

## Waterman, Robert - WHD

---

**From:** Allison Wohl <allison@apse.org>  
**Sent:** Saturday, October 03, 2015 5:00 PM  
**To:** WHDPRAComments  
**Subject:** Comments on Proposed Revisions to Information Collection re: Special Employment Standards Under FLSA  
**Attachments:** APSE 14c Information Collection Comments.doc; APSE 14c Information Collection Comments.doc

To Whom it May Concern:

APSE, the Association of People Supporting EmploymentFirst is pleased to provide comments on the proposed revisions to the information collection pertaining to special employment standards under the Fair Labor Standards Act (FLSA). Please see the attached document for comments.

Sincerely,

Allison H. Wohl  
Executive Director  
APSE National  
[tel:\(301\) 789-3565](tel:(301)789-3565)  
[allison@apse.org](mailto:allison@apse.org)  
[www.apse.org](http://www.apse.org)



October 5, 2015

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

APSE, the Association of People Supporting EmploymentFirst is pleased to provide comments on the proposed revisions to the information collection pertaining to special employment standards under the Fair Labor Standards Act (FLSA).

In the view of APSE, changes in the information collection for Applications for Authority to Employ Workers with Disabilities at Special Minimum Wages must be fully reflective of not only the new requirements of Section 511 the Workforce Innovation Opportunity Act (WIOA) to limit the use of subminimum wage, but also support the overall objective of WIOA and federal disability employment policy in general to increase competitive integrated employment (e.g., Olmstead enforcement actions by the U.S. Department of Justices, Center for Medicare and Medicaid actions). It is APSE's view, based on extensive field observations and experience, that Section 14(c) often results in unnecessary segregation of individuals with disabilities, in violation of the Americans with Disabilities Act and U.S. Supreme Court's 1999 Olmstead decision. In addition, the proposed WIOA regulations state "...that individuals with disabilities, including those with the most significant disabilities, are capable of achieving high quality, competitive integrated employment when provided the necessary skills and supports." (Federal Register, April 16, 2015). This statement is very much aligned with APSE's long-standing mission and values. However, this recent federal policy statement is at odds with the core premise of Section 14(c) of the FLSA (last amended in 1986): "This minimum wage exemption exists because people with disabilities may not be able to compete successfully with workers who do not have disabilities for jobs paying the minimum wage." (USDOL Wage and Hour Division Field Operations Handbook Section 64a00)

It is clear that the ongoing existence of special wage certificates is at odds with current federal policy regarding citizens with disabilities and employment. Given that, in APSE's view, as long as Section 14(c) remains part of federal law, it is essential that via the regulatory powers of the federal government, that every effort be made to restrict its use, which includes not only full compliance with the intent and requirements of Section 511 of WIOA, but also full compliance with the existing requirements for payment of special minimum wages, in particular that a special minimum wage "may be paid only when an individual has a disability for the work he or she is employed to perform. While a disability may affect a worker's earning or productive capacity for one type of work, the same disability may have no impact on his or her ability to perform another kind of work. Only when a disability impairs the individual for the job to be performed may an employer pay a special minimum wage." (USDOL Wage and Hour Division Field Operations Handbook Section 64a01: Worker with a Disability).



Within this context, APSE has the following specific feedback regarding the proposed information collection changes:

1. We request the removal of the term “supported employment” from both Form wh226 and wh226a. The revised federal definition of supported employment under WIOA, states that supported employment is “competitive integrated employment, including customized employment, or employment in an integrated work setting in which individuals are working on a short-term basis toward competitive integrated employment, that is individualized and customized...”. Based on this definition, and the specific integrated employment requirements under WIOA, it does not seem possible that placement in a “supported employment site/enclave” using a special minimum wage will meet the WIOA definition of supported employment both in terms of wages and integration. Continuing to use the term “supported employment” on form WH226 will result in confusion and misapplication of the term. As an alternative, it is suggested that the term “off-site/enclave” be used instead.
2. On Form wh226, APSE applauds the addition of #6 – Number of Workers with Disabilities. This will assist in addressing the long-standing issue of lack of accurate data on the number of individuals being paid under Section 14(c). APSE strongly recommends clarifying the data being requested, by specifying in #6, that the information being requested is the number of workers with disabilities being paid under Section 14(c).
3. APSE is pleased to see on both forms the addition of questions regarding government contracts subject to Executive Order 13658.
4. Given the increased scrutiny of AbilityOne by the U.S. Department of Labor Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, and the new wage requirements for government contractors under Executive Order 13658 on Form wh226, we ask that the following additional question be added: “Are you an AbilityOne provider?”
5. On Form wh226, APSE feels that there are numerous changes and additions needed under # 15: ***Representations and Written Assurances***, to assure full awareness of and compliance with federal laws and regulations. These include the following:
  - In order to emphasize that, per the DOL Field Manual for Special Minimum Wage, “A worker may have a disability for one type of work but not be impaired for other types of employment.” that under # 15, change assurance 1 from: “Workers employed under the authority in 29 C.F.R. part 525 have disabilities for the work to be performed;” to “Workers employed under the authority in 29 C.F.R. part 525 have disabilities for the **specific** work to be performed, and it is understood that the same disability may have no impact on the worker’s ability to perform another kind of work.”
  - Additional language is needed to assure compliance with the requirement under WIOA Section 511 that a local educational agency may not “enter into a contract or other arrangement with an entity for the purpose of operating a program for an individual who is age 24 or under which work is compensated at subminimum wage”. Requested language is certification that: “As required under 34 C.F.R Part 397.31, no contracts or other arrangement exist with local educational agencies for the purpose of operating a program for payment of subminimum wage to an individual who is age 24 or under.”
  - Additional language is needed to ensure compliance with the requirements under WIOA Section 511 for youth 24 and under, specifically certification that: “All necessary steps required under 34



C.F.R Part 397.2 have been complied with prior to employment of youth 24 and under at subminimum wage, including provision of pre-employment transition services; referral to state Vocational Rehabilitation, resulting in either a determination of ineligibility or unsuccessful case closure; and provision of career counseling and referrals by public Vocational Rehabilitation to sources of employment assistance designed to enable the individual to explore, discover, and experience competitive integrated employment.”

- Additional language is needed to ensure compliance with the requirements under WIOA Section 511 for individuals currently employed at subminimum wage, specifically certification that: “For each individual currently employed at subminimum wage, compliance with the requirements under Section 511(c) of the Workforce Innovation Act of 2014, including on an annual basis provision of career counseling and referrals to sources of employment assistance by the state’s Vocational Rehabilitation system designed to enable the individual to explore, discover, and experience competitive integrated employment, and provision by the employer of information regarding self-advocacy, self-determination, and peer mentoring training opportunities available from other entities; and compliance with all required documentation requirements under Section 511(e)(2).”
- 6. In general, we are pleased to see on form wh226a, under # 7, the additional information now being requested on each individual worker, as this will help ensure compliance with requirements under Section 14(c) of the FLSA, and new requirements of Section 511 of the Workforce Innovation and Opportunity Act. To strengthen this compliance and encourage pursuit of competitive integrated employment aligned in alignment with federal disability employment policy, we request the following revisions:
  - Adding questions that will help ensure compliance with the annual review requirements of Section 511, as well as ensuring that efforts are being made to transition the individual to competitive integrated employment. These include:
    - i. Date of last referral to public Vocational Rehabilitation.
    - ii. Date individual was last provided information regarding self-advocacy, self-determination, and peer mentoring training opportunities available from other entities.
    - iii. Does the individual have an individualized plan for employment (IPE) with the state vocational rehabilitation agency and/or an individual service plan (ISP) that includes a goal of competitive integrated employment? (Yes/No)
    - iv. In the past year, have there been efforts to place the individual into competitive integrated employment, using supported employment services, including customized employment?
    - v. Has the individual been referred to a Community Work Incentives Counselor (CWIC) to ensure full and accurate understanding of the impact of employment on public benefits? If so, on what date?
  - Adding questions that will ensure that the employer is fully complying with the requirements that special minimum wage is job specific, and that opportunities for competitive integrated employment are not unnecessarily being restricted. These include:
    - i. Is the individual currently working in competitive integrated employment, in addition to employment at subminimum wage?
    - ii. Has the individual worked in competitive integrated employment in the past?
  - Many if not most providers of employment under special wage certificates are also responsible for providing support services and case management related to employment for such individuals. In the view of APSE, such a relationship is a clear conflict of interest – i.e., the employer of the



individual is also the entity responsible for assisting them with transitioning into competitive integrated employment and serves in a case management role. These roles should be separate. (Note: The Center for Medicare and Medicaid Services now requires that case management for individuals receiving services under a Medicaid waiver must be conflict-free – i.e., the same entity cannot be providing case management and services and supports.) Given that a large number of individuals being paid under 14(c) certificates receive Medicaid funded supports, APSE feels that the certification of employers under 14(c) should reflect this requirement.) Adding questions that identify the source of employment and other supports for the worker will assist in identifying the extent of this issue. We request the following questions:

- i. Is the employer provided funding to provide case management services for the worker?
  - ii. Is the employer provided funding to assist the individual to transition to competitive integrated employment?
  - iii. If so, what are the sources of this funding? - State/ county intellectual developmental disability agency; - State/county mental health agency; - Other
- APSE requests that the birth date for each individual be requested. This will not only help ensure that the requirements for youth 24 under Section 511 of WIOA are complied with, but will also provide important demographic data on the use of special wage certificates to guide federal policy.
  - In terms of (d) “Was worker provided reasonable accommodation(s)?”. The purpose of this information is not clear, and given the subjective nature of reasonable accommodations, we feel this would provide little value. Either additional specific information on the reasonable accommodations being provided should be requested, or this question should be removed

APSE strongly feels that our requested changes and additions to the information requirements for special wage certificates are not unduly burdensome, and are absolutely necessary as part of efforts for consistent federal policies on employment of people with disabilities, ensuring that citizens with disabilities, including those with the most significant disabilities, are given every opportunity to achieve competitive integrated employment, and not unnecessarily segregated in violation of federal law and policy.

Thank you for your full consideration of our comments.

Sincerely,

Allison Wohl  
Executive Director, APSE



October 5, 2015

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

APSE, the Association of People Supporting EmploymentFirst is pleased to provide comments on the proposed revisions to the information collection pertaining to special employment standards under the Fair Labor Standards Act (FLSA).

In the view of APSE, changes in the information collection for Applications for Authority to Employ Workers with Disabilities at Special Minimum Wages must be fully reflective of not only the new requirements of Section 511 the Workforce Innovation Opportunity Act (WIOA) to limit the use of subminimum wage, but also support the overall objective of WIOA and federal disability employment policy in general to increase competitive integrated employment (e.g., Olmstead enforcement actions by the U.S. Department of Justices, Center for Medicare and Medicaid actions). It is APSE's view, based on extensive field observations and experience, that Section 14(c) often results in unnecessary segregation of individuals with disabilities, in violation of the Americans with Disabilities Act and U.S. Supreme Court's 1999 Olmstead decision. In addition, the proposed WIOA regulations state "...that individuals with disabilities, including those with the most significant disabilities, are capable of achieving high quality, competitive integrated employment when provided the necessary skills and supports." (Federal Register, April 16, 2015). This statement is very much aligned with APSE's long-standing mission and values. However, this recent federal policy statement is at odds with the core premise of Section 14(c) of the FLSA (last amended in 1986): "This minimum wage exemption exists because people with disabilities may not be able to compete successfully with workers who do not have disabilities for jobs paying the minimum wage." (USDOL Wage and Hour Division Field Operations Handbook Section 64a00)

It is clear that the ongoing existence of special wage certificates is at odds with current federal policy regarding citizens with disabilities and employment. Given that, in APSE's view, as long as Section 14(c) remains part of federal law, it is essential that via the regulatory powers of the federal government, that every effort be made to restrict its use, which includes not only full compliance with the intent and requirements of Section 511 of WIOA, but also full compliance with the existing requirements for payment of special minimum wages, in particular that a special minimum wage "may be paid only when an individual has a disability for the work he or she is employed to perform. While a disability may affect a worker's earning or productive capacity for one type of work, the same disability may have no impact on his or her ability to perform another kind of work. Only when a disability impairs the individual for the job to be performed may an employer pay a special minimum wage." (USDOL Wage and Hour Division Field Operations Handbook Section 64a01: Worker with a Disability).



Within this context, APSE has the following specific feedback regarding the proposed information collection changes:

1. We request the removal of the term “supported employment” from both Form wh226 and wh226a. The revised federal definition of supported employment under WIOA, states that supported employment is “competitive integrated employment, including customized employment, or employment in an integrated work setting in which individuals are working on a short-term basis toward competitive integrated employment, that is individualized and customized....”. Based on this definition, and the specific integrated employment requirements under WIOA, it does not seem possible that placement in a “supported employment site/enclave” using a special minimum wage will meet the WIOA definition of supported employment both in terms of wages and integration. Continuing to use the term “supported employment” on form WH226 will result in confusion and misapplication of the term. As an alternative, it is suggested that the term “off-site/enclave” be used instead.
2. On Form wh226, APSE applauds the addition of #6 – Number of Workers with Disabilities. This will assist in addressing the long-standing issue of lack of accurate data on the number of individuals being paid under Section 14(c). APSE strongly recommends clarifying the data being requested, by specifying in #6, that the information being requested is the number of workers with disabilities being paid under Section 14(c).
3. APSE is pleased to see on both forms the addition of questions regarding government contracts subject to Executive Order 13658.
4. Given the increased scrutiny of AbilityOne by the U.S. Department of Labor Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, and the new wage requirements for government contractors under Executive Order 13658 on Form wh226, we ask that the following additional question be added: “Are you an AbilityOne provider?”
5. On Form wh226, APSE feels that there are numerous changes and additions needed under # 15: ***Representations and Written Assurances***, to assure full awareness of and compliance with federal laws and regulations. These include the following:
  - In order to emphasize that, per the DOL Field Manual for Special Minimum Wage, “A worker may have a disability for one type of work but not be impaired for other types of employment.” that under # 15, change assurance 1 from: “Workers employed under the authority in 29 C.F.R. part 525 have disabilities for the work to be performed;” to “Workers employed under the authority in 29 C.F.R. part 525 have disabilities for the **specific** work to be performed, and it is understood that the same disability may have no impact on the worker’s ability to perform another kind of work.”
  - Additional language is needed to assure compliance with the requirement under WIOA Section 511 that a local educational agency may not “enter into a contract or other arrangement with an entity for the purpose of operating a program for an individual who is age 24 or under which work is compensated at subminimum wage”. Requested language is certification that: “As required under 34 C.F.R Part 397.31, no contracts or other arrangement exist with local educational agencies for the purpose of operating a program for payment of subminimum wage to an individual who is age 24 or under.”
  - Additional language is needed to ensure compliance with the requirements under WIOA Section 511 for youth 24 and under, specifically certification that: “All necessary steps required under 34



C.F.R Part 397.2 have been complied with prior to employment of youth 24 and under at subminimum wage, including provision of pre-employment transition services; referral to state Vocational Rehabilitation, resulting in either a determination of ineligibility or unsuccessful case closure; and provision of career counseling and referrals by public Vocational Rehabilitation to sources of employment assistance designed to enable the individual to explore, discover, and experience competitive integrated employment.”

- Additional language is needed to ensure compliance with the requirements under WIOA Section 511 for individuals currently employed at subminimum wage, specifically certification that: “For each individual currently employed at subminimum wage, compliance with the requirements under Section 511(c) of the Workforce Innovation Act of 2014, including on an annual basis provision of career counseling and referrals to sources of employment assistance by the state’s Vocational Rehabilitation system designed to enable the individual to explore, discover, and experience competitive integrated employment, and provision by the employer of information regarding self-advocacy, self-determination, and peer mentoring training opportunities available from other entities; and compliance with all required documentation requirements under Section 511(e)(2).”
- 6. In general, we are pleased to see on form wh226a, under # 7, the additional information now being requested on each individual worker, as this will help ensure compliance with requirements under Section 14(c) of the FLSA, and new requirements of Section 511 of the Workforce Innovation and Opportunity Act. To strengthen this compliance and encourage pursuit of competitive integrated employment aligned in alignment with federal disability employment policy, we request the following revisions:
  - Adding questions that will help ensure compliance with the annual review requirements of Section 511, as well as ensuring that efforts are being made to transition the individual to competitive integrated employment. These include:
    - i. Date of last referral to public Vocational Rehabilitation.
    - ii. Date individual was last provided information regarding self-advocacy, self-determination, and peer mentoring training opportunities available from other entities.
    - iii. Does the individual have an individualized plan for employment (IPE) with the state vocational rehabilitation agency and/or an individual service plan (ISP) that includes a goal of competitive integrated employment? (Yes/No)
    - iv. In the past year, have there been efforts to place the individual into competitive integrated employment, using supported employment services, including customized employment?
    - v. Has the individual been referred to a Community Work Incentives Counselor (CWIC) to ensure full and accurate understanding of the impact of employment on public benefits? If so, on what date?
  - Adding questions that will ensure that the employer is fully complying with the requirements that special minimum wage is job specific, and that opportunities for competitive integrated employment are not unnecessarily being restricted. These include:
    - i. Is the individual currently working in competitive integrated employment, in addition to employment at subminimum wage?
    - ii. Has the individual worked in competitive integrated employment in the past?
  - Many if not most providers of employment under special wage certificates are also responsible for providing support services and case management related to employment for such individuals. In the view of APSE, such a relationship is a clear conflict of interest – i.e., the employer of the



individual is also the entity responsible for assisting them with transitioning into competitive integrated employment and serves in a case management role. These roles should be separate. (Note: The Center for Medicare and Medicaid Services now requires that case management for individuals receiving services under a Medicaid waiver must be conflict-free – i.e., the same entity cannot be providing case management and services and supports.) Given that a large number of individuals being paid under 14(c) certificates receive Medicaid funded supports, APSE feels that the certification of employers under 14(c) should reflect this requirement.) Adding questions that identify the source of employment and other supports for the worker will assist in identifying the extent of this issue. We request the following questions:

- i. Is the employer provided funding to provide case management services for the worker?
  - ii. Is the employer provided funding to assist the individual to transition to competitive integrated employment?
  - iii. If so, what are the sources of this funding? - State/ county intellectual developmental disability agency; - State/county mental health agency; - Other
- APSE requests that the birth date for each individual be requested. This will not only help ensure that the requirements for youth 24 under Section 511 of WIOA are complied with, but will also provide important demographic data on the use of special wage certificates to guide federal policy.
  - In terms of (d) “Was worker provided reasonable accommodation(s)?”. The purpose of this information is not clear, and given the subjective nature of reasonable accommodations, we feel this would provide little value. Either additional specific information on the reasonable accommodations being provided should be requested, or this question should be removed

APSE strongly feels that our requested changes and additions to the information requirements for special wage certificates are not unduly burdensome, and are absolutely necessary as part of efforts for consistent federal policies on employment of people with disabilities, ensuring that citizens with disabilities, including those with the most significant disabilities, are given every opportunity to achieve competitive integrated employment, and not unnecessarily segregated in violation of federal law and policy.

Thank you for your full consideration of our comments.

Sincerely,

Allison Wohl  
Executive Director, APSE