

Waterman, Robert - WHD

From: David Hutt <david.hutt@ndrn.org>
Sent: Monday, October 05, 2015 3:56 PM
To: WHDPRAComments
Subject: Comments for Control No: 1235-0001 (Information Collection on Proposed 14(c) Application Forms)
Attachments: NDRN Comments on Revisions to 14(c) Application Forms (1235-0001).pdf

Dear Wage and Hour Division,

The National Disability Rights Network ("NDRN"), the membership organization for the Protection and Advocacy system and Client Assistance Program is pleased to submitted the attached comments to the information collection request to revise forms WH-226 and WH-226A related to applications for certificates issued pursuant to section 14(c) of the Fair Labor Standards Act.

Sincerely,

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Comments from NDRN for Control Number: 1235-0001

October 5, 2015

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

Via E-mail to: WHDPRACommentes@dol.gov

Re: Comments on Proposed Revisions to Forms WH-226 and WH-226A
by the Wage and Hour Division (Control No: 1235-0001)

Dear Wage and Hour Division:

The National Disability Rights Network ("NDRN") is pleased to offer the attached comments on the proposed revisions by the U.S. Department of Labor, Wage and Hour Division, to Forms WH-226 and WH-226A used by applicants seeking to pay individuals with disabilities a subminimum wage under section 14(c) of the Fair Labor Standards Act ("FLSA").

NDRN is the non-profit membership association of the Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies located in all 50 states, the District of Columbia, the five United States territories, and for Native American Tribes located in the four corners region. The 57 P&A and CAP agencies are authorized under various federal statutes to ensure the civil and legal rights of people with disabilities through legal representation and related advocacy services; to monitor the delivery of services, supports and other assistance to people with disabilities; and to investigate incidents of abuse and neglect of individuals with disabilities in a variety of facilities and settings.

The work of the P&A/CAP system includes monitoring and advocating for individuals with disabilities working in sheltered workshops, many of whom are paid subminimum wages under section 14(c). P&A agencies further represent individuals with disabilities in employment discrimination cases under federal and state laws, including the Americans with Disabilities Act, file complaints with the Wage and Hour Division for possible 14(c) violations, and undertake other legal and advocacy work to protect the employment rights of individuals with disabilities.

NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate in society by exercising choice and self-determination. While NDRN ultimately aims for the elimination of all unequal treatment for workers with disabilities, including the end of the 14(c) subminimum wage, it also seeks to ensure that current 14(c) requirements are aggressively followed and enforced. NDRN has written two documents on sheltered workshops and subminimum wages, and administers a program under contract with the Social Security Administration for P&A agencies to monitor agencies acting as representative payees. Begun after the discovery of years of exploitation of workers with disabilities in Iowa, the representative payee review project reviewed a number of organizations holding 14(c) certificates.

NDRN welcomes this opportunity to submit the following comments and recommendations.

**Comments and Recommendations Submitted by the
National Disability Rights Network on
Proposed Information Collection Activities of the Department of Labor, Wage and Hour
Division under Section 14(c) of the Fair Labor Standard Act**

Control Number: 1235-0001

The National Disability Rights Network offers the following comments and recommendations regarding the proposed revisions to WH-226 and WH-226A as announced in the Federal Register on August 6, 2015 at 80 F.R. 47004 - 06.

***I. Recommendations for WH-226: Application for Authority to Employ Workers with
Disabilities at Subminimum Wages***

Item 1 – Application Type

NDRN Comments and Recommendations:

The proposed revision to WH-226 asks the employer who submits the application whether the employer previously applied for or held a valid 14(c) certificate.

- To ensure the records of the Wage and Hour Division are accurate, NDRN recommends that the applicant also be asked whether any previous 14(c) application by the employer was denied, or whether the employer ever held a certificate which was revoked. Such information is important to ensure the Wage and Hour Division is aware of any prior problems with the employer either in a previous application, or in fulfilling the requirements of a 14(c) certificate before approving the application.
- NDRN further recommends in the instruction section to revised WH-226 for item 1 that the Wage and Hour Division define the term “valid certificate” as a “certificate which has not expired prior to the date of submission of the application and for which the employer has fulfilled all obligations required of the certificate during the period of the certificate.” NDRN has been informed of situations where the Wage and Hour Division has accepted a renewal application received within 30 days after the expiration date of the prior certificate. NDRN believes such a practice is detrimental to proper oversight of the section 14(c) program, and that 14(c) applications submitted after the expiration date of a prior certificate should be considered a new application requiring the employer to pay the federal minimum wage until a decision is rendered on the application. Defining the term “valid certificate” will clarify to the employer when a renewal application must be filed.

Item 3 – Parent Organization

NDRN Comments and Recommendations:

The proposed WH-226 requests information in item 3 about the “parent organization” of the applicant if different than the employer. The instructions for item 3, however, do not define what the Wage and Hour Division considers a “parent organization.”

- To ensure full accountability for the payment of proper wages and compliance with other requirements under federal law by all responsible parties, NDRN suggests that the Wage and Hour Division include a definition of the term “parent organization” in the instructions.

Item 5 Removed from Current Form – Primary Disability Group Employed

NDRN Comments and Recommendations:

Current form WH-226 requires an applicant to identify the primary disability group employed. The revised WH-226 eliminates this question.

- NDRN believes this question should remain in the revised application. The federal government should remain aware of individuals with disabilities who are primarily paid subminimum wages in order to better assist in the creation and implementation of programs to increase competitive full-wage employment for such groups. Furthermore, information on the predominant disability employed by the applicant will enable the Wage and Hour Division to assess whether the proper accommodations are being considered and provided (see comment below under WH-226A, Item 7), and to better determine whether the disability of the primary group impairs the individuals for the work to be performed.

Item 6 – Number of Workers with Disabilities

NDRN Comments and Recommendations:

Item 6 in proposed WH-226 asks for information about the total number of workers with disabilities who worked for the employer, and the number of workers with disabilities who worked in one of four 14(c) worksite settings for the most recently completed financial quarter. The instructions for item 6 clarifies that the total number of workers to be entered are workers paid subminimum wages. No such clarification, however, is included in the instructions about which employees with disabilities should be counted as working in the various worksite settings, i.e. all workers with disabilities or only those paid a subminimum wage. The instructions also do not indicate whether both an initial applicant and renewal applicant needs to complete item 6.

NDRN believes determining the numbers of individuals working for subminimum wages is important to assess whether issuance of the 14(c) certificate to the applicant is necessary to “prevent curtailment of opportunities for employment” for individuals with disabilities, and therefore appreciates the inclusion of this item in the revised application. NDRN, however, believes the Wage and Hour Division should require applicants to state both the total number of individuals with disabilities working for the employer at all establishments and sites, as well as the total number of individuals being paid a subminimum wage. These number are also necessary to fully determine whether the certificate is necessary to “prevent the curtailment of employment opportunities.” NDRN therefore makes the following recommendations for item 6:

- Require both initial and renewal applicants to state the total number of workers with disabilities for whom the employer is aware has a disability during the most recent financial quarter. The applicant can determine this number from prior knowledge about workers with disabilities already employed, acquired in compliance with the Americans with Disabilities Act, and for new workers the applicant can request this information, consistent with the Americans with Disabilities Act, after making a conditional job offer to an individual.
- Require renewal applicants to indicate the total number of individuals with disabilities paid a subminimum wage for the prior financial quarter.
- Require initial applicants who formerly held a 14(c) certificate to provide the total number of individual with disabilities paid a subminimum wage prior to the expiration of the former certificate.

NDRN further notes that the Wage and Hour Division does not intend to publish the number of employees with disabilities paid a subminimum wage when the Division publishes the names and addresses of employers issued 14(c) certificates. (See Supporting Statement for Paperwork Reduction Act, Response to Question 16, page 24). NDRN believes to ensure oversight, accountability, and transparency that the number of employees paid a subminimum wage reflected in the application be published with the employers names and addresses.

Items 8 – Prevailing Wage Survey for Workers Paid Hourly Wage Rates

NDRN Comments and Recommendations:

The proposed WH-226 requires that for the most recent financial quarter that applicants provide certain information on the payment of subminimum hourly rates for the contract under which the employer uses the largest number of workers with disabilities paid a subminimum wage. The current WH-226 form requires information for the four largest current contracts of the applicant. The revised form also requires the applicant to provide the name/number of the contract, the recent wage survey conducted for the contract, a description of the work

performed under the contract, and whether the contract identified is covered under the McNamara-O'Hara Services Contract Act.

The reduction in requiring information from four contracts to one contract represents a significant change from the current application form. NDRN has several concerns regarding the changes contained in item 8, as well as the limited scope of the information requested.

Though many employers utilize workers with disabilities paid a subminimum wage under a 14(c) certificate to fulfill contracts, other certificate holders either do not have outside contracts, or in addition to such contracts employ workers with disabilities in non-contract tasks. NDRN is aware of employers with 14(c) certificates who have wholly run internal operations and which do not enter into outside service or production contracts, or these contracts are only a small part of the employer's use of workers paid subminimum wages. For example, non-profit thrift stores pay individuals with disabilities subminimum wages under 14(c) certificates to sort cloths or other items and do not have outside contracts. As another example, NDRN is aware of a disability service provider with a 14(c) certificate which operates a store that sells an agricultural product through both an on-site retail store and over the internet. Individuals with disabilities sort, bag, mail, and sometime prepare the actual products, and the employer/provider does not have contracts with outside entities.

NDRN further believes that even if an employer only utilizes individuals paid a subminimum wage to fulfill contracts, the Wage and Hour Division needs to assess information about more than one contract. In some cases a certificate holder may have a number of contracts of similar size, and limiting information to the largest contract would not enable a proper assessment regarding the employer's adherence to the certificate for other equally large contracts.

NDRN therefore strongly recommends that the Wage and Hour Division require the following of applicants in item 8:

- Indicate the type and description of work, and prevailing wage determination for all non-contract work performed by employees paid a subminimum wage, such as in thrift stores, retail stores, or in the production of goods or services directly sold or offered by the employer, or provided solely for the benefit of the employer.
- For employers with multiple contracts, indicate the name, a description of the work performed, and prevailing wage determination for, at minimum, the **four** contracts for which the largest number of workers paid a subminimum wage are assigned as is required in the current application form.

Item 9 – Work Measurement/Time Study for Workers Paid Hourly Wage Rates

NDRN Comments and Recommendations:

In item 9 of proposed WH-226, the applicant is required to attach a “work measurement or time study for one currently employed worker with a disability who is paid an hourly subminimum wage for the same contract and job reflected in Item 8.”

NDRN believes that the inclusion of only one example of a work measurement or time study is too small to ensure a meaningful assessment of the proper implementation of a 14(c) certificate. An employer seeking to evade the requirements of the certificate could simply ensure that the one example selected was completed properly, thus preventing the Wage and Hour Division from finding errors in the time studies unless the Division conducted an audit of the employer. The limited ability to discover errors in the application process based on one example will especially be a concern for employers paying a large number of workers a subminimum wage. In addition, as stated in the NDRN comments for item 8, a certificate holder may not utilize outside contracts, and therefore the current requirement of only one example for contract work would miss work measurement and time study examples for non-contract work as part of the application.

NDRN therefore strongly recommends that the application process and form be amended to include the following for item 9 to ensure the Division has sufficient information to make a determination on an application:

- The Wage and Hour Division, after receipt of a renewal application, should randomly select from the names submitted in proposed Form WH-226A, at least 15% of the total number of employees with disabilities paid a subminimum wage, or 4 employees, whichever is greater, and require the applicant to provide a copy of the work measurement or time study for those individuals selected by the Division.
- As an alternative to the NDRN preferred recommendation in the previous bullet, the Wage and Hour Division should require that the applicant submit wage measurements or time studies for at least 15% of the total number of employees with disabilities paid a subminimum wage, or 4 employees, whichever is greater, with the application.
- The requirement to submit examples of wage measurements or time studies should include both contract and non-contract work, as mentioned in the NDRN comments for item 8, and include more than just one contract or non-contract operation, as applicable.

NDRN also recommends that the Wage and Hour Division indicate either in item 9, or in the instructions for the item, that only renewal applications are required to complete item 9.

Item 10 – Prevailing Wage Survey for Workers Paid on a Piece Rate Basis

NDRN Comments and Recommendations:

The information required of applicants in item 10 of the proposed revision to WH-226 mirror those contained in item 8, with the substitution of “hourly rate” with “piece rate.” NDRN therefore refers the Wage and Hour Division to the comment, concerns, and recommendations under item 8 above. Based on the same concerns expressed for item 8, NDRN recommends the following for item 10:

- Indicate the type and description of work, and prevailing wage determination for all non-contract work performed by employees paid a subminimum piece rate wage, such as in thrift stores, retail stores, or the production of goods or services directly sold or offered by the employer, or provided solely for the benefit of the employer.
- For employers with multiple contracts, indicate the name, a description of the work performed, and the prevailing wage determination for the **four** contracts for which the largest number of workers paid a subminimum piece rate wage are assigned.

Item 11 – Prevailing Wage Survey for Workers Paid on a Piece Rate Basis

NDRN Comments and Recommendations:

Under the proposed revisions to WH-226, an applicant who paid employees with disabilities a piece rate under a 14(c) certificate must provide limited information concerning the piece rate for the contract listed in item 10. As stated previously in these comments for items 8 and 10, not all employers who pay workers with disabilities under a 14(c) certificates enter into production or service contracts with other entities. Furthermore, for employers who do enter into contracts, these contracts may use a similar number of workers with disabilities but with differing production rates, and therefore the correct piece rate determination for fulfilling one contract may be incorrect for a different contract. NDRN is therefore concerned about the proposed reduction requiring applicants to provide information for only the largest contract from the current requirement of the four largest contracts.

- NDRN recommends, therefore, that the Wage and Hour Division expand the information required for item 11 to include, as applicable, non-contract piece work paid under a certificate, along with, at minimum, the **four** contracts for which the largest number of workers paid a subminimum piece rate wage are assigned.

Item 15 – Representations and Written Assurances

NDRN Comments and Recommendations:

The Wage and Hour Division has the authority pursuant to 29 C.F.R. § 525.17(a)(1) to revoke a 14(c) certificate for misrepresentations or false statements made to obtain a certificate. The revised WH-226 references revocation, but does not state that misrepresentations or false statements are grounds for revocation.

- NDRN recommends that the Wage and Hour Division specifically include a statement under the assurances that the applicant understands that a 14(c) certificate may be revoked for misrepresentation or false statements made on the application forms, or in the supporting documentation or attachments included with the application, as well as for other grounds, pursuant to 29 C.F.R. Part 525.

II. Recommendations for WH-226A: Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Subminimum Wages

Item 7 – Chart for Workers with Disabilities Paid under a Certificate

NDRN Comments and Recommendations:

The Wage and Hour Division requires applicants seeking an initial or renewal 14(c) subminimum wage certificate to complete both proposed WH-226 and proposed WH-226A. Item 7 of proposed WH-226A requires applicants to complete a chart identifying all workers with disabilities paid a subminimum wage during the past fiscal quarter. The chart in item 7 requests a variety of information, including in column (d) of the chart whether the worker was provided a reasonable accommodation. The instructions for item 7 provides examples of reasonable accommodations to include “a stool or chair, jig, or other assistive technology.”

Employers who pay individuals with disabilities a subminimum wage, and who either employ at least 15 employees for 20 or more weeks in a calendar year, or who receive federal financial assistance, must provide reasonable accommodations to employees under Title I of the Americans with Disabilities Act (“ADA”) and/or section 504 of the Rehabilitation Act of 1973, as amended. The reasonable accommodation is to assist the individual perform the job held or sought, and can range from providing assistive technology, and modifying equipment or the work environment, to job reassignment, allowing flexible work schedules, and revising training methods or other policies and procedures.¹

If an accommodation would enable an otherwise qualified worker to meet the quality and quantity standards of the position, the employer needs to provide the accommodation if reasonable. Employers should further engage in an interactive process to determine if a

¹ See 29 C.F.R. §§ 1630.2(o) and 1630.9; see also EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*

reasonable accommodation may be appropriate. Thus, if an employer failed to provide a reasonable accommodation to allow an otherwise qualified worker to meet the quality or quantity standards of a job and continued to pay the worker a subminimum wage because the worker is impaired for the job performed without the accommodation, the employer would be in violation of the ADA and/or section 504.²

- To ensure the implementation and enforcement of all federal laws protecting the rights of individuals with disabilities, NDRN recommends that column (d) be revised to ask whether the applicant has 1) assessed providing a reasonable accommodation to the worker, 2) provided a reasonable accommodation, and 3) if an accommodation was provided to identify the accommodation. Moreover, the examples provided of reasonable accommodations in the instructions should be removed, as the range of possible accommodations are far broader than those included in the proposed examples.

III. Recommendations for Additional Items not included in Proposed WH-226 or 226A

Section 511 of the Workforce Innovation and Opportunity Act (WIOA)

NDRN Comments and Recommendations

In order to meet the minimum requirements of section 511 of the Workforce Innovation and Opportunity Act (WIOA), proposed WH-226A correctly inquires whether the worker was 24 years old or younger when the employer first paid the individual a subminimum wage rate. However, to meet the new requirements of section 511 of WIOA (which becomes effective on July 22, 2016) that addresses the limitations on the use of subminimum wages, the Wage and Hour Division needs to inquire whether the applicant has fulfilled these additional provisions.

Specially, WIOA requires that if an individual is 24 years old or younger and not currently employed by an entity holding a 14(c) certificate, the employer seeking to pay the individual a subminimum wage must review and document that the individual is aware of and has been offered services from the local vocational rehabilitation (VR) agency. Second, regardless of the individual's age, an employer cannot employ an individual at a subminimum wage rate unless, after the individual begins work at that wage, the employer informs the individual of self-advocacy, self-determination and peer mentoring training opportunities available in the geographic area. The employer needs to document proof of dissemination of this information. Finally, these two actions, and the corresponding documentation indicating their completion,

² See Wage and Hour Division, U.S. Department of Labor, Field Operations Handbook (Ch. 64: Employment of Workers with Disabilities at Special Wages Under Sec. 14(c)) at § 64a02 (noting that, in the opinion of the Solicitor's Office of the Labor Department, a Section 14(c) certificate "would not protect an employer from charges pursuant to the [Americans with Disabilities Act]").

should be carried out every 6 months for the first year and every year thereafter for the duration of the subminimum wage employment.

NDRN recommends that either WH-226 or WH-226A be amended to include the following documentation by the applicant:

- Whether the employer has ensured that an individual under 24 years old who was not paid a subminimum wage by a former entity is aware of and has been offered vocational rehabilitation services from the appropriate public agency,
- Whether the employer informed all individuals paid a subminimum wage about self-advocacy, self-determination, and peer training opportunities; and
- Whether the above two activities were completed every 6 months after the individual paid a subminimum wage was employed, and then every year thereafter.