BUILDING BLOCKS OF CHANGE: STATE INITIATIVES AND THE FAIR LABOR STANDARDS ACT § 14(C)

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"Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." - William J. Brennan, Jr.[1]

* J.D. 2018., Rutgers Law School (Camden). I would like to thank my family, friends, professors, and all others who helped me throughout this process.

[1] Sch. Bd. of Nassau City v. Arline, 480 U.S. 273, 284 (1987).

I. INTRODUCTION

Minimum wage has been a passionate topic for Americans ever since the federal statutory scheme for minimum wages, known as the Federal Labor Standards Act ("FLSA"), was introduced in 1938[2]. At that time, the idea of establishing fair labor standards for the workforce by setting a pay floor was revolutionary.[3] The American people very quickly supported the idea of being paid proper wages for their work and having their wages protected from unscrupulous labor practices. As a result, state statutes were also put into effect expanding minimum wage protections.[4] However, social and economic realities in America, such as rising inflation and an increased cost of living, have changed greatly over time. As such, the FLSA has been amended to reflect these changes by increasing minimum wage,

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[2] Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, UNITED STATES DEPARTMENT OF LABOR, (1978), https://www.dol.gov/general/aboutdol/history/flsa1938 (last visited Oct. 7, 2016).

[3] *Id.*

[4] *Minimum Wage Laws in the States*, WAGE AND HOUR DIVISION-UNITED STATES DEPARTMENT OF LABOR (Aug. 1, 2016), https://www.dol.gov/whd/minwage/america.htm (last visited Oct. 8, 2016).

which has been done on twenty-two occasions.[5] However, even though the minimum wage itself has continually increased over time, there are still aspects of the Federal Labor Standards Act that have been minimally altered since its adoption. For example, §14 of the FLSA, which applies to learners, apprentices and disabled workers, has been almost completely stagnant since 1938.[6]

Section 14 of the FLSA is troublesome precisely for its age; its detractors argue that the law continues an antiquated system of economics and of thought that has no place in modern American society.[7] The most vocal in their scorn of the law have

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[5] *Minimum Wage- U.S. Department of Labor- Chart 1*, UNITED STATES DEPARTMENT OF LABOR, https://www.dol.gov/featured/minimum-wage/chart1 (last visited Oct. 8, 2016).

[6] Theresa Golde, Article*, Pennies an Hour: Was This Really the Intent Behind § 14(c) of the Fair Labor Standards Act? A Note Calling for a System Change to an Otherwise Broken System*: Comment, 48 Tex. Tech L. Rev. 459, 471 (Winter, 2016).

[7] The Autistic Self Advocacy Network, ("ASAN"), states that Section 14(c) is "unjust, exploitative and isolates people with disabilities from their peers in competitive employment." *See* Mary O'Hara, *In the US They Even Have 'Sub-minimum' Wages for Disabled People,* THE GUARDIAN (May 24, 2016). https://www.theguardian.com/society/2016/may/24/no-one-should-

been disabled rights activists because of how the FLSA treats disabled workers under subsection (c). Under §14(c), it is completely legal for disabled workers to be paid less than the minimum wage.[8] As explained more fully below in Part I, the rationale at the time of this law's passage may have been appropriate and done with the best of intentions, but disabled advocates argue that the ideas behind those rationales are antiquated.[9] In contrast, supporters of keeping the law in place argue that the law still provides valuable employment options when jobs themselves are limited and they worry about how

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earn-sub-minimum-wage--disabled-people#comments (last visited Oct. 8, 2016). Other organizations such as the National Federation of the Blind have expressed similar sentiments. *See, e.g., The Issue of Fair Wages for Workers with Disabilities*, THE NATIONAL FEDERATION OF THE BLIND https://nfb.org/fair-wages (last visited Oct. 8, 2016).

[8] Melia Preedy, Note, *Subminimum or Subpar? A Note in Favor of Repealing the Fair Labor Standards Act's Subminimum Wage Program*, 37 SEATTLE U. L. REV. 1097, 1098 (Spring, 2016) (citing the Fair Labor Standards Act of 1938, 29 U.S.C. § 214(c) (1989)).

[9] Zoe Brennan-Krohn, Note, *Employment for People with Disabilities: A Role for Anti-Subordination,* 51 HARV. C.R.-C.L. L. REV. 239, 240 (Winter, 2016).

having to pay an increase in wages to disabled employees might affect employers.[10]

While this Note, in Part I, does expand on some of the reasoning on both those who wish to keep §14(c) in place and those who wish to abolish, it is not its main purpose, many other scholarly works have covered that particular topic in detail.[11] Rather, as evidenced by statements made in support of ending subminimum wages at both the Republican National Convention and the Democratic National Convention in 2016, public perception on the issue of subminimum wages has been changing from "Should we end it?" to "When and how should we?"[12]

To that end, this Note seeks to discuss how a law would most likely be passed to revoke §14(c), which I put forth is best done by the passage of multiple state-level laws revoking subminimum wage locally. I believe that only a concerted effort by a majority of the states, showing approval of such a policy of abolition would the federal government abolish §14(c). In Part I, the Congressional intent behind this Section and the arguments for and against its repeal will be given; to explain where the law stands and how public attitudes have changed,

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[10] *Id.* at 241.

[11] *See, e.g.,* Golde, *supra* note 7, Preedy, *supra* note 9, and Brennan-Krohn, *supra* note 10.

[12] Michelle Diament, *Democrats, Republicans Urge End to Subminimum Wage*, DISABILITY SCOOP (July 28, 2016). https://www.disabilityscoop.com/2016/07/28/democrats-republicans-subminimum/22548/ (last visited Oct. 7, 2016).

making a scheme of state laws easier to enact. Part II discusses both the failures of the federal government to pass repeals of this Section and what can be learned from why those laws failed. Some of the discussion will include summaries of the court cases that helped spur those laws into being. Part III will discuss: what we can learn from successful state law; how the successful passage of such laws occurred; what makes these laws different from previous failed attempts; how other states can remodel their laws; and above all, how the states can help influence a change in the federal law as a result. The Note will then briefly conclude with a summary of how the passage of state laws can support disabled employees nationwide.

II. History of The Fair Labor Standards Act §14(c)

A. The Set-up of § 14(c) and Congressional Intent

The FLSA came about as part of the New Deal proposed by Franklin D. Roosevelt after the Great Depression. The motivation for the FLSA was in part to bring back economic stability to the United States, but it was also about helping to protect the rights of underpaid workers and exploited child laborers, all the while putting a cap on the number of hours a person could legally work.[13] While the motivations behind the bill were admirable, the protections provided for workers did not extend to disabled workers in the same way.

The origins of §14(c) came from Roosevelt's National Industrial Recovery Act (hereinafter "NIRA") of 1933, a law that eventually became the FLSA.[14] NIRA promoted the definitions

[13] Grossman, *supra* note 3.

[14] Matthew Crawford and Joshua Goodman, *Note, Below the Minimum: A Critical Review of the 14(c) Wage Program for*

and classifications of disabled workers as people "whose earning capacity is limited because of age, physical or mental handicap, or other infirmity."[15] The FLSA included this definition when creating the exception to minimum wage, which became the following law still in effect today:

> [t]he Administrator, to the extent necessary, in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for... (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage.[16]

This section of law was enacted to prevent disabled workers from losing job opportunities. The reasoning was that disabled workers were less productive than their non-disabled counterparts, and if an employer had to choose between paying the same rate for a disabled worker who naturally produced less and a non-disabled employee who produced more an employer would choose the non-disabled employee.[17] By paying less than the minimum wage, employers were thus incentivized to hire

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Employees with Disabilities, 30 HOFSTRA LAB. & EMP. L.J. 591, 594 (Spring, 2013).

[15] *Id.*

[16] Fair Labor Standards Act § 8; §14(c), 75 P.L. 718, (1938).

[17] Preedy, *supra* note 9, at 1105 (citations omitted).

disabled workers as a money-saving option, giving disabled persons employment and a wage they may not find elsewhere.[18]

Section 14(c) puts this employment scheme in place by allowing employers of workers with disabilities to file with the Department of Labor for a special certificate, that once approved, allows an employer to pay the disabled worker a subminimum wage.[19] Once given permission, an employer must pay the employee what is known as a commensurate wage rate, which measures the worker's productivity and pays them a rate that is proportionate to a non-disabled employee's pay for essentially the same type and quality of work.[20] This is a subjective standard measured by the employer's view of productivity, but the rate of pay must be reevaluated by the employer every six months to account for changes.[21] Additionally, the Administrator of the Wage and Hour Division of the Department of Labor oversees this program so that workers may petition the Administrator for review of their compensation should there ever be questions of abuse or mistake.[22] The certificate allowing for the payment of subminimum wages must also be renewed every one or two years depending on whether the disabled employee is working in

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[18] *Id.*

[19] WAGE AND HOUR DIV.- U.S. DEP'T OF LABOR, FACT SHEET #39: THE EMPLOYMENT OF WORKERS WITH DISABILITIES AT SUBMINIMUM WAGES, (2008) https://www.dol.gov/whd/regs/compliance/whdfs39.htm.

[20] *Id.*

[21] *Id.*

[22] *Id.*

a competitive field, or in a less- competitive field and what is known as a sheltered workshop.[23]

Sheltered workshops are a specific style of employment that grew out of paying subminimum wages.[24] These are work centers that offer employment, training, and rehabilitation services to disabled workers, often in isolation from non-disabled workers.[25] Many disabled advocates believe that sheltered workshops are a holdover from the age at which the disabled were institutionalized.[26] Institutions provided much residential support, and many still do today, but they also have a long history of abusing disabled persons.[27] When the public became aware of such a history of abuse, there was a great incentive to integrate the disabled from the institutions into the community as active community members rather than as patients, including obtaining employment and housing.[28]

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[23] *Id.*

[24] Preedy, *supra* note 9, at 1106

[25] *Id.*

[26] *Id.* at 1107.

[27] Catherine Thornberry and Karin Olson, *The abuse of individuals with developmental disabilities*, 33 DEVELOPMENTAL DISABILITIES BULLETIN 1, 1 (2005) https://files.eric.ed.gov/fulltext/EJ844468.pdf (last visited January 26, 2018).

[28] *Reform and Closing of Institutions*, DISABILITY JUSTICE, http://disabilityjustice.org/reform-and-closing-of-institutions/, (last visited January 26, 2018).

However, many possible employers and community members still held the belief that the disabled were not able to fully integrate into a competitive[29] job system in a way that would not harm business. The solution was to integrate disabled persons into society at large but to segregate disabled workers into sheltered workshops, where they would receive job skills

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[29] ADVISORY COMM. ON INCREASING COMPETITIVE INTEGRATED EMP'T FOR INDIVIDUALS WITH DISABILITIES. FINAL REPORT. (2016). https://www.dol.gov/odep/topics/wioa.htm. Here, competitive and integrated employment is defined as "work performed on a full or part-time basis (including self-employment) for which an individual is [...] compensated at not less than federal minimum wage requirements or state or local minimum wage law (whichever is higher) and not less than the customary rate paid by the employer for the same or similar work performed by other individuals without disabilities." *Id.* Additionally, "the employee interacts with other persons who do not have disabilities [...] to the same extent that individuals who do not have disabilities and who are in comparable positions interact with other persons" and "[p]resented, as appropriate, with opportunities for advancement that are similar to those offered other employees who are not individuals with disabilities and who have similar positions." *Id.*

without slowing business at large.[30] Sheltered workshops are by far the most common subminimum wage certificate holder, with 84% of certificates being held by the workshops according to the General Accounting Office (hereinafter "GAO").[31] Of all 424,000 disabled workers in the workforce, 94% work in sheltered workshops.[32]

B. Why Advocates Argue for Repeal

When critics and disabled advocates argue that the FLSA is no longer necessary law, they are, in part, arguing that the sheltered workshops that FSLA supports are a violation of a disabled worker's rights. First, almost all critics argue that the existence of the Americans with Disabilities Act (ADA) necessarily conflicts with this law because sheltered employment constitutes discriminatory segregation.[33] Similarly, the Supreme Court, in the landmark decision *Olmstead v. L.C. by Zimring*, stated that "[u]njustified placement or retention of persons in institutions, severely limiting the persons' exposure to the outside community, constitutes a form of discrimination based on disability prohibited by Title II of the Americans with

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[30] Preedy, *supra* note 9.

[31] *Id.* at 1108.

[32] *Id.*

[33] *See, e.g.,* Nat'l Disability Rights Network, *Segregated & Exploited: A Call to Action!* 45 (2011), http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf, (archived at http://perma.cc/HW9U-N8MT).

Disabilities Act of 1990."[34] Additionally, the Court laid out that "individuals with disabilities had to be provided services in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[35] This is commonly known as the integration mandate, which critics argue can be applied to sheltered workshops because their work keeps them isolated from community-based jobs unnecessarily.[36]

Advocates also point to several examples where employers take advantage of individuals with disabilities by failing to provide job training that would allow workers to access competitive employment and minimum wages. A prime example of this being where the skills learned in the workshop are non-transferable to competitive employment.[37] Additionally, only a small percentage of workshop employees ever move on to competitive employment, despite the fact that the goal of sheltered workshops is to provide with job skills that can transfer into gainful employment.[38] These examples suggest that people with disabilities become essentially institutionalized in sheltered workshops, where perhaps with the proper support; an employee with disabilities could have become a successful member of employed society.[39] This conclusion is supported by the results of a study called the Vocational Rehabilitation

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[34] Olmstead v. L. C. by Zimring, 527 U.S. 581, 587 (1999).

[35] Nat'l Disability Rights Network, *supra* note 31, at 17.

[36] Brennan-Krohn, *supra* note 10, at 241.

[37] Nat'l Disability Rights Network, *supra* note 31, at 8-9.

[38] *Id.*

[39] Brennan-Krohn, *supra,* at 241.

Longitudinal Study.[40] There, 8,500 recipients of employment with varying levels of disability were selected, pulling from both sheltered workshops and integrated employment schemes on a national level.[41] The study found that the 7,765 employees working in sheltered workshops had an average hourly wage of $3.03, below the federal minimum wage of $5.15 an hour at the time.[42] This amount fluctuated over the next two years, becoming $2.64 and later $2.89 on average.[43] Additionally, sheltered workshop employees worked about twenty-nine hours a week on average, and only 12% of those employees had health insurance.[44] In comparison, integrated employees earned an average of $7.56 an hour, which rose to $13.48 in three years. Of those employees, 58.8% had health insurance, demarking a large disparity in wages in benefits in the two different environments.[45]

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[40] Becky J. Hayward & Holly Schmidt-Davis, *Longitudinal Study of the Vocational Rehabilitation Services Program, 3rd Final Report: The Content of VR Services*, RESEARCH TRIANGLE INSTITUTE (2005), http://www2.ed.gov/rschstat/eval/rehab/vr-final-report-3.pdf (last visited Oct. 8, 2016).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

Another issue raised by advocates is a lack of proper oversight from the government. In 2001, the Government Accounting Office (hereinafter "GAO") released a report about the Department of Labor ("DOL"), noting that the DOL had failed to oversee compliance. This report was best summarized by William G. Whittaker. [46] He noted:

> GAO reported that DOL "has not effectively managed the special minimum wage program to ensure that 14(c) workers receive the correct wages." It noted that "in past years," the Department had "placed a low priority on the program." DOL, it asserted, "lacks the data it needs to manage the program and determine what resources are needed to ensure compliance by employers." GAO concluded that the Department "has not done all it can to ensure that employers comply with the law" and "has provided little training to its staff" that would enable them to work with the several program participants.[47]

Advocates also advance that not only is the FSLA §14(c) antiquated in the above substantive ways, it is also antiquated in

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[46] William G. Whittaker, *Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act,* CORNELL UNIV. ILR SCH. DIGITAL COMMONS at 34 (Feb. 9, 2005), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1211 &context=key_workplace (last visited Oct. 7, 2016).

[47] *Id.*

general longevity.[48] The law is eighty years old, and while it was originally meant mostly for physically disabled veterans, the population of disabled workers has changed in make-up.[49] First, there is more advanced assistive technology now than could have been imagined then; including power wheelchairs and augmentative communication devices that make accessibility to competitive employment and participation in community more possible than ever.[50] Second, while the physically disabled are not a diminishing population, the developmentally disabled population is growing quickly.[51] One in sixty-eight children has been diagnosed with an Autistic Spectrum Disorder, all of whom will one day reach the age employment, which doesn't include the rates of other developmental disorders such as Down Syndrome.[52] These are numbers that were unprecedented in 1938, partly because this segment of the disabled population

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[48] Nat'l Disability Rights Network, *supra* at 13.

[49] *Id.*

[50] *Id.*

[51] *Developmental Disabilities: Recent Statistics*, CABELL-HUNTINGTON HOSPITAL, http://cabellhuntington.org/services/pediatrics/developmental-disabilities-recent-statistics/ (last visited January 26, 2018).

[52] *Data and Statistics- Autistic Spectrum Disorder (ASD)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/ncbddd/autism/data.html (last visited Oct. 8, 2016).

were usually institutionalized and partly because there have been increases in diagnoses over the past two decades.[53] This law was not created with this population in mind and seems, as the Vocational Rehabilitation study shows above, is a poor fit for the present circumstances.[54]

Perhaps the most persuasive argument of all, however, is the personal experience of some who have worked for subminimum wage and the risk of abuse that occurs, even if not working in a sheltered workshop per se. Take for instance, the case of Henry's Turkey Service in Atalissa, Iowa, which culminated in the case *E.E.O.C. v. Hill Country Farms, Inc.*[55] Sixty intellectually disabled men worked at a turkey factory and lived in a 106-year old house provided by the company that lacked central heat and was infested by cockroaches.[56] The company deducted around $10,000 a week from all their

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[53] *Shift in diagnosis only partly explains rise in autism prevalence*, AUTISM SPEAKS (July 23, 2015), https://www.autismspeaks.org/science/science-news/shift-diagnosis-only-partly-explains-rise-autism-prevalence (last visited Oct. 7, 2016).

[54] Hayward & Davis, *supra* note 39.

[55] E.E.O.C. v. Hill Country Farms, Inc. 899 F.Supp.2d 827 (S.D. Iowa 2012) (*aff'd* EEOC v. Hill Country Farms, Inc., 564 Fed. Appx. 868 (8th Cir. 2014))

[56] Preedy, *supra,* at 1118; *see also* Nat'l Disability Rights Network, *supra* at 12.

paychecks for various expenses, so that the men only averaged sixty-five dollars a month for their thirty-year period of employment.[57] This averaged to a net of $0.41 an hour, whereas the non-disabled coworkers earned between $9-$12 an hour for the exact same work.[58] While an extreme case, advocates argue that the way 14(c) is written makes it far too easy to take advantage of underprivileged workers in this manner.

C. Why Supporters Argue FLSA Should Stay

Supporters of maintaining the FSLA argue that the law, while not ideal, is not as dire as disabled advocates make it seem. First, multiple providers of vocational services and lay people believe that if these jobs are not available to those that are disabled, the disabled will not be able to find jobs.[59] This is

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[57] *Id.* (noting that this is just enough so that all the men continued to receive Social Security and other benefits, which Henry's already received as a payee as compensation for their care, in effect doubly charging the workers for care.)

[58] *Id.*

[59] *Fair Labor Standards Act (FLSA): Protect Employment Opportunities for People with Disabilities*, GOODWILL (Feb. 1, 2014), http://www.goodwill.org/wp-content/uploads/2013/06/Final-FLSA-Fact-Sheet.pdf (last visited Oct 8, 2016). *See also* Tim Worstall, *Hillary And Bernie's Absurd Insistence On Abolishing The Sub-Minimum Wage For The Disabled*, FORBES (May 19, 2016 9:42 AM),

because there are still many employers who believe that disabled workers are less productive than their peers, and they would rather hire more productive workers.[60] Second, supporters argue that there *are* disabled workers who are less productive and would not be able to succeed in a competitive position, because their disability is too severe.[61] Another line of reasoning comes from the same GAO study as cited above, employers who offer subminimum wages are more able and do provide services to their disabled employees such as:

> Assistive devices and technology, behavior modification, case management, daily living skills training, increased supervision, job coaching, job station adaptation, occupational therapy, personal care assistance, psychological counseling, speech therapy, task adaptation, [and] transportation.[62]

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http://www.forbes.com/sites/timworstall/2016/05/19/hillary-and-bernies-absurd-insistence-on-abolishing-the-sub-minimum-wage-for-the-disabled/#59b3927b73ba (last visited Oct 8,2016); Donald J. Boudreaux, *An Open Letter to Hillary Clinton*, CAFEHAYEK.COM (May 18, 2016), http://cafehayek.com/2016/05/open-letter-to-hillary-clinton.html (last visited Oct. 9, 2016).

[60] *See* Worstall, *supra* note 59; Boudreaux*, supra* note 59

[61] *Id.*

[62] Gretchen Nye, *The Uncertain Future of Section 14(c) of the Fair Labor Standards Act*, THE GEORGE WASHINGTON UNIVERSITY SCHOOL

Competitive employers could not possibly provide all these things to an employee, disabled or not. The best any employer could do is just enough to make the job accessible to work as required under the ADA, leaving the burden of cost on the disabled worker for other nonessential adaptions.

The most persuasive argument, however, is that disabled workers will no longer be eligible to receive benefits such as Social Security and Medicare if they make too much money.[63] An employee will either have to severely limit their hours to still qualify for benefits, negating the reasoning behind giving disabled workers minimum wage, or the worker will have to lose their benefits and pay for services such as adult programs, physical therapy, and occupational therapy themselves.[64] However, these services are prohibitively expensive; especially if a disabled employee is making minimum wage and either must pay for health insurance, or go without it.[65] Any benefits that would be offered in employment, outside of a Fortune 500 company, are objectively worth less than the government benefits as well, so a disabled employee might be better off

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OF PUBLIC HEALTH AND HEALTH SERVICES, 4 (June 2013),

http://www.accses.org/CMS/Resources/dropbox/2016%20pp%20up

date/employment/theuncertainfutureofsection14cofthefairlaborstand

ardsact.pdf

[63] *Id.* at 5.

[64] *Id.*

[65] *Id.*

receiving less than minimum wage, unless the job being worked is more than an entry level position in a local business.[66]

Once again, this Note's purpose is not to decide whether it is wise to abolish FLSA §14(c); both sides have compelling arguments from an anti-discrimination standpoint and a need-for-benefits standpoint. However, public and political perception has been leaning towards abolishment as mentioned above. So, how has the federal government attempted (and failed) to revoke §14(c)? Did they have concerns about the economic feasibility? How have state legislatures passed laws banning the subminimum wages knowing the risk to disabled employees in losing benefits?

III. Federal Attempts, the Laws Proposed, and Why §14(c) Continues

Much of the history of disability law has focused on promoting equality and preventing discrimination against the disabled.[67] For example, the Americans with Disabilities Act, the Fair Housing Act, the Rehabilitation Act, and the Individuals with Disabilities Education Act all focus on preventing "discrimination on the basis of disability" in multiple areas of

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[66] *Id.*

[67] *A Guide to Disability Rights Law*, U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION DISABILITY RIGHTS SECTION, https://www.ada.gov/cguide.htm#anchor62335 (2009) (last visited Nov. 14, 2016).

daily life.[68] While this remains a necessary area of law, even laws that have addressed discrimination in employment and pay, such as the Americans with Disabilities Act,[69] do not apply to §14(c) because §14(c) is considered a specialized exemption to these laws.[70] With that in mind, there have been recent attempts to repeal §14(c), and put issues of disabled employment and pay strictly under the control of other federal laws.[71] Both the courts and the legislature have attempted to repeal or at least open up the possibility of repeal; however, each

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[68] *Id.*

[69] The Americans with Disabilities Act, 42 U.S.C.S. § 12101 (1990). *See A Guide to Disability Rights Law*, U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION DISABILITY RIGHTS SECTION, https://www.ada.gov/cguide.htm#anchor62335 (2009) for an overview of the substance of the Americans with Disabilities Act.

[70] Fair Labor Standards Act § 8; §14(c), 75 P.L. 718, (1938).

[71] *See, e.g.,* Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 607 (1999); E.E.O.C. v. Hill Country Farms, Inc. 899 F.Supp.2d 827 (S.D. Iowa 2012); Lane v. Kitzhaber, 283 F.R.D. 587 (D. Or. 2012); Fair Wages for Workers with Disabilities Act of 2013, H.R. 831, 113th Cong. (2013); Fair Wages for Workers with Disabilities Act of 2011, H.R. 3086, 112th Cong. (2011); The Transitioning to Integrated and Meaningful Employment Act, H.R. 188, 114 Cong. (2015).

of these federal attempts has failed for various reasons.[72] If there is to be any progress in repealing subminimum wages, it must first be understood why these previous attempts failed.

A. The Court System's Attempts to Create a Possibility of Repeal

While courts have not found or explicitly stated that §14(c) is unconstitutional, nor have they advocated for its repeal, opinions on both disability discrimination cases and in §14(c) cases have created much room for arguing such. Chief among them, *Olmstead v. L. C. by Zimring*, as mentioned above, is most cited because the Supreme Court created the integration mandate, which combats disability discrimination.[73]

In *Olmstead*, intellectually and mentally disabled women were institutionalized by the state of Georgia even though their original healthcare providers recommended a community-based treatment program as most beneficial for their health and overall well-being.[74] In *Olmstead*, healthcare providers of an institution refused to place two women and continued institutionalization despite objection, citing costs as a limiting factor preventing placement.[75] This argument was rejected by the Supreme Court, which further held, that under Title II of

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[72] Fair Wages for Workers with Disabilities Act of 2013, *supra* note 71, Fair Wages for Workers with Disabilities Act of 2011, *supra* note 71, The Transitioning to Integrated and Meaningful Employment Act, *supra* note 71.

[73] *Olmstead*, 527 U.S. at 592.

[74] *Id.* at 593-94.

[75] *Id.* at 595.

ADA, the states are required to place the disabled in community based-settings instead of institutionalization when: the State healthcare providers deem it appropriate; when the mentally disabled individual does not object; and such a change can be reasonably accommodated, otherwise known now as the integration mandate.[76] Here, the Court found that the budget of the state of Georgia could very easily accommodate such a change, and found in favor of the two women respondents.[77]

While this case does not directly address subminimum wages, advocates and legal scholars argue that *Olmstead* requires integration where appropriate, and with the advancements in community-based treatment and in ability to accommodate in community-based settings, there is little to no reason to continue segregating disabled employees in sheltered workshops.[78] As a result of the fact that sheltered workshops hold most of the certificates used to pay subminimum wages; a lack of necessity for sheltered workshops equally means a lack of necessity for subminimum wages.[79] Additionally, advocates argue that this rate of pay still counts as a form of wage discrimination under the ADA even though it is part of a special exemption.[80]

In more recent years, the federal district courts have heard cases directly related to the issue of subminimum wages, as well as sheltered workshops. In 2012, the United States District Court for the Southern District of Iowa heard *E.E.O.C. v.*

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[76] *Id.* at 592.

[77] *Id.* at 603-04.

[78] Golde, *supra* note 7 at 470-71.

[79] *Id.*

[80] *Id.*

Hill Country Farms, as discussed above.[81] The turkey farm stole money from disabled workers while paying the employees subminimum wages for work that non-disabled employees also did, but for minimum wage.[82] In addition, even though the employees often worked over 40 hours a week, they were never paid overtime.[83]

The court granted partial summary judgment for the employees, stating that the wage practices of Hill Country Farms, Inc. were discriminatory.[84] The court pointed to many facts in making this determination, including but not limited to:

> For more than thirty (30) years during which the disabled men were employed in Iowa, all of them were always paid in the same manner, using the same method of calculation, a cash payment of $65.00 per month. ...and[...]United States Department of Labor's Wage and Hour Division determined that [Hill Country Farms] had violated the FLSA and instructed HCF/HTS regarding minimum wages, overtime, Section 3(m) credits

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[81] EEOC v. Hill Country Farms, Inc., 899 F.Supp.2d 827 (S.D. Iowa 2012) (*aff'd* EEOC v. Hill Country Farms, Inc., 564 Fed. Appx. 868 (8th Cir. 2014)).

[82] Preedy, *supra,* at 1118; *see also* Nat'l Disability Rights Network, *supra* at 12.

[83] EEOC v. Hill Country Farms, 899 F. Supp. 2d 827, 827-33 (S.D. Iowa 2012).

[84] *Id.* at 827.

> and record keeping; however, despite the knowledge of these violations, and an agreement to comply with the wage laws, [Hill Country Farms] never changed its pay practices.[85]

The court went on to produce six full pages of findings of wrongdoing and liability in regards to the pay practices, even though Hill Country Farms argued that during some of the years upon which these events occurred they were allowed to pay subminimum wages.[86] Again, this represents an extreme case, the court was displeased with the idea of subminimum wage abuse and this became a key argument for disability advocates who argue that a reason for abolition of subminimum wages is to point out the relative ease in which to abuse the system. In support of their argument, the abuses in this case went on for thirty years before it was discovered[87], leading opponents to argue that there is most likely just as many abuses still ongoing that the federal government has not yet discovered. The findings and the tone of this case, at least, allows for the possibility of reform.

Finally, the United States District Court for the District of Oregon allowed for a class of disabled workers to be certified in 2012 and was settled in 2015.[88] Known as *Lane v. Kitzhaber*

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[85] *Id.* at 827-33

[86] *Id.*

[87] Nat'l Disability Rights Network, *supra* at 12.

[88] Lane v. Kitzhaber, 283 F.R.D. 587 (D. Or. 2012); *Fact Sheet on Proposed Agreement Over Oregon Supported Employment*, ADA.GOV,

and later *Lane v. Brown*, the class of workers concerned included, "all individuals in Oregon with intellectual or developmental disabilities who are in, or who have been referred to, sheltered workshops" and "who are qualified for supported employment services."[89] The complainants, eight disabled workers in this class, along with the organization United Cerebral Palsy of Oregon and Southwest Washington, argued that Oregon violated the integration mandate of *Olmstead* and Title II of the ADA by continuing to unnecessarily segregate disabled workers into sheltered workshops and paying them subminimum wages through the poor "administration, management and funding of its employment service system."[90]

Complainants had previously asked for and would have preferred to receive supported employment services, which were available. These services would have allowed the workers more job opportunities, upward mobility, and a minimum wage.[91] But they claimed that as a result of Oregon's failings in management and funding they remained segregated and were still paid a subminimum wage.[92] The case settled, and as a result Oregon renewed its focus on supported employment and passed a new

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https://www.ada.gov/olmstead/documents/lane_fact_sheet.pdf (last visited Nov. 13, 2014).

[89] *Id.* at 589.

[90] *Id.* at 591.

[91] *Id.*

[92] *Id.*

executive order to that effect.[93] The state also renewed its focus on enhancing employment outcomes for disabled workers.[94]

This case, while ending in a settlement, is of some interest to those looking to end subminimum wage. One could conclude from this result that state governments seemed to realize, even if by threat of suit, that denying disabled workers interest in advancement and the opportunity for growth, *including access to an equal minimum wage*, violated the ADA. One can conclude generally that while this line of thought hinges upon a violation of the integration mandate, it seems states seem to be beginning to recognize that in general, a denial of opportunities for advancement, brings unethical concerns that makes them unwilling to challenge possible suits, even if they could argue that a subminimum wage is still legal under §14(c).

B. The Federal Acts that Failed

Unlike the court system, which has opened up legal avenues for the possible end of subminimum wages, federal legislative action in regards to the subminimum wage has been lacking, with little to no changes in the FLSA since FSLA's passage in 1938.[95] Three recent attempts to repeal §14(c) have all failed.[96] The first attempt took place when Florida

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[93] *Id.*; *Fact Sheet on Proposed Agreement Over Oregon Supported Employment*, *supra* note 85.

[94] *Id.*

[95] Fair Labor Standards Act §8; §14(c), 75 P.L. 718, (1938).

[96] Fair Wages for Workers with Disabilities Act of 2013, *supra* note 71, Fair Wages for Workers with Disabilities Act of 2011, *supra* note 71,

Representative Clifford Stearns introduced the Fair Wages for Workers with Disabilities Act of 2011 to the 112th Congress.[97] This proposal listed many arguments as to why repealing would be beneficial.[98] For example, the bill mentioned,

> "Employees with disabilities, when provided the proper rehabilitation services, training, and tools, can be as productive as nondisabled employees. Even those individuals that are considered most severely disabled have been able to successfully obtain employment earning minimum wage or higher."[99]

The bill also raised an interesting point, that many of the employers who have the subminimum wage certificates benefitted from "philanthropic donations and preferred status when bidding on Federal contracts" but overstated their claims that the businesses would no longer be financially viable if forced to pay minimum wage.[100]

In addition, the bill considered that §14(c) requires that the wage to be paid be established through very complex means and creates a "productivity benchmark" that is difficult for even

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The Transitioning to Integrated and Meaningful Employment Act,

supra note 71.

[97] Fair Wages for Workers with Disabilities Act of 2011, *supra* note 71.

[98] *Id.*

[99] *Id.* at § 2 (4).

[100] *Id.* at § 2 (6)

a non-disabled employee to maintain.[101] Furthermore, considering the costs involved in improving the law and bringing oversight up to acceptable standards, it would be cheaper and better served to put money and energy into integration employment services.[102] The law itself would require a transition period of three years in which all special wage certificates would slowly be revoked, ending with a total repeal of §14(c).[103]

So why did this bill not pass? Strictly, because it had a very low priority in Congress, even though it had 82 co-sponsors.[104] The House of Representatives passed upon enacting immediately, instead moving it into the House Education and the Workforce Committee and the Workforce Protections Subcommittee, where committee chairs, who decide whether the bill moves on for consideration, let the bill languish until it died at the end of the Congressional term.[105]

The second attempt involved Representative Gregg Harper's reintroduction of the bill, renamed the Fair Wages for

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[101] *Id.* at § 2 (9)

[102] *Id.* at § 2 (8) (Examples of the costs involved would include training and support for the Wage and Hour Division of the Department of Labor, who is charged with oversight and prevention of abuse).

[103] Fair Wages for Workers with Disabilities Act of 2011, *supra* note 71 at § 3 (2).

[104] *Id.*

[105] *Id.*

Workers with Disabilities Act of 2013.[106] The text of the bill and its rationale are identical. The bill was also nearly identical to the original, in that is was treated as a low priority that was once again placed into the House Education and the Workforce Committee and the Workforce Protections Subcommittee where it floundered despite having 97 co-sponsors.[107]

Why is this bill such a low priority? The most documented reason is because many of the subminimum wage certificate holders have come out against the law, making many of the same strong arguments detractors have made; such as fear of losing benefits.[108] In building upon those fears, many families and employers fear a repeal of subminimum wages under the FLSA.[109]

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[106] Fair Wages for Workers with Disabilities Act of 2013, *supra* note 71.

[107] *Id.*

[108] *See generally Fair Labor Standards Act (FLSA): Protect Employment Opportunities for People with Disabilities*, GOODWILL INDUSTRIES INTERNATIONAL (Feb. 1, 2014) http://www.goodwill.org/wp-content/uploads/2013/06/Final-FLSA-Fact-Sheet.pdf (last visited Oct 8, 2016).

[109] *See generally* Anna Schecter, Disabled Workers Paid Just Pennies an Hour--and It's Legal, NBC NEWS (June 25, 2013, 3:12 PM), http://investigations.nbcnews.com/_news/2013/06/25/19062348-

The most recent attempt to repeal §14(c) was titled the Transitioning to Integrated and Meaningful Employment (hereinafter "TIME") Act, which has the exact same text and plan for transition and appeal as the two previous bills.[110] As before, the bill only has a one percent chance of passage, as it is very low priority.[111]

Perhaps, in making our own conclusions, part of the issue is that the bills themselves do not address how the government, while repealing §14(c), will ensure that disabled employees will have the proper systems in place to prevent them from losing employment opportunities. Or how the government will prevent disabled persons from being shunted to adult care centers full-time once the law is repealed. One possible suggestion for employer reticence is that we could conclude the burden of figuring out workable alternatives to their current business models of subminimum wages falls to employers without legislative suggestions.

C. The Workforce Innovation and Opportunity Act and President Obama's Executive Order 13658

Despite the failures of the federal government in repealing §14(c), it is inaccurate to say that the federal government is ineffective in passing laws that benefit the disabled community. Two examples of laws that have had a positive impact on the disabled community are the Workforce

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disabled-workers-paid-just-pennies-an-hour-and-its-legal (last visited Nov. 15, 2016).

[110] The Transitioning to Integrated and Meaningful Employment Act, *supra* note 71.

[111] *Id.*

Innovation and Opportunity Act and President Obama's Executive Order 13658.[112] Both of these do not specifically focus on disability and employment. The focus of each is on employment generally, with specific carve-outs for the disabled community.[113] Under the Workforce Innovation and Opportunity Act (hereinafter "WIOA"), one section, 458, out of the total 513 sections, is specifically devoted to addressing subminimum wages involving disabled workers, although many other sections discuss employment opportunities for the disabled.[114] Under Section 458, disabled individuals aged twenty-four or younger are required to apply for vocational rehabilitation or pre-employment transition programs first, in order to determine if competitive and integrated employment is a more suitable alternative.[115]

Under Section 458, a young disabled adult can be put forth for subminimum wages only when: competitive integrated

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[112] *See* Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, 128 Stat. 1425, 1676-79, U.S. DEPT. OF LAB. https://www.gpo.gov/fdsys/pkg/PLAW-113publ128/pdf/PLAW-113publ128.pdf (last visited Jan 24, 2017); Exec. Order No. 13658, 79 Fed. Reg. 9851 (Feb. 12, 2014), http://www.gpo.gov/fdsys/pkg/FR-2014-02-20/pdf/2014-03805.pdf (last visited Jan 24, 2017).

[113] *See generally,* WIOA, *supra* note 108 and Exec. Order No. 13658, *supra* note 108.

[114] WIOA, *supra* note 108, at Sec. 458.

[115] *Id.*

employment has been deemed unsuitable, the individual is either ineligible for vocational rehabilitation or the individual has been unsuccessful using vocational rehabilitation, career counseling has been offered, and referrals have been made to other federal and state resources for seeking competitive integrated employment.[116] Furthermore, WIOA also requires that vocational rehabilitative services offer transitional services for individuals moving from both public and private schools to employment and earmark 15 percent of the federal funding received for that purpose.[117]

In doing this, a safety net has been created for disabled young adults so that they can integrate to competitive employment without struggling through difficult transitions and sheltered workshops and their accompanying subminimum wages. Knowing the stances of both the disabled advocates and the § 14(c) supporters, both sides likely enjoy some aspects of this rule. First, disabled activists would enjoy the fact that the focus of the law is on limiting the use of subminimum wages and sheltered workshops, promoting more gainful employment. However, disabled advocates likely do not enjoy the limitation in the law to disabled individuals aged twenty-four and younger.[118] This means that the impact of the law does not reach all disabled individuals. In fact, Section 458 of WIOA would likely not affect anyone but the disabled who are just joining the workforce.[119] The law does very little for those who have been receiving subminimum wages for a number of years or for older adults.[120]

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[116] *Id.*

[117] Golde, *supra* note 7, at 480.

[118] *Id.* at 481.

[119] *Id.*

[120] *Id.*

Second, the law allows for the continuation of subminimum wages in specific circumstances, meaning that if integrated jobs are not plentiful, if disabled workers are not being hired, or if a worker is too limited in productivity to be considered for competitive and integrated employment, sheltered workshops with subminimum wages will still be able to provide jobs for the disabled. Supporters of § 14(c) like this continuation, because this guarantees that there will be very little in the way of influxes of the disabled using full-time care services and institutions because of joblessness. The law seems to be a sufficient compromise addressing the concerns of both sides of the issue.

In addition to the above, WIOA also created the Advisory Committee of on Increasing Competitive Integrated Employment for Individuals with Disabilities (hereinafter, the Committee). [121] Leaders from federal agencies, representatives from disability advocacy groups, providers of employment services, economic, employment, and wage experts, and individuals with disabilities among many others, staffed this Committee.[122] The goal of the Committee was to address the growing desire to do away with sheltered workshops and subminimum wages by presenting recommendations to the Department of Labor on how to increase the use of competitive and integrated employment for those with disabilities and how to improve oversight of the use of subminimum wages.[123] Some of the committee's many recommendations include topics such as: how to increase use of competitive and integrated employment; how to reduce the use of subminimum wages and

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[121] ADVISORY COMM. ON INCREASING COMPETITIVE INTEGRATED EMP. FOR INDIVIDUALS WITH DISABILITIES, *supra* note 27, at 1.

[122] *Id.* at iii.

[123] *Id.*

increase oversight of current employers who provide subminimum wages; and how to entice and support businesses in hiring and paying disabled workers a full minimum wage..[124] More specifically, this includes but is not limited to:

> Guidance, policies and strategies to prioritize federal funding for [competitive integrated employment] . . . [f]unding and initiatives to help agencies build [competitive integrated employment] capacity, develop national standards of professional competence, and train professionals skilled in facilitating [competitive integrated employment], and . . . amend the FLSA to allow for a multi-year, well-planned phase out of Section 14(c), [t]he Wage and Hour Division of the U.S. Department of Labor engage in stronger oversight of the current use of 14(c) certificates, and [t]he federal government assists states with building capacity of service systems to provide [competitive integrated employment] services as alternatives to those provided under programs using a 14(c) certificate.[125]

Obviously, the recommendation that is most aligned with the general interest in ending § 14(c) is the recommendation to phase-out §14(c), but each of the other recommendations would help ensure that disabled individuals would have access to competitive integrated employment opportunities rather than floundering in unemployment or seeking daycare/long-term

[124] *Id.* at ii.

[125] *Id.* at 1-4.

care facilities. These recommendations were presented to the Secretary of Labor in September of 2016.[126]

Another step towards repeal brought about by the federal government was President Obama's Executive Order 13658 on February 12, 2014.[127] The executive order increased the minimum wage of federal and subcontractors to $10.10 an hour.[128] This includes those who work in sheltered workshops, where subminimum wages are most often paid.[129] This addressed the issue of subminimum wages directly, forcing contractors to pay minimum wages; but the executive order does not address every issue brought on by subminimum wages. For example, while the law eliminated subminimum wages in sheltered workshops, sheltered workshops still exist to segregate disabled individuals from community. Additionally, in competitive and integrated employment, there is an opportunity for raises, promotions, and beneficial lateral transfers.[130] However, in sheltered workshops, there is very little opportunity for promotion in title, raises in pay based upon performance, or transfers that allow for learning a variety of skills, which

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[126] ADVISORY COMM. ON INCREASING COMPETITIVE INTEGRATED EMP. FOR INDIVIDUALS WITH DISABILITIES, *supra* note 27, at i.

[127] Exec. Order No. 13,658, 79 Fed. Reg. 9851 (Feb. 12, 2014).

[128] *Id.*

[129] Golde, *supra* note 7, at 481.

[130] ADVISORY COMM. ON INCREASING COMPETITIVE INTEGRATED EMP. FOR INDIVIDUALS WITH DISABILITIES, *supra* note 27.

sheltered workshops either limit or lack entirely.[131] It also matters that the executive order was not intended only to address the issues of subminimum wages, but was intended for all federal contractors.[132] While these laws help with the issues of subminimum wages, they do not abolish the law entirely and do not address the co-existing issues that occur because of subminimum wages, such as sheltered workshops and their dubious benefits.

D. The State Law that Failed? What Maine's Attempt to Abolish Subminimum Wages Possibly Lacked

One state has attempted to abolish their laws supporting subminimum wages. Maine moved to eliminate subminimum wages in 2008, phasing out sheltered workshops which paid the majority of subminimum wages over a number of years, from 2008 to 2015.[133] However, according to George Washington

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[131] *See generally,* Laura C. Hoffman, *An Employment Opportunity or a Discrimination Dilemma?: Sheltered Workshops and the Employment of the Disabled*, 16 U. PA. J.L. & SOC. CHANGE 151 (2013).

[132] Exec. Order No. 13,658, 79 Fed. Reg. 9851 (Feb. 12, 2014).

[133] Elise Young, *Disabled Earn Pennies as Caregivers Debate Clinton's Raise Plan*, BLOOMBERG, (May 17, 2016), https://www.bloomberg.com/politics/articles/2016-05-17/disabled-earn-pennies-as-caregivers-debate-clinton-s-raise-plan; Janet A. Phoenix & Tyler Bysshe, Transitions: A Case Study of the Conversion from Sheltered Workshops to Integrated Employment in Maine,

University's study, the phase-out has not been successful so far. [134] So how did the law fail if Maine phased out the sheltered workshops? According to the University's June 2015 study on the impact of the phase-out, "two-thirds of those onetime employees didn't find other paid positions" and "enrollment in daycare and other programs soared to 3,178, from 550." [135] These statistics are very concerning, as the main goal of ending subminimum wages is to promote both equal pay and to end sheltered workshops which should lead to an increase in competitive and integrated employment.

So, what went wrong with this legislation? Mainly, three issues: general economic downturn compounded with the integration leading to lowered employment, passage of good public laws for integration but ineffective implementation of those laws by the Division of Vocational Rehabilitation, and provisions in those laws that decreased overall pay to the disabled.[136]

First, it is important to note that employment percentages in general went down for all populations including the non-disabled.[137] This is important because it could mean

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GEORGE WASHINGTON U. MILKEN INSTITUTE SCH. OF PUB. HEALTH DEP'T OF HEALTH POL'Y & MGMT. (June 2015), http://www.vaaccses.org/vendorimages/vaaccses/REPORT_Transitions_ConversionFromShelteredWorkshops_Maine_July2015.pdf.

[134] Phoenix & Bysshe, *supra* note 129.

[135] *Id.*

[136] *Id.* at 7,

[137] Phoenix & Bysshe, *supra* note 129.

that decreased employment rates for the disabled were not because of the failure of integration from sheltered workshops, but because the employment market in general just happened to have a downturn. However, from 2008 to 2012 employment fell 2.3 percent for non-disabled workers but fell even more for disabled workers, 5.4 percent in total.[138] Employment rates for the disabled were already very low as compared to non-disabled workers, so a higher decrease in employment for disabled workers than their non-disabled counterparts could mean that integration may have had an impact.[139] The study makes no definite conclusions, but it is possible to infer that the transition may have compounded the decrease in employment for the disabled in a way that did not occur for the non-disabled despite general employment downturn, causing the disparity.

In transitioning from sheltered workshops to competitive integrated employment, Maine passed multiple public laws that facilitated the transition.[140] As we will see, all these laws were ineffectively implemented by the Division of Vocational Rehabilitation and related support organizations.[141] Most concerning of all, those limitations actually decreased the take-

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[138] *Id.* at 7.

[139] *Id.* at 7. (The employment rate for non-disabled Mainers is 79.1%, compared to a rate of 31.4% for disabled workers.)

[140] *Id.* at 17.

[141] ME. DEP'T OF LABOR, ME. DEP'T OF HEALTH AND HUMAN SERV., A REPORT ON PUBLIC LAW CHAPTER 101 RESOLVE, TO CREATE IMPROVED EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH DISABILITIES (JAN. 2008) at 39-40.

home pay of disabled workers, the exact opposite of Maine's original goal.[142]

Maine first passed Chapter 570, "An Act To Create Employment Opportunities for People with Disabilities."[143] This law first required each of Maine's state agencies to review its hiring and practices for disabled individuals, specifically the law focuses on individuals with intellectual and developmental disabilities.[144] Each agency was required to develop a plan for increasing hiring opportunities for disabled individuals and "engage in outreach activities so that people with disabilities would become more aware of employment related services."[145] Then, those agencies signed a Memorandum of Understanding, which implemented the MaineCare Waiver Supports Program, to Maine's updated Medicaid program (hereinafter, "MaineCare").[146] This program was supposed to oversee all of the different programs for employment services for disabled individuals in Maine, which includes: the Division of Vocational Rehabilitation of the Maine Department of Labor, the Office of Adults with Cognitive and Physical Disabilities, and the Maine Department of Health and Human Services, among others.[147]

However, disabled job applicants faced long wait times for receiving job placement services from the Division of Vocational Rehabilitation; many reported wait times over more

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[142] Phoenix & Bysshe, *supra* note 129 at 29.

[143] *Id.* at 17.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 17, 20-21.

than a year to complete job placement assessments.[148] If jobs changed or are ended, the worker must go through the lengthy employment process all over again.[149] The Division's inefficiency is especially impeding because much of the funding for employment services, as limited as the services can be, cannot begin until after Vocational Rehabilitation finishes its' placement.[150] Some interviewees reported that some disabled workers had lost some employment prospects because they were waiting for their vocational rehabilitation assessments to be completed.[151] Further complicating matters, many employment service providers that originally employed disabled workers, in sheltered workshops, could have easily placed disabled workers in integrated employment themselves; as they usually provided all-around services including placement. Those employers were now required to wait until after Vocational Rehabilitation finished its own assessment before they could place a disabled worker.[152]

As part of the introduced MaineCare program, Sections 21 and 29 fund a support system for disabled individuals to encourage the transition from sheltered workshops to competitive integrated employment.[153] Under both sections, employment services that are provided include but are not limited to "periodic interventions on the job site to identify a member's opportunities for improving productivity, minimizing

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[148] Phoenix & Bysshe, *supra* note 129, at 29.

[149] *Id.* at 29.

[150] *Id.*

[151] *Id.*

[152] *Id.* at 29-30.

[153] *Id.* at 17.

the need for formal supports by promoting natural workplace relationships, adhering to expected safety practices, and promoting successful employment and workplace inclusion" and "assistance in transitioning between employers when a member's goal for type of employment is not substantially changed, including assistance identifying appropriate employment opportunities and assisting the member in acclimating to a new job."[154]

Employment specialists would provide all these services, either from an agency or independently, if certified.[155] These specialists would be provided at places of employment where non-disabled workers are also employed.[156] Use of these specialists are for periods of transition to integrated employment or when transferring jobs.[157] For long-term employment situations, work support supplants employment specialist support in providing the tools to independently maintain employment and productivity for disabled individuals.[158] Ideally, MaineCare promotes the referral of all disabled individuals to the Division of Vocational Rehabilitation to coordinate their employment goals and needed support structure, where funds for Employment Specialist Services and Work Support can be managed according to the disabled worker's needs.[159] Again, actual access to those services was

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[154] ME. DEP'T OF LABOR, *supra* note 141 at 38-40.

[155] *Id.* at 38.

[156] *Id.*

[157] *Id.*

[158] *Id.* at 39.

[159] *Id.* at 39-40.

limited by the delay created by the Division of Vocational Rehabilitative Services.[160]

Additionally, those who found employment had their workweek shortened greatly; because Section 29 of MaineCare put a cap on how many hours the disabled could work in a week and limited the hours of support they can receive.[161] Therefore, while the average per-hour earnings for disabled workers increased by receiving minimum wage, the drastic cut in the hours worked per week, meant disabled workers began earning less than before the transition.[162]

Additionally, the new laws were intended to allow disabled workers to work independently without supervision or support approximately fifty percent of the time.[163] However, many individuals were not able to work at that level of independence and many employers were not able to provide the amount of supervision needed for a lower level of independence.[164] The employment services provided under MaineCare created for these purposes of supporting workers in independence have a cap on how many hours they can be used, meaning that less independent members did not have enough hours of support service needed to become more independent.[165] This also meant that the services put in place by Section 21 and 29 of MaineCare were limited in how much service they could

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[160] Phoenix & Bysshe, *supra* note 129, at 20, 29.

[161] *Id.*

[162] *Id.*

[163] *Id.* at 28-29.

[164] *Id.*

[165] *Id.*

provide for disabled workers long-term, especially if workers needed support beyond their yearly allotment of support hours.[166]

Obviously, the laws were comprehensive, but again, the issue remained on proper execution. While these laws did indeed phase-out sheltered workshops and subminimum wages, more disabled individuals were spending their time in either volunteer positions or in non-work activities such as day programs.[167] The most egregious limitation provided by the laws implemented is that the cut in work hours has led to decreased overall pay, exactly what Maine did not want to occur.[168]

Finally, there were a series of minor issues that also impeded the state of Maine in successful transition to integrated employment. Many of the employment providers interviewed stated that employers were still hesitant to pay minimum wage to workers who may not be as productive, and many reported that disabled workers did not meet minimum productivity standards, although this may be due to some inherent weaknesses in the support system provided by MaineCare as mentioned above.[169] Additionally, many of the jobs open to the disabled were vulnerable to the changing local and national

[166] Phoenix & Bysshe, *supra* note 129.

[167] Phoenix & Bysshe, *supra* note 129, at 20, 29.

[168] *Id.* at 20, 29.

[169] *Id.* at 29.

economy,[170] management changes,[171] or structural changes.[172] Severity of disability and age were also factors that limited the amount of jobs that were available with the amount of support needed to succeed, meaning workers with more severe disabilities needed support that both Sections 21 and 29 could not provide due to their caps or that an employer could not reasonably supply to its workers.[173]

These issues, dealing primarily with how support systems and funding are set up under Maine's new laws are concerning, and reform for the system is heavily advocated.[174] However, it is important to note that much of the knowledge about the issues in Maine's system come from the study cited above, from George Washington University. However, the study does not capture a perfect picture. For example, much of the data collected in the study came directly from Community Rehabilitation Programs that once ran the sheltered workshops, which were phased out.[175] Community Rehabilitation Programs does benefit directly from sheltered workshops as a sheltered workshop provider. [176]

Additionally, the study only interviewed five employed disabled workers/recipients of employment services and only to

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[170] Phoenix & Bysshe, *supra* note 129, at 31.

[171] *Id.* at 29, 31.

[172] *Id.* at 29.

[173] *Id.* at 30.

[174] *See* Phoenix & Bysshe, *supra* note 129.

[175] *Id.* at 10, 29-31.

[176] *Id.* at 29.

discuss the hours they work.[177] As recipients and subjects of the laws in question, it may be prudent to survey those workers as to their impressions of their job outcomes, like "What could be improved upon?" and so on. The sample size is obviously small.

Finally, this study was funded in part by the CHIMES Foundation.[178] While this is not improper or unusual in anyway, it is important to recognize that the CHIMES Foundation provides services and support to people with disabilities.[179] While this may not be the aim of the study, CHIMES along with many other disability providers may benefit both financially or otherwise by reform of Maine's failed attempts at a successful end to the need for subminimum wages.

While Maine was not the most successful implementation of laws in regards to improving employment among the disabled and while there is not officially a law that ends subminimum wages in Maine altogether, they still accomplished an important first step of abolishing segregated employment practices and subminimum wages.[180] However, there are examples of both successful repeal of subminimum wages and sheltered workshops in other states that would provide better examples of how subminimum wages could end.

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[177] *Id.* at 25.

[178] *Id.* at 2.

[179] CHIMES FOUNDATION,

http://www.chimes.org/foundation/index.htm (last visited Feb. 25,

2017).

[180] *See* Phoenix & Bysshe, *supra* note 129.

IV. Small Successes: How Successful State Laws Came to Be

Two examples of states that passed laws abolishing subminimum wages that had successful outcomes for disabled workers include New Hampshire[181] and Maryland.[182] Additionally, Vermont, while not officially eliminating subminimum wages through law, has removed sheltered

[181] Michelle Diament, *In First, State to Ban Subminimum Wage*, DISABILITYSCOOP (May 8, 2015), https://www.disabilityscoop.com/2015/05/08/in-first-ban-subminimum/20279/.

[182] *Maryland Votes to End Subminimum Wage*, THE AUTISTIC SELF-ADVOCACY NETWORK, (Mar. 28, 2016), http://autisticadvocacy.org/2016/03/maryland-votes-to-end-subminimum-wage/.

workshops,[183] and has improved integrated employment outcomes for disabled employees to a great degree.[184]

The first state to examine is New Hampshire, the first adopter of an official law that bans subminimum wages and as a result phases out both subminimum wages and effectively shuts down sheltered workshops.[185] The text of the bill itself is relatively simple, stating:

> AN ACT repealing the payment of subminimum wages to persons with disabilities.
>
> *Be it Enacted by the Senate and House of Representatives in General Court convened:*
>
> 40:1 Payment of Subminimum Wages. RSA 279:22 is repealed and reenacted to read as follows:
>
> 279:22 Payment of Subminimum Wages. Except as provided in RSA 279:22-aa and RSA 279:26-a, no

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[183] Jennie Masterson, *Op-ed: Vermont Setting the Standard for Supported Employment,* VT. OFFICIAL STATE WEBSITE, (Mar. 2016), http://ddsd.vermont.gov/op-ed-vt-setting-standard-supported-employment (last visited January 26, 2018).

[184] NAT'L COUNCIL ON DISABILITY, REP. ON SUBMINIMUM WAGE AND SUPPORTED EMPLOYMENT, http://www.ncd.gov/publications/2012/August232012/sites/ (last visited Feb. 25, 2017).

[185] Diament, *supra* note 178.

> person shall employ any individual with a disability as an employee at an hourly rate lower than that set forth in RSA 279:21.
>
> 40:2 Repeal. RSA 279:22-a, relative to special authorization for sheltered workshops, is repealed.
>
> 40:3 Effective Date. This act shall take effect 60 days after its passage.[186]

This law, while simply stated, has several reasons why it may have been more successful than the attempts in Maine.[187] Its success may be in part due to how companies that were traditionally for subminimum wages in New Hampshire now call for the end of the practice.[188] An example of this change in New Hampshire as it relates to subminimum wages is exemplified by Goodwill Industries of Northern New England.[189] As previously mentioned above, Goodwill Industries International, as a national non-profit corporation,[190] is one of the largest users of special wage certificates that allow for the

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[186] S.B. 47, 114th Gen. Ct., Reg. Sess., (N.H. 2015).

[187] Diament, *supra* note 178.

[188] *See Public Policy at Goodwill*, GOODWILL INDUSTRIES OF NORTHERN NEW ENGLAND, https://goodwillnne.org/public-policy/ (last visited Mar. 15, 2017).

[189] *Id.*

[190] *See generally, About Us*, GOODWILL INDUSTRIES INTERNATIONAL, http://www.goodwill.org/about-us/ (last visited Mar. 15, 2017).

payment of subminimum wages to disabled employees.[191] As such, Goodwill Industries International has long advocated against repealing § 14(c), for reasons including preventing limitations in job opportunities for disabled employees.[192] Obviously, it can also be argued that Goodwill also dislikes the possibility of repeal because paying their employees minimum wage would financially impact them, possibly to their detriment. However, Goodwill Industries of Northern New England, a member of Goodwill Industries International that works in New Hampshire, Vermont and Maine,[193] does not follow the lead of its head office and implements its autonomous nature by advocating for the repeal of § 14(c) and ending subminimum wages.[194] While this may not seem important in the overall fight for repeal of subminimum wages, it does show that businesses and individuals in positions of influence can have a great effect on attitudes about subminimum wages, leading to smoother transitions into repeal.

New Hampshire itself put together a study to discuss the possibility of repealing subminimum wages.[195] It found that "all three of [subminimum wage special certificate holders in New Hampshire] were paying all of their employees the minimum wage or more and had no intention of renewing their

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[191] *Fair Labor Standards Act (FLSA): Protect Employment Opportunities for People with Disabilities*, *supra* note 54.

[192] *Id.*

[193] *About Us*, GOODWILL INDUSTRIES OF NORTHERN NEW ENGLAND, https://goodwillnne.org/about/ (last visited Mar. 15, 2017).

[194] *Public Policy at Goodwill, supra* note 187.

[195] H.B. 1174, 113th Gen. Ct., Reg. Sess. (N.H. 2014).

certificates."[196] This further shows that the attitudes of the large businesses had much to do with how the state discussed subminimum wages. In this instance, it would have made very little sense to keep subminimum wage laws in place because no person or entity was using them and had no intention of using them.

The second state to repeal subminimum wages was Maryland in 2016.[197] This is known colloquially as the Ken Capone Equal Employment Act.[198] Under this law, Maryland set out that between October 1, 2016 and October 1, 2020 there will be a phase-out of subminimum wages for disabled workers.[199] After October 1, 2020, all § 14(c) certificate holders will no

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[196] Rose Sloan, *Written Statement for the Record Advisory Committee on Increasing Competitive Integrated Employment for Individuals With Disabilities*, NAT. FED'N OF THE BLIND (Mar. 23-24, 2015) https://www.dol.gov/odep/topics/date/20150423-Blind.pdf.

[197] Josh Magness, *Ending Subminimum Wages for Workers with Disabilities Passes*, MD. REP. (Apr. 18, 2016), http://marylandreporter.com/2016/04/18/ending-subminimum-wages-for-workers-with-disabilities-passes/.

[198] *Maryland to Phase Out 14(c) Subminimum Wage*, DISABILITY RIGHTS MD. http://disabilityrightsmd.org/maryland-to-phase-out-14c-subminimum-wage/ (last visited Mar. 17, 2017).

[199] H.B. 420, 2016 Leg., 436th Sess. (Md. 2016).

longer be paying subminimum wages.[200] During the years of the phase out (2017-2020), state agencies must first develop a phase-out plan that includes working in concert with agencies and businesses affected by the repeal of subminimum wages.[201] First, they must submit the phase-out plan each year to Maryland's Governor and the General Assembly that includes "benchmarks, outcomes, and funding or resource recommendations of the phase-out," which includes providing education and resources to businesses so that the fiscal impact of switching to minimum wage is eliminated or mitigated, so that small employers and non-profits especially do not feel burdened.[202]

In addition, each disabled employee, their case managers, employers, or resource coordinators, and the businesses that pay subminimum wages must develop a plan to optimize the worker's integration to competitive employment.[203] This includes recommendations, descriptions of services and supports that would best serve the employee's needs, possible issues that could or have occurred, involving the employee in develop the plan by providing communication devices or techniques, and an integrated employment setting that would best provide for the employee's needs.[204] These planning meetings are meant to occur annually and when at the request of

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[200] DEP'T OF LEG. SERVICES MD. GEN. ASSEMBLY, FISCAL AND POLICY NOTE HOUSE BILL 420, 2016 Leg., 436th Sess. (2016).

[201] *Id.* at 2.

[202] *Id.*

[203] *Id.* at 2-3.

[204] *Id.* at 3.

the employee during the phase-out.[205] The state agencies in charge of the phase-out are also responsible for collecting the documentation of the above meetings with the employees, collating them for each year and reporting them to the Governor and the General Assembly as part of a study to track the impact and possible results of the phase-out.[206]

The initial analysis of the Maryland law suggests, that before the new law, thirty-six organizations pay about 35,000 disabled workers subminimum wages.[207] Under this law for phase-out, Maryland's Department of Labor, Licensing, and Regulation states that there would be no fiscal effect on the state and its Division of Labor as much of what the law now requires can be done with resources already in place.[208]

The above analysis of the law, and the important aspects involved in the law are most likely what caused the law to be passed. First, it was easier to sign such a law into effect because of the lack of fiscal impact, because revenue would not have to be raised to implement the phase-out, meaning it had no impact on citizens' taxes, probably making such a law easier to support by its citizens. Additionally, the phase-out is being conducted with care, monitoring employees and the impact of the phase-out on them. This is beneficial because the focus is on making sure the law works as intended and by following the impact of the law over time, changes can be made to improve outcomes or to increase efficiency if need be. This may have been a major

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[205] *Id.*

[206] DEP'T OF LEG. SERVICES MD. GEN. ASSEMBLY, FISCAL AND POLICY NOTE HOUSE BILL 420, 2016 Leg., 436th Sess., at 3 (2016).

[207] *Id.* at 7.

[208] *Id.*

problem in Maine's phase out, as their law made it impossible to follow employees over time, meaning Maine was not aware of deficiencies in the law until much later.[209] This aspect added by Maryland probably made the law easier to support by advocates and others because it focused upon improving outcomes for disabled workers long-term, rather than passing a law with no follow-up as to how the law actually works for those who are impacted by it, an efficient use of resources.

Finally, part of the impetus for change was due to the change in the culture of Maryland towards subminimum wages.[210] An example of this was Melwood, a horticultural training center, which provided employment to those with disabilities for subminimum wages.[211] Melwood found through studying their own practices that over time payment of subminimum wages to their employees lead to reduced financial savings.[212] While at one time the company was saving over a half-million dollars by paying subminimum wages, advances in both federal and state law (such as President Obama's Executive Order) made it so that those savings were quickly

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[209] *See* Phoenix & Bysshe, *supra* note 132.

[210] *See* Cari DeSantis, *HB 420; SB 417 Labor and Employment - Minimum Wage - Individuals With Disabilities (Ken Capone Equal Employment Act)*, MELWOOD, (Feb. 10, 2016), https://www.melwood.org/files/dmfile/HB%20420%20SB%20417%20White%20Paper%20FINAL%20no%20appendix.pdf.

[211] *Id.* at 3.

[212] *Id.* at 7.

diminishing.[213] Second, Melwood found that their way of rating productivity of workers in order to set their subminimum wages.[214] Actually, there was less productivity just in the time it took to conduct the time studies and subsequent reevaluations, not including in the stress and distraction that these tests caused in workers.[215] Melwood also found morale to be negatively impacted as a result.[216] Finally, Melwood felt that their reputation as a company was at risk because of the complaints about their practices regarding subminimum wages.[217] As a result of this study, Melwood found that it was no longer advantageous to continue paying subminimum wages and supported the state's efforts to end subminimum wages in Maryland.[218] This change in attitude, expressed by a corporation that once advocated for subminimum wages, is exactly the kind of culture change that makes it easier to pass laws on a state level. Like what occurred in New Hampshire, this probably helped in garnering support for Maryland's law.

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[213] *Id.* at 9.

[214] *Maryland to Phase Out 14(c) Subminimum Wage*, *supra* note 196. (This rating is called a time study, which Maryland commonly used, involving timing disabled employees doing a task and comparing it with the timing of non-disabled employees.)

[215] DeSantis, *supra* note 208, at 9.

[216] *Id.* at 10.

[217] *Id.* at 9.

[218] *Id.*

Third, Vermont has also made great strides in eliminating subminimum wages and integrating employment. Vermont first began the transition to competitive and integrated employment very early compared to other states.[219] In 2000, Vermont began a three-year transition period and closed its last sheltered workshop by 2003.[220] The sheltered workshop providers were given advice and assistance in how to best integrate and place their workers by a partnership between the state of Vermont and the University of Vermont, who still continue to provide support to workers even after the phase-out.[221] The results of continued state support in the phase-out show that there have been improved outcomes for disabled workers.[222] Forty-seven percent of those who receive developmental disabilities services are employed in integrated environments in 2015, up from 34 percent in 2011.[223] Vermont attributes its success to three aspects of its employment and disability services.

First, Vermont's Medicaid waivers made it so that incentives were provided to seek integrated employment while removing the risk that seeking integrated employment support services would cause a disabled employee to be reimbursed less or not at all on other home of community supports or benefits by making lump sum payments and bundling services.[224]

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[219] Phoenix & Bysshe, *supra* note 132, at 32.

[220] *Id.*

[221] *Id.*; Golde, *supra* note 7, at 482.

[222] Masterson, *supra* note 180, at 2; Phoenix & Bysshe, *supra* note 132, at 33.

[223] *Id.*

[224] Phoenix & Bysshe, *supra* note 132, at 33.

Additionally, Vermont set up its vocational rehabilitation reimbursement so that it was like a grant-funding mechanism rather than fee-for-service.[225] This allows for service providers to follow along with their clients and to set other long-term employment goals and follow through in ways that are not otherwise possible.[226]

Second, Vermont took the initiative to incentivize providers of subminimum wages to now provide disabled workers support in gaining integrated employment by working together with the employee's service providers and support team when applicable.[227] This was meant as a way to reduce disabled employees who had limited support in terms of others services to at least be provided assistance so that they did not languish.[228] Additionally, and perhaps what made the law so successful was that Vermont held many meetings responding to questions and concerns of family members of disabled employees to assure them that undue burden would not be placed on home care rather than employment or that employment would not dry up for disabled employees.[229]

Finally, Vermont made it so that their plan hinged on not only incentivizing subminimum wage providers to abandon subminimum wages, but also on providing one-on-one support

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[225] *Id.*

[226] *Id.*

[227] Golde, *supra* note 7, at 483.

[228] *Id.*

[229] *Id.* at 483.

for individuals, meaning that all support provided to disabled workers were individualized to each worker's needs.[230]

V. Conclusion: What Can State and Federal Governments Learn?

So, what can the state and federal governments learn from these three states when trying to apply their own laws? First, laws that are as simplistic as the ones put forth by the federal government are only successful if they already have a culture of employment that does not need or rely upon subminimum wages, such as New Hampshire. It can be argued that the only reason New Hampshire's law, a simple as it was, passed because New Hampshire employers had already done away with subminimum wages through their own initiative.[231]

In addition, for laws such as those in Vermont and Maryland, who were using subminimum wages, there were aspects of the laws that cultivated the culture New Hampshire showed. The federal government put laws in place that allowed for a phase-out of subminimum wages, but the successful laws of Vermont and Maryland show that to be successful there needs to be a phase-out combined with aspects designed to put businesses, families, and service providers at ease with the changes occurring, creating a culture where ending subminimum wages is possible. Maryland put forth a study that showed businesses and employers that there would be little to no fiscal impact to them in ending subminimum wages, and put a system in place that would ensure that disabled workers would be provided support during the transition in an effective and

[230] *Id.* at 484.

[231] Diament, *supra* note 178.

efficient way.[232] Vermont set up its Medicaid waiver system in a way that would provide the most benefit and support for workers, incentivized employers to forfeit subminimum wages, provided continuous support through the transition, and allayed the concerns of workers and their families through educational initiatives.[233] These additional initiatives created a culture where ending subminimum wages is possible.

So in order for a state or federal law to most likely be enacted, successful laws show three things: first, the law must be in a phase-out form, preferably over a number of years. Second, the law must provide a system that prioritizes successful integration of disabled employees. Finally, the law must have some way of allaying common fears if it is to be passed. In addition, a law repealing subminimum wages would most likely be successful as a wave of many state-level initiatives. This is because no federal laws have managed to successfully repeal whereas states have been successful.[234]

If many states managed to successfully repeal subminimum wages by crafting laws that include the three successful traits listed above, the federal government may have an easier time repealing § 14(c) because the states show that they value a culture where subminimum wages are a thing of the past, meaning there would be much support behind such a repeal. It is up to the states to show the federal government their unity on the issue of subminimum wages if there is ever to be a federal initiative to repeal § 14(c).

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[232] DEP'T OF LEG. SERVICES MD. GEN. ASSEMBLY, FISCAL AND POLICY NOTE HOUSE BILL 420, 2016 Leg., 436th Sess. (2016).

[233] Golde, *supra* note 7, at 482-83.

[234] *See* Preedy, *supra* note 9; Golde, *supra* note 7.