

**Waterman, Robert - WHD**

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**From:** Kelly Israel <kisrael@autisticadvocacy.org>  
**Sent:** Monday, October 05, 2015 3:22 PM  
**To:** WHDPRAComments  
**Subject:** ASAN Comments, Proposed Revision of WH-226 and WH-226A  
**Attachments:** Autistic Self Advocacy Network, Comments, On Notice of Proposed Revision of the Information Collections Pertaining to Special Employment Under the Fair Labor Standards Act.docx

Dear Wage and Hour Division,

Attached are the Autistic Self Advocacy Network's comments on the Notice of Proposed Revision of the Information Collections Pertaining to Special Employment Under the Fair Labor Standards Act, Control Number 1235-0001.

Sincerely,

Autistic Self Advocacy Network



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Division of Regulations, Legislation, and Interpretation  
Wage and Hour, U.S. Department of Labor  
Room S-3502, 200 Constitution Avenue, NW.  
Washington, DC 20210  
Control Number 1235-0001

Dear Wage and Hour Division,

The Autistic Self Advocacy Network (ASAN) submits the following comments on the proposed revision to the information collection request (ICR) entitled, "Information Collections Pertaining to Special Employment under the Fair Labor Standards Act (FLSA)." Agency Information Collection Activities; Comment Request; Information Collections Pertaining to Special Employment Under the Fair Labor Standards Act, 80 Fed. Reg. 151 (August 6, 2015). ASAN is a 501(c) (3), non-profit organization which exists to advance the social and civil rights of Autistic people and other individuals with disabilities.

The proposed revisions concern Form WH-226 and its supplemental information form WH-226A. Employers and contractors must file these two forms with the federal government in order to have the authority to pay people with disabilities less than the federal minimum wage. If the employer or organization is found to be eligible, they will be issued a certificate providing them with that authority.

ASAN makes the following comments on the proposed revisions to Form WH-226:

1. We support the proposed elimination of the current Item 5, which requests information on the "primary disability group" served by the applicant. Requiring applicants to specify a "primary disability group" employed only serves to encourage further segregation of individuals with disabilities from both the general population and from other disability groups.
2. We recommend adding the question, "Are any of the work sites and establishments covered by this certificate currently receiving supplemental funding from a federal government agency?" to Form WH-226. We believe collection of this information is consistent with the requirements of the Paperwork Reduction Act because the information is necessary in order to enable the Department of Labor to determine whether a 14(c) certificate is necessary in order to avoid curtailment of employment of individuals with disabilities, as required by the Fair Labor Standards Act. 29 U.S.C. 214 (c) (1). If a given employer already receives compensation from another source -- such as Medicaid or Vocational Rehabilitation funds -- for the purposes of providing training or additional supervision, then it may be harder for the employer to show that it cannot employ the same individuals while paying them above-minimum wages. Employers



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who receive federal funding should be required to specify the source, category, and amount of that funding.

3. We recommend adding the question, “Are any of the work sites and establishments covered by this certificate currently receiving supplemental funding from a government agency within their home state?” to Form WH-226. We believe adding this question is permissible under the Paperwork Reduction Act for the same reasons listed in Comment #2.
4. We recommend adding the question, “Document the amount of funding you have received in charitable contributions towards any of the work sites and establishments covered by this certificate” to the proposed draft of Form WH-226. We believe adding this question is permissible under the Paperwork Reduction Act for the same reasons listed in Comment #2.
5. We propose a brief independent, third-party review of the work measurement and time studies for both hourly rate and piece rate work that employers are required to provide on Form WH-226. This would provide the Department of Labor with a greater understanding of the source of the data provided by each 14(c) applicant. It is also more consistent with the Department of Labor’s intent to better account for the changes in law and policy since the 14(c) application process was created.

ASAN makes the following comments on the proposed revisions to Form WH-226A:

1. We support the addition of the “Whether the Worker Was Provided Reasonable Accommodations” category to Item 7 of the form, but urge that employers be required to provide additional information beyond a simple “yes” or “no.”

It is highly unlikely that employers will self-report that they have not provided reasonable accommodations to their workers. As a result, it is highly unlikely that a yes-or-no question about reasonable accommodation will provide the Department with information that would prove useful to determining whether an employer should be awarded a 14(c) certificate. Requiring employers to include a list of reasonable accommodations that they have provided will give the Department better insight into whether the accommodations provided are sufficient.

For example, some workplaces may seek approval to pay sub-minimum wages for less “productive” workers, while failing to provide reasonable accommodations such as adaptive equipment that would increase those workers’ productivity. These same workplaces may believe that they are providing a reasonable accommodation in the form of extra time to complete tasks, while simultaneously citing that extra time as a justification



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for paying a sub-minimum wage. Gathering specific information on the nature of the reasonable accommodations available to employees would enable the Department to detect and correct such problems.

2. We propose that the category, "Total Fees Charged to This Employee for Services Provided" be added to the data collected for each employee under Item 7. It has come to our attention that some 14(c) employers charge persons with disabilities employed under the certificate for some transportation and food.

These charges are grossly exploitative given the below-minimum wage salaries of the individuals concerned and contrary to the rehabilitative purpose of Section 14(c) of the Fair Labor Standards Act. If sheltered workshops and other rehabilitative programs exist to prevent the curtailment of employment of individuals with very significant disabilities, extra costs that exist as part of that employment would only serve to worsen the economic circumstances of those individuals rather than improve their chances of success in productive employment.

We therefore recommend that these extra costs be compared against wages earned in order to determine whether employers are eligible for a 14(c) certificate, and that data be gathered on 14(c) programs and employers who currently impose such costs. If the employees in question were instead provided with the minimum wage necessary to purchase food and transportation (along with any support necessary for them to do so), it would be much more consistent with the Department of Labor's other policies with regards to people with disabilities.



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