



NATIONAL CONFERENCE *of* STATE LEGISLATURES

NCSL State Subminimum Wage Trends 2017
Presentation to the New Mexico Disability Concerns Subcommittee

Madame Chair and Members of the Committee,

My name is Jackson Brainerd. I am a fiscal and labor policy analyst with the National Conference of State Legislatures. I want to thank you for having me here today to speak on state minimum wage exemptions. If you're not familiar with NCSL, we are a bipartisan organization that serves the legislatures and staffs of the states and territories. We do not have an official opinion on ideal minimum wage rates or policies related to minimum wage exemptions.

Trends in Minimum Wage Increases

Before I get into subminimum wages, I want to give a quick overview of the state of the national minimum wage picture generally. Minimum wage debates have been picking up steam across the country. In the last four years, there have been 30 enacted increases via either legislation or ballot measure compared three in the four years prior. Nineteen states began the new year with a higher minimum wage because of recently approved measures or annual indexed increases. This trend seems to be cooling down, as no states have enacted an increase in 2017. However, the New Mexican legislature was one of three to pass an increase that was subsequently vetoed.

Current Minimum Wages

Six states and Washington D.C. now have minimum wages above \$10.00. Currently D.C.'s is the highest at \$11.50. Close to half the states are between \$7.50 and \$10, while the rest of the states are at the federal rate of \$7.25. Most debates have primarily been focused around general rate increases but, here and there, states have been looking into raising wages for certain types of employees who are generally allowed to be paid at rates below the statutory minimum. These efforts commonly pertain specifically to tipped workers, youth workers, or workers with disabilities.

Fair Labor Standards Act

The federal Fair Labor Standards Act is a New Deal-era law and the primary federal statute regulating employment wages. It provides for a national minimum wage along with exemptions to the minimum wage rate for certain types of employees, including learners, students, apprentices, patient workers, messengers and people with disabilities. States may establish standards more protective of employees than those set by the FLSA, and they can also regulate the wages and hours of employees who are not subject to the FLSA. For the most part, states have chosen to adopt the

exemptions included in the FLSA and, therefore, most recent legislative action on this front has sought to limit them.

Tipped Minimum Wages

Tipped wages are technically subminimum wages, although the FLSA requirement is that tipped earnings must at least equal the minimum wage when added to the sub-wage. Nevertheless, there have been instances where this law has proven difficult to enforce. Furthermore, the tipped wage, which was frozen at \$2.13 in 1996, has eroded over time relative to the regular minimum wage, which has been raised multiple times. This has spurred some states to consider eliminating or reducing the tip credit.

A handful of states and territories require full wage before tips (Alaska, California, Guam, Minnesota, Montana, Nevada, Oregon, and Washington). Twenty-five states and D.C. require tipped workers be paid above federal minimum cash wage (\$2.13) but below full rate. Seventeen states, Puerto Rico, and the Virgin Islands require only the same wage as the federal Fair Labor Standards Act. At least seven states have enacted legislation raising tipped wages since 2014, but fewer have moved to eliminate the use of tip credits entirely. After Maine voters eliminated the tip in the 2016 election, the legislature restored it the 2017 session.

Training Wages

The FLSA also provides for subminimum wages for youth workers under 20, as well as full-time students, student-learners and apprentices. A subminimum wage no lower than \$4.25 may be paid to these workers for the first 90 days of employment. The goal of these lower wages is similar to that of subminimum wages for people with disabilities and is frequently stated in statute: to prevent the curtailment of employment opportunities. Fourteen states have adopted the federal youth minimum wage, and another 18 states have youth minimum above the federal level or with other restrictions. Voters in South Dakota overturned the creation of youth minimum wage in the 2016 election. In 2017, at least four states (Maine, New York, New Hampshire, Oregon) proposed legislation to create a youth minimum wage, while Idaho proposed a training wage increase.

14 (c) program

Section 14(c) of the FLSA authorizes an employer to pay subminimum wages to a worker with a disability after receiving a certificate from the Department of Labor's wage and hour division. It doesn't apply unless a disability actually impairs the worker's productive capacity for the work being performed. The DOL [determines](#) the special minimum wage rates based on the quantity and quality produced by the worker with a disability compared to production rates of workers without disabilities, as well as prevailing wages, or wages paid to experienced workers who do not have disabilities for similar work in the same geographic regions. The rates are reviewed and re-determined at least every six months.

According to the [National Council on Disability](#), the 14(c) program is primarily used by non-profit or state-operated social service providers, like sheltered workshops, rather than the for-profit sector. Roughly 5,600 employers pay subminimum wage to 424,000 workers with disabilities nationwide. This accounts for about 3 percent of the all employed people with disabilities. Seventy-four percent of 14(c) employees have an intellectual disability. The program used to have a wage floor of 50% of the statutory minimum rate, but this was repealed by Congress in 1986. Now, it simply requires that people with disabilities be paid at a rate “commensurate with those paid to non-handicapped workers” and be “related to the individual’s productivity.” This productivity is typically measured by employers, who compare how quickly a person with a disability can complete a given task relative to a worker without a disability. A 2001 [GAO report](#) found that the DOL does not systematically verify that an employer’s assessment of worker productivity and wages are in compliance with the program.

Federal 14(c) Action/Proposals

There have been steps taken at the federal level to reduce the use of subminimum wage certificates. As part of WIOA, the Labor Department [tightened standards](#) for granting employers exemptions, required that workers in sub-minimum wage positions receive transitional services focused on integration into community-based jobs, and required that workers under age 24 be offered transitional services before placed in exempt jobs. A recent executive order raised minimum wages for federal contract workers with disabilities.

There have been several congressional efforts to repeal the 14(c) program as well. In 2017, several measures have been proposed by members of both parties (H 15/S 1242/H 1377) that would phase out special wage certificates and raise the minimum wage for workers with disabilities.

State Provisions

Some states adopt federal law by reference, and a 14(c) certificate is all that is required of employers seeking a subminimum license. But many states require that special certificates be obtained from the state to pay employees with disabilities subminimum wages. Interestingly, a [fiscal note](#) accompanying Maryland’s recent phase-out of subminimum wages mentions that, although 36 organizations in the state held 14(c) certificates issued by the federal DOL, the state had not received any applications for state required-certificates from these workshops, despite outreach efforts notifying them of this requirement.

While most states mirror the FLSA and leave the determination of the subminimum rate and renewal period to a regulatory authority, some state set explicit subminimum wage floors. Alaska and Delaware, for instance, set it at 50 percent of the state minimum rate, while Colorado only allows certified employees to receive a wage 15 percent lower than the state minimum rate. Violations of state wage and hour laws are typically subject to fines of between \$100 and \$1000 dollars or 30 days in jail (e.g. Colorado, California) but some are a bit more strict. A first-time, willful violation in Washington D.C. results in a misdemeanor and fine of \$5,000 per affected employee or no more

than 30 days in jail for a first-time, willful violation, and a \$10,000 fine or no more than 90 days in jail for subsequent violations.

State Funding for Sheltered Workshops

Because most subminimum wage employment occurs in sheltered workshops (the GAO estimated 95 percent in 2001), state efforts to move funding away from such employment services goes hand in hand with moving away from subminimum wages. Vermont was technically the first state to eliminate the subminimum wage after it closed its last sheltered workshop in 2002. Per the [Department of Labor](#), it has since ensured that no individuals with disabilities are being paid subminimum wages.

As far as how the employment situation of people with disabilities have fared since it's repeal, that might depend on how you interpret the available data. The number of employed Vermonters with disabilities has [gradually increased](#) over time. The State Data Report, published in 2014 by the Institute for Community Inclusion (which opposes sheltered employment), found that found people with intellectual disabilities were most likely to find jobs within a year of applying in Vermont, as were people with other types of disabilities. Thirty-eight percent of people with disabilities in Vermont participated in integrated employment in 2013, and those with intellectual disabilities who were employed worked an average of sixteen hours per week. However, according to a 2016 *Harvard Civil Rights-Civil Liberties Law Review* report, “because Vermont no longer has any sheltered employment settings, this means that the remaining 63% of people with disabilities in Vermont were not employed in any capacity, and those who had employment were working well under half-time.”

Other State Actions

Other states have recently looked into ending sheltered employment, though such efforts have faced resistance. In Massachusetts, a 2013 the state Department of Developmental Services put forward a “blueprint for success” that called for shuttering sheltered workshops. However, in 2015, the state budget limited its reach by prohibiting the state from reducing funding for sheltered workshops serving people with disabilities who voluntarily chose such employment services. Similarly, in response to Governor Andrew Cuomo’s proposal to eliminate sheltered employment in New York, a 2015 bill known as the “Employment First Choice Act” was proposed to the New York State Senate that would have allowed persons with developmental disabilities to choose to remain in sheltered employment.

New Hampshire became the first state to eliminate subminimum wages for people with disabilities when it passed [SB 47](#) in 2015 by explicitly prohibiting employers from employing people with disabilities at a lower hourly rate than the federal minimum wage, except for training programs or family businesses. In 2016, Maryland enacted a measure ([HB 420/SB 417](#)) that eliminated the ability of the State Commissioner of Labor and Industry to allow sheltered workshops to pay subminimum wages to employees with disabilities and set up a phase-out of existing certificates authorizing the payment of a subminimum wage by October, 2019. As part of the phase-out, it required the state Department of Labor, Licensing, and regulation to track the wages, unemployment rates, and employment outcomes of people with disabilities moving out of congregated employment settings.

Recent Subminimum Proposals

There have been a few additional state legislative proposals to close sheltered workshops or repeal subminimum wages for workers with disabilities in the last couple years. In addition to New Mexico, legislation was introduced in Oregon, Maine, and Texas but none of them progressed beyond committee. A bill is still pending in California that would have the state subsidize the difference between the subminimum wage and the minimum wage for certain employers of workers with disabilities. If an employer hires a worker who may be paid a special minimum wage at the full minimum wage rate or higher, they would be eligible for a credit equal to the difference between the statewide minimum wage and the special minimum wage provided to that employee, multiplied by the hours worked.

In closing, states weighing changes to subminimum wage policies are doing so in the context of a national discussion on the role and benefits of the minimum wage generally. In looking to alter the status quo on subminimum wages, the same policy questions apply. Is the goal to provide a living wage? Are enforcement mechanisms strong enough? How will required wage increases affect employment opportunities for those the increase is seeking to help? While there are financial concerns for employers who take advantage of subminimum wage programs, the rights of individuals with disabilities who are paid below minimum wage can't be overlooked either. It's a balancing act that we can expect states to continue to grapple with in the coming years.

This concludes my remarks. I am now glad to answer any questions.