employer-employee relationship. The underlying although not necessarily overtly stated rationale for such

efforts is to maintain the status quo as much as possible in terms of service provision, rather than examining fundamental questions in terms of determining how individuals with significant disabilities can economically contribute to society in ways that are similar to the rest of the population.

Washington, Vermont, New Hampshire and Tennessee have done much work to prioritize integrated employment over sheltered work or other segregated day supports for individuals with intellectual and developmental disabilities. This report highlighted a series of concrete strategies that state systems have used to increase the commitment of stakeholders to expanding work. Strategies proved to be the most successful when they were embedded within the context of a solid values base, a network of dedicated stakeholders, and clarity about the system's goal. Washington's working age adult policy, for example, is the outcome of a long-term strategy that includes policy change, a significant investment in training and technical assistance, attention to funding and contracting, outreach to individuals and families while they are still in school, and a strong focus on local innovation. Similarly, Vermont gradually reduced the role of sheltered workshops while working collaboratively with vocational rehabilitation and providers to develop capacity for alternative service models. The experiences of these four states suggest the importance of tying any sub-minimum wage policy change closely to disability policy and strategy so that organizations receive support to reframe their focus and to ensure that services are not simply transferred from sheltered employment to non-work services.

From these state experiences several general conclusions can be drawn that provide insight into the process of restricting access to sub-minimum wage employment:

- Clearly stated values and philosophies provide the direction in promoting community employment.
- Benchmark goals are critical to track progress towards the reduction of sub-minimum wage and the expansion of community employment.
- Mechanisms for funding day and employment supports must reflect the commitment of the state to increase opportunities for working in the community.
- Planning for the reduction of sub-minimum wage has to occur at the state, regional and local levels, and must involve multiple stakeholders, including individuals, families, and providers.
- In some states elimination of sheltered employment has led to an increase in non-work services along with the increase in integrated employment. This has occurred where states place the priority on integrated over non-integrated settings. More research is needed to better understand the personal impact of expanding integrated employment while reducing or eliminating access to sheltered employment for individuals who do not initially enter an integrated job.
- Change is a gradual process that requires substantive investment in training and technical support. In Vermont the change relied on a strong working partnership with vocational rehabilitation and individual budget allocations were increased to support the changeover. In Washington the investment in integrated employment took place over time, and was facilitated by a group of dedicated key stakeholders who are heavily invested in work as a priority goal. New Hampshire's progress was said to happen "one job at a time."

- There is no evidence unusual growth in the cost of services concurrent with the work of these states. Data was shared on the cost of services in Vermont compared to the nation as a whole, but it should be cautioned that these data were not collected for the purpose of reporting on the per person cost of services. In addition, Vermont's individually directed system of funding may not provide as many hours of day support as other state approaches to services, emphasizing quality over quantity.

While states need to consider changes in sub-minimum wage policy within a broader context of other systems change elements, it is also clear that states can use sub-minimum wage policy as part of such efforts, and can send a clear message regarding how sub-minimum wage is to be utilized. Given the significant shortcomings of the US Department of Labor in monitoring sub-minimum wage certificates, and ongoing issues regarding compliance of service providers, as discussed, states may wish to also consider strengthening their policies regarding protections for people with disabilities and strategies for outreach that clearly educate individuals about their rights and the responsibilities of service providers in implementing sub-minimum wage law. In addition, given the shortcomings of the U.S. Department of Labor in this regard, states may wish to consider enhancing their roles in terms of monitoring the use of the sub-minimum wage.

Whether or not a state implements policy changes related to sub-minimum wage, it is also clear that the changing economy is making it difficult for many organizations to sustain a viable business model. As entry-level jobs based in the U.S. shift from manufacturing to service industries it will become increasingly difficult to compete for traditional workshop jobs such as assembly and packaging. It is striking that the research on changes in the general minimum wage was based largely in service sectors such as the restaurant industry. Restaurants compete for personnel only in the local labor market (with the exception of seasonal businesses that have increasingly reached overseas for temporary help), which limits to their ability to trim their labor force and still deliver the product, and have the ability to rapidly adjust prices to account for increases in labor costs. The research on the impact of changes in the general minimum wage makes it clear that the relationship to the labor market is complex.

Setting a policy objective. Establishing a policy objective to increase wages and employment options for individuals who are currently working in sheltered workshops must happen within the context of a larger policy initiative. Simply changing policy regarding sub-minimum wage as the primary mechanism for systems change will result in a multitude of unintended consequences, with service providers in particular focusing on maintaining the status quo rather than seeing this as an opportunity for change. To date, initiatives based in the funding and disability support systems of a state have been the most effective in supporting large-scale change. Currently the implementation of policy in New Zealand provides the best laboratory for observing the impact of change in sub-minimum wage policy in the context of a coordinated commitment between disability and labor policy. In the meantime, changes in sub-minimum wage policy do represent a largely untapped opportunity as one part of a larger initiative to expand participation in integrated employment.

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Appendix A

Key Indicators for Identifying Employment Activities in British Columbia

The following identifies, through the use of a specific work activity, the conditions that must exist in order that an appropriate classification can be made. The specific work activity is painting boards.

Support	Preparation	Training	Employment
An individual is allowed to attend a site that provides the boards, brushes and paint. While general support and safety is provided, there is neither instruction or expectation for painting or work related behaviors.	An individual is expected to attend a site that provides the boards, brushes and paint. The painting has neither quantity or quality expectation and is used as a vehicle to facilitate instruction in work related behaviors with specific outcomes expected.	An individual is expected to attend a site that provides the boards, brushes and paint. Instruction is provided in the skills related to painting and there is an expectation of improved productivity.	An individual is expected to attend a site that provides the boards, brushes and paint. The individual is expected to produce a product within a determined quality and quantity level.
Maintenance of existing skill and/or related behavior level with/out work activity	Work related behavior development is the primary focus with/out work activity	Employment skill development is primary focus with/out work activity	Employer expected skill and related behavior performance with work activity
May occur on or off industrial site	May occur on or off industrial site	May occur on or off industrial site	Occurs on industrial site
No economic gain expected	No economic gain expected	No economic gain expected	Economic gain expected
Opportunity to participate is provided	Expectation to attend set hours	Expectation to attend set hours	Expectation to attend set hours
No product performance expectations	No product performance expectations	Product performance expectations	Product performance expectations
	Life Skills		

<----- REHABILITATION ----->

<----- EMPLOYMENT ----->
>

GOALS:

Support	Preparation	Training	Employment
<ul style="list-style-type: none"> • Support relationship building • explore options • build trust 	<ul style="list-style-type: none"> • support • create opportunities to explore options and develop goals • life skills training • pre-vocational skills • build confidence 	<ul style="list-style-type: none"> • set goals • develop goal plan • implement goal plan • work experience • educational/skills training • work habit/ethic • work skills • develop skills 	<ul style="list-style-type: none"> • choose, get, keep job of choice • part or full-time employment • employment
<----- REHABILITATION ----->			
		<----- EMPLOYMENT ----->	

ENVIRONMENT:

Support	Preparation	Training	Employment
<ul style="list-style-type: none"> • safe, supportive • non-demanding • no time limits 	<ul style="list-style-type: none"> • therapeutic • some expectations for performance • "work" activity secondary to therapeutic goals of 	<ul style="list-style-type: none"> • supportive skill development • expectations for review and completion • supported work • time-limited 	<ul style="list-style-type: none"> • ongoing support as needed • supported employment

	<ul style="list-style-type: none"> individual • some time limits 		
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REMUNERATION:

Support	Preparation	Training	Employment
	<ul style="list-style-type: none"> • incentive allowance 	<ul style="list-style-type: none"> • training allowance 	<ul style="list-style-type: none"> • wage

<----- REHABILITATION ----->

<----- EMPLOYMENT ----->

PROGRAM STANDARDS SET BY:

Support	Preparation	Training	Employment
Ministry of Health, Ministry of Social Services, Ministry of Education, Skills and Training	Ministry of Health, Ministry of Social Services, Ministry of Education, Skills and Training	Ministry of Health, Ministry of Social Services, Ministry of Education, Skills and Training	Ministry of Labour and Citizens' Services

ACT APPLIES:

NO	NO	YES -- exemption	YES
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<----- REHABILITATION ----->

<----- EMPLOYMENT ----->

Source: Interpretation Guidelines Manual British Columbia Employment Standards Act and Regulations, Part 7: Exclusions (BC, n.d.)

Appendix B

Additional resources

Effects of increasing the minimum wage

- The Employment Policies Institute maintains that increases of the minimum wage do not lead to reducing poverty: <http://www.epionline.org/index.cfm>
- The Economic Policy Institute maintains that increasing of the minimum wage lead to greater income of low income families: http://www.epi.org/content.cfm/issueguides_minwage
- Minimum Wage Laws in the States: <http://www.dol.gov/esa/minwage/america.htm>
- U.S. Department of Labor on the minimum wage: <http://www.dol.gov/dol/topic/wages/minimumwage.htm>
- The minimum wage issues described by wikipedia: http://en.wikipedia.org/wiki/Minimum_wage

About sub-minimum wage

- Federal Regulations on Employment of Workers with Disabilities Under Special Certificates: www.dol.gov/dol/allcfr/ESA/Title_29/Part_525/toc.htm
- Special Minimum Wage Statute: US Code: Title 29, Ch. 8, 214: Employment under special certificates: http://www4.law.cornell.edu/uscode/search/display.html?terms=special%20minimum%20wage&url=/uscode/html/uscode29/usc_sec_29_00000214----000-.html
- U.S. Department of Labor - OASP/Office of Compliance Assistance Policy - Wages and Hours Worked: Sub-minimum Wage: www.dol.gov/compliance/topics/wages-sub-minimum-wage.htm

British Columbia

- Laws and legislation: <http://www.llbc.leg.bc.ca/weblinks/legal.htm>
- Community Living BC (CLBC) delivers support and services to people with developmental disabilities, children with special needs and their families: <http://www.communitylivingbc.ca/>
- The Employment Standards Branch administers the Employment Standards Act and Regulation, which set minimum standards of wages and working conditions in most workplaces: <http://www.labour.gov.bc.ca/esb/welcome.htm>
- Information for Persons with Disabilities: <http://www.eia.gov.bc.ca/pwd.htm>
- Opportunities through Rehabilitation and Work Society (ORW) is a non-profit, independently funded resource base, serving organizations, business and government involved in the employment of persons with disabilities: <http://www.orw.ca/findex.html>
- Parents Support Group for Families of Mentally Handicapped Adults: <http://www.members.shaw.ca/parentsupport/index.html>

- The BC Association for Community Living is a provincial association dedicated to promoting the participation of people with developmental disabilities in all aspects community life: <http://www.bcacl.org/index.cfm?act=main&call=8db60b7c>

New Zealand

- The Office for Disability Issues provides support to the Minister for Disability Issues and is responsible for ensuring that the government keeps faith with the New Zealand Disability Strategy, by promoting the participation and inclusion of disabled people in the society: <http://www.odi.govt.nz/>
- This is one of the largest sheltered workshops in NZ. The website shows how this workshops is responding to the policy change: <http://www.workforceindustries.org.nz/document-view.php?id=8>
- The Intellectually Handicapped Children's Society (IHC) is one of the largest providers of services and advocacy to people with intellectual disabilities in New Zealand. IHC supports the policy change in NZ: <http://www.ihc.org.nz/>