

Waterman, Robert - WHD

From: Munson, Emily A <EMunson1@ipas.IN.gov>
Sent: Monday, October 05, 2015 1:46 PM
To: WHDPRAComments
Cc: Keyes, Melissa
Subject: Control Number 1235-0001
Attachments: 14c Certificate Proposed Rule Comments.pdf

To Whom It May Concern:

Please find attached comments from Indiana Protection & Advocacy Services regarding the Department of Labor's proposed rules for 14(c) certification.

Thank you,
Emily

Emily Munson | Staff Attorney | **Indiana Protection & Advocacy Services**
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October 5, 2015

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

SUBMITTED VIA EMAIL

Re: Control Number 1235-0001

To Whom It May Concern:

Indiana Protection & Advocacy Services (IPAS) is a federally-mandated, independent state agency that protects and advocates for the rights of people with disabilities in Indiana. Because 14(c) certificates enable employers to treat employees with disabilities disparately from employees without disabilities, IPAS is concerned about their continued issuance. Generally, IPAS wants to ensure that certificate holders do not violate the rights of employees with disabilities or expose these employees to unsafe working conditions. To that end, IPAS offers the following comments with regard to the proposed amendments to Form WH-226 and WH-226A.

Prevailing Wage Survey for Workers Paid Hourly Wages/Prevailing Wage Survey for Workers Paid on a Piece Rate Basis. The decision to require employers to disclose the basis for concluding that the experienced worker wage is not based on entry-level employment will provide greater transparency.

However, IPAS is concerned that the proposed Form offers employers the opportunity to check a box indicating the impracticality of conducting a prevailing wage survey. This could be an easy way for employers to circumvent their responsibility to determine the prevailing wage. Requiring employers to justify claims of impracticality, as well as mandating use of Bureau of Labor Statistics prevailing wage data if impracticality is claimed, would minimize the likelihood that employees with disabilities are being paid a wage below that intended by Congress.

Work Measurement/Time Study for Workers Paid Hourly Wage Rates. The Department of Labor (DOL) proposes requesting a work measurement or time study for only one currently employed worker with a disability paid an hourly subminimum wage. Having DOL review work measurement and time studies for

all subminimum hourly wage employees rather than just one would provide greater protections for workers with disabilities receiving subminimum wage. Even if DOL used its discretion in actually reviewing submitted information, employers would still be incentivized to make sure all work measurement and time studies that are submitted are accurate.

Guardianship. The proposed Form would require employers to disclose the number of employees for whom it serves as the representative payee of Social Security benefits, as well as indicate whether employee wages are reduced for the cost of board, lodging, and transportation. However, adding an additional question that would require employers to disclose the number of employees for which it, or its employees, serve as a guardian would reveal important conflict of interest information.

Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Subminimum Wages. IPAS is encouraged to see the additional data in the proposed version of WH-226A. However, inclusion of the following additional metrics would make gathered information more meaningful.

- *Was worker provided reasonable accommodation(s)?* This can only be answered with “yes” or “no.” Yet, this information is only useful if DOL knows that reasonable accommodations were offered or requested.
- *Primary disability that affects productivity for job described in (h).* DOL would receive more robust information if the employee’s actual disability, as opposed to category of disability, was reported. A review of 14(c) certificates submitted by sheltered workshops in Indiana revealed some employees were considered disabled due to conditions such as varicose veins. “Varicose veins” may raise a red flag upon DOL review, whereas a listing of “Other (OT)” may not.
- *Downtime.* DOL should consider requiring employers to submit information regarding the amount of time employees spend in downtime (e.g., when employees are unable to work due to broken machinery). Employees in Indiana have anecdotally expressed concerns about excessive downtime, but quantitative data has not been measured.
- *Transition to competitive, integrated employment.* IPAS requests that DOL consider requiring employers to submit information regarding the number of employees transitioning to competitive, integrated employment each year or quarter. The Workforce Opportunity & Innovation Act illustrates Congress’ intent that sheltered workshops be used primarily as an opportunity for employees to learn about job skills and gain experience. If 14(c) employers are truly providing valuable skills and experience, DOL should expect employees to regularly be transitioning into competitive,

integrated employment. Tracking these transitions would be a means of measuring whether sheltered workshops actually provide a practical employment service.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Melissa Keyes", with a stylized flourish at the end.

Melissa Keyes
Legal Director

A handwritten signature in blue ink, appearing to read "Emily Munson", with a horizontal line drawn underneath.

Emily Munson
Staff Attorney