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Collaboration
to Promote
Self-Determination

POLICY BRIEF:

Proposed Policy Changes to the Fair Labor Standards Act Aimed at Promoting Supported Employment among Individuals with Significant Disabilities

Current law (under Section 14(c) of the Fair Labor Standards Act) allow public and private employers who obtain special certificates from the Department of Labor's Wage & Hour Division to compensate workers with significant disabilities at rates below the current federal minimum wage based on the individual's level of measured productivity. Additionally, in meeting the wage responsibilities imposed by the Act, Section 3(m) of the FLSA authorizes employers to take deduct from an employee's wages the reasonable cost or fair value of food, lodging and other facilities customarily furnished to the employee by the employer. Criticisms of these two provisions range from charges of discriminatory wage setting to arguments that the measures of productivity are antiquated and as such set standards for workers with the most significant disabilities that are not established for workers without disabilities.

The Collaboration to Promote Self-Determination supports the implementation of a balanced, comprehensive approach to systems change, which includes as a key component the eventual phasing out of subminimum wage and wage deduction provisions under Sections 14(c) and 3(m) for all individuals (regardless of ability) and simultaneous capacity building to support individuals with significant disabilities in supported, integrated employment paid at or above the prevailing minimum or industry wage rates. The proposed National Systems-Change Initiative includes the following key public policy components:

I. Proposed Short-Term Reforms

A. Limit use of the Board, Lodging & "Other Facilities" Wage Credit Section 3(m) of the Fair Labor Standards Act) that allows employers to deduct room and board from wages for people with significant disabilities.

- 1.** Reverse through legislative statute DOL's final regulation issued on 12/18/2008 related to interpretation of recruitment expenses under 3(m) rule, thus prohibiting employers from deducting any expenses related to the recruitment of workers from employee wages, clarifying that such expenses are primarily for the benefit of the employer, not the employee.
- 2.** Prohibit employers from deducting from an employee's cash wages an amount that is greater than the cost to the employer of the room or board that the employer furnishes to an employee.
- 3.** Strengthen penalties for exploitation of workers by employers who violate the 3(m) rule.
 - Direct DOL to seek back wages for all years where violations occurred (currently, DOL only seeks back wages for 2-3 years).
 - Seek liquidated damages and require employers to pay employees interest on any money withheld from employees that were in violation of the law.

- Direct DOL to impose civil money penalties (up to \$1000 for each violation) against any person who repeatedly or willfully violates the minimum wage or overtime pay provisions of the FLSA.
- 4. Increase the number of investigators and legal staff within the U.S. Department of Labor's Wage & Hour Division.
 - The number of investigators has decreased from 1500 in 1975 to fewer than 750 in 2009.
 - The number of legal staff has decreased from 786 in 1992 to 590 in 2007.

B. Mandate annual public reporting of data by all entities holding subminimum wage certificates to determine the following information:

1. Number of people moved into integrated employment over the certificate period;
2. Number of people still employed at subminimum wage;
3. Wages paid and status of productivity level for all employees under subminimum wage, stratified by number of years at facility, ethnicity, gender, and age;
4. Require an annual report by DOL summarizing performance on a national, state and certificate-holder level.

C. Include the piloting of a "Better Outcomes for Youth in Transition" Initiative to provide ten states across the country with funds for a five-year period to target youth transitioning from special education to ensure that they achieve employment outcomes such as competitive employment, self-employment, supported and customized employment, paid internships or post-secondary programs which result in paid employment at or above minimum wage.

II. Implement a Ten-Year Phase Out of the Subminimum Wage Payment Provisions under Section 14(c) by amending the FLSA to achieve the following:

A. Phase out the Issuance of the Subminimum Wage Certificates to Community Rehabilitation Providers.

1. Immediate elimination of the issuance of subminimum wage certificates for any new providers that have not previously applied for and received subminimum wage certificates, thus barring this practice by any entities considering the use of subminimum wage within their business model.
2. Prior to the next renewal of any subminimum wage certificate from the U.S. Department of Labor's Wage & Hour Division of the Employment Standards Administration, all applications should be required to report the number of employees who will be paid at subminimum wage for the next two years under the new subminimum wage certificate. This will serve as the maximum number of individuals allowed to be employed under subminimum wage by the certificate-holder, and used for the baseline in calculating a phased-in reduction in future years.
3. Implement a procedure that requires a 25% reduction in years 4-6-8-10 of the number of persons served in a baseline year as the maximum number of individuals that that could be in a program and paid on a subminimum wage certificate. Require that 75% of the total served in the base year would be eligible to remain paid at sub-minimum wage by the end of the fourth year after the "baseline" renewal period; 60% of the total baseline year by the end of the sixth year; 25% of the total baseline year by the end of

the eighth year; and by the tenth year after the baseline was established, no individuals would be allowed to be paid at subminimum wage.

4. In order to receive a renewal of the subminimum wage certificate at years 4, 6 and 8, employers must demonstrate that at least 50% of those individuals who were transitioned out of subminimum wage remained employed in a customized, supported or self-employment opportunity, and were elevated to minimum wage or higher.
 5. Allow CRPs to negotiate an alternative transition plan with DOL's Office of Wage Enforcement to decrease a percentage of employees covered at each certificate renewal between now and defined end date of 14(c) program should they desire.
 6. Call for use of W-2 forms to capture income so as to maximize potential of each individual to receive refundable tax credits for which they are eligible.
 7. Consider extending VR services beyond the 18 months to 36 months for individuals with more significant disabilities so VR can provide OJT funds as needed for individuals who may need additional support and time to increase productivity in their community job.
 8. Extend the Work Opportunity Tax Credit for an additional two years to employers who hire individuals with more significant disabilities who may need additional support and time to increase productivity in their community job.
- B. End the practice of placing youth under the age of 21 into subminimum wage employment environments immediately, and ensure appropriate individual transition plans that prepare youth with disabilities for meaningful employment opportunities through effective training, placement and ongoing supports.**
1. Prohibit individuals under the age of 21 from entering subminimum wage jobs, and prohibit state and federal agencies focused on job placement for individuals with disabilities under the age of 21 from placing them in subminimum wage settings.
 2. Require U.S. Department of Education to extend current Vocational Rehab policy that excludes sheltered workshop from being counted as a category of "employment", and establish consistent policy eliminating the use of sheltered employment (especially where subminimum wages are utilized) as an acceptable place in the transition planning process across all divisions of the U.S. Department of Education.
 3. Create a comprehensive approach to effective transition at the federal level through the incorporation of key systemic reforms.

III. COMPREHENSIVE NATIONAL SYSTEMS-CHANGE REFORM: Implement positive systems change through the development of new and existing community-based infrastructure to expand opportunities for employment and workforce participation among individuals with cognitive, intellectual and developmental disabilities.

While the eventual elimination of the subminimum wage is a priority for the CPSD, the Collaboration is also committed to ensuring that the 424,000 individuals currently employed and being paid subminimum wages are not harmfully impacted by any changes in existing public policy. To avoid any unintended harmful consequences, the CPSD proposes a comprehensive national systems-change initiative that will ensure an innovative, sustainable infrastructure to support a modernized, focused approach to employment in typical work settings at typical wages and benefits. **CPSD believes that at a minimum, the following systemic reforms must be implemented simultaneous to and in alignment with a phasing out of subminimum wage practices:**

- A. Systemic development and implementation of Employment-First policies across all relevant federal and state agencies that fund services and programs related to employment should be the top priority.** Employment First policies are used by states to operationalize key values and goals that reflect a commitment to using public funds as investments in persons' lives, with a specific priority on enabling individuals with disabilities to access, maintain and advance in employment as well fully participate in their communities.

- B. Create a National Systems Change Initiative that includes key components of an Employment First platform, the core goal of placing individuals into employer-paid jobs in typical integrated employment settings. The initiative would be administered and funded by the Administration on Developmental Disabilities and in coordination with the Centers on Medicare & Medicaid Services, U.S. Department of Labor, U.S. Department of Education (specifically Vocational-Rehabilitation) and the Social Security Administration.**
 - 1.** Provide \$100 million/annually beginning in FY 2010 to initiate a targeted grant program that stresses an "Employment First" approach. Emphasis would be placed on evaluating the impact of funded Employment First programs on individual employment outcomes. The grant program (modeled off of the CDC's successful Arthritis Action Plan state grants) would be a three-phased initiative, beginning with 10 three-year capacity building grants.
 - At the end of the initial three years, the original 10 grantees would be evaluated to ensure that the state had drafted both a state-wide Employment First strategic plan, to include the completion of key Memoranda of Understanding between the Department of Education, Vocational Rehabilitation, Developmental Disabilities Agencies, Department of Labor, and Medicaid.
 - The second phase would include a significant increase in funding, to begin the implementation phase of the states' Employment First strategic plans. The second phase would result in a multi-year grant for a period of 5 years, reflecting a full implementation of the Employment First plan.
 - The third phase would include ongoing funding, reviewed every three years, the level of which would be based on specific outcomes pertaining to the transition in employees with significant disabilities into integrated employment including but not limited to supported, customized, or self-employment. All agencies

involved would be held accountable to meeting key objectives, and funding levels for phase three would be set based on the states meeting specific milestones.

2. Funds would be used by states to build the infrastructure required to help certificate-holders transition out of subminimum wage employment models. A percentage of the grants will flow directly to State DD authorities to assure funding is available to 1) ensure the availability of multiple employment options and a solid system of informed choice by each individual in the employment decision-making process; manage a shift in public resources toward supporting people in jobs within the generic workforce setting as a top priority; allow for the placement of individuals with significant disabilities in adult integrated community activities only after it has been proven that all options for employment have been fully exhausted. This will assist states to avoid the consequence of people moving backwards into congregate day habilitation centers as occurred in Arizona following legislation requiring immediate transition to minimum wage standards. The funding could be used to meet a variety of objectives, including but not limited to the following:
 - Provide technical assistance and support to help organizations and states move from a “subminimum wage” paradigm to more innovative approaches to employment.
 - Afford states opportunity under Section 1915(i) of Home & Community Based Option to help support transitional period of subminimum wage phase-out. Money can be used to incentivize certificate holders of 14(c) certificates to transition quickly and ensure continued employment for those individuals with significant disabilities currently being paid subminimum wages. Funds must also be used to assess at the state level the current use of subminimum wage certificates in order to better understand the scope of the issue in each state. The assessment should collect key data, including number of providers, number of individuals employed at subminimum wages, wage levels, types of employment/tasks completed.
 - Bring the stakeholders together, develop the infrastructure, rebalance the funding and ensure that ending the subminimum wage is not done in a vacuum or causes economic harm to individuals with disabilities.
 - Provide initial seed funding for the establishment of job development & coaching services and/or agencies that are independent and can be not-for-profit as well as profit-based in community programs as well as in industry.

3. **Establish, in concert with CMS, a consistent set of “Employment First” criterion, and embed Employment First principles in CMS Home & Community Based Waiver requirements:**
 - Prioritize employment services & supports as primary criterion of interest in reviewing waiver applications submitted for any working age adult with significant disabilities.

- Require outcome reports of employee status (such as location, wages and hours) on an individual level.
 - Create a mechanism for direct Employee-to-Employer Services to allow and promote the use of Medicaid dollars to reimburse employers for on-the-job training and workplace support needs.
 - Rebalance reimbursement rates for services that lead to meaningful and sustained employment.
 - Change the Federal Financial Participation (FFP) matching rates to 90% for employment services for a period of five years so as to incentivize states to focus on employment first targets by increasing the federal financial participation (FFP) of home-based and community services so that they can make those conversions.
 - Costs in the first year may be higher and then reduce in subsequent years as the individual remains employed because they will likely need less support and cost less over time. As the costs drop, the total CMS dollars also decrease, but the percentage of FFP could remain at the 90% for 60 months for an individual. In this case, if there is a job termination during the 60-month period, the state can immediately step in and subsequently seek reimbursement from CMS for any additional costs associated with replacing an individual into an alternative employment setting.
 - **Under current plans of care for people receiving supports required by state Medicaid plans (ie. Person-centered plans, etc.), design specific objectives related to the upward mobility of individuals with disabilities in an effort to track progress toward competitive employment in their service plans.**
 - Ensure that “pre-vocational” supports are used toward activities that eventually will progress into competitive employment options.
- 4. Significantly improve the Social Security and SSI disability programs to enable work.**
- Establish a single substantial gainful activity (SGA) level for people with disabilities and people who are blind at the level used for people who are blind. (Title II and SSI)
 - Raise the SSI asset limit to at least \$20,000 and index annually for inflation. (SSI)
 - Establish earnings offset so that benefits gradually decline as earned income rises. (Title II)
 - Allow ongoing presumptive re-entitlement for those able to work (that is not time-limited), but who have continuing disabilities (Continued Attachment, Title II and SSI)
 - Significantly improve SSA’s administrative functions to reduce the incidence of overpayments to working individuals with disabilities. Prohibit SSA from seeking repayment for any overpayments incurred longer than six months prior.

5. **Shift Focus from Prevocational Programs to Employment-Specific Programs.** Given that research and evidence has clearly demonstrated that prevocational programs have very limited impact in terms of positively affecting employment outcomes, resources should be shifted from prevocational programs to employment-specific programs. Steps should also be taken to decouple the eligibility for the waiver from eligibility for ICFs/MR, which would greatly lessen the emphasis on prevocational services.
6. **Phase out Sheltered Workshop Business Model.** Require states applying for grants from national systems-change initiative to include as a component of their applications a strategic plan for the phasing out of funding of sheltered workshops in their states. The plan would describe the training and supports that would be provided during the transformation process.
7. **Resource Allocation.** Ensure that resource allocation procedures and rates of reimbursement for services reward desired employment outcomes achieved in the system.
8. **Promote Pragmatic Employer Incentives.** Incentives should include direct employee-to-employer financial supports, employer payroll tax incentives, and technical assistance to small and medium businesses, enabling them to better interact with the various systems of supports and services provided to individuals with significant disabilities.
9. **Other Long-Term Systemic Reforms:**
 - Consistent definitions of employment, integrated employment, supported employment, customized employment, self-employment and the underlying concepts around Employment First. Universal acknowledgement across all agencies of how these terms are defined.
 - Coordination of rate methodologies across agencies to ensure that rate structures are all linked to a universal definition and categories of employment services, and that reimbursement rates reflect similar employment goals and expected outcomes.
 - Creation of Consistent Data Collection & Performance Measurement Systems.
 - Create a comprehensive approach to effective transition at the federal level through the incorporation of key systemic reforms as outlined in the *Collaboration to Promote Self-Determination's Transition Policy Module*.
 - Provision of discretionary funds for Personnel Preparation, Development & Training within the Departments of Education, HHS, and Labor.
 - Development of certification process and increased emphasis around training of personnel who provide on-the-job supports as well as those in job development. Also growth in wage payment and incentives of job coaches and/or employment training specialists in an effort to recruit the strongest pool of talent possible in these areas.
 - Promotion of universal design and access within generic workforce development systems, and develop stronger models for serving individuals with significant support needs within the generic workforce.

APPENDIX

INCLUSION OF A “*BETTER OUTCOMES FOR YOUTH IN TRANSITION*” PILOT INITIATIVE

REQUEST: Include the piloting of a “Better Outcomes for Youth in Transition” Initiative in current legislative efforts to reform the Fair Labor Standards Act as it relates to individuals with significant disabilities.

- 1. Provide ten states across the country with funds for a five-year period to target youth transitioning from special education to ensure that they achieve employment outcomes** such as competitive employment, self-employment, supported and customized employment, paid internships or post-secondary programs which result in paid employment.
- 2. The objectives of the grant will include the design and implementation of policy, regulatory and other changes that determine practice and the delivery of supports and services to ensure that students transitioning from school become employed and earn at least minimum wage or are enrolled or attending an appropriate post-secondary program which will result in employment.** Strategies utilized to achieve these outcomes should include school-based preparatory experiences, career preparation and work-based learning experiences, youth development and leadership, self-advocacy training and self-determination skill building and peer mentoring.
- 3. Eligibility requirements:**
 - Applicants will consist of a consortium of state agencies such as the Departments of Education, Vocational Rehabilitation, and Labor that administer programs and funds to support and serve youth with intellectual disabilities. The lead agency in the consortium applicant must be the state MR/ ID/DD agency.
 - The consortium applicant will target for system change improvements transitioning students with disabilities who are within one year of leaving school between the ages of 16-22, including all persons with intellectual disabilities for whom the anticipated outcome may or is sheltered work at subminimum wage in selected school districts geographically distributed across the state. These youth in transition are students whose transition plan outcome is or is likely to be sheltered work at subminimum wage.
- 4. Scope of Work:** The consortium/applicants will:
 - Create and maintain a statewide job development resource.
 - Collect data to ensure that the systems change efforts are resulting in increased employment at minimum wage. Track outcomes for students, wages, and hours worked and impact of employment on benefits.
 - Additionally, assess which supports and system change features are critical to achieving an employment outcome. Also, provide analysis explaining reasons for the system failure to provide essential supports necessary to achieve an employment outcome and/or factors leading to a failed employment outcome.

- Embed in a system of planned change efforts, practices and procedures which result in an individualized, person-centered plan for each student that will enhance the ability of students and their families to make informed choices and decisions concerning post-school outcomes based on the principles of self-determination.

5. Further, as part of the systems change plan, the following recommended provisions should be included either as part of the legislation or in the administrative rules-process.

- Require the development of a budget to implement an individualized, person-centered plan for individual students exiting the school system in employment. Provide clarification regarding state flexibility to blend and braid public funds to support the implementation of these plans.
 - Some blending and braiding is taking place now. We are not entirely certain if existing authority is adequate yet. Clarification would be helpful.
- Ensure that the individualized, person centered transition plans identify and achieve employment outcomes that results in compensation for the individual youth at minimum wage or above.
- Provide clarification that a higher rate of reimbursement for providers whose efforts lead to or result in paid employment at minimum wage for the youth in transition is permissible (already in federal statute, but needs further reinforcement).
- Provide a hold harmless provision in the plan that protects students involved in the pilot from losing benefits or jeopardizing future benefits if they accumulate assets above the threshold established by the Social Security Administration and earn wages that exceed the income threshold established by the Social Security Administration.
- Clarify that experimentation with various financial incentives and other supports for employers seeking to hire youth in transition is permissible and facilitate experimentation.
- Provide formal assistance to the individual and his/her family in navigating the complex system of supports and services across the array of relevant federal and state programs. This navigation process should result in an informed decision leading to an employment outcome and the securing of funding supports for the outcome.

6. Create a National Technical Assistance Center to coordinate personnel training and professional development in evidenced based best practices resulting in employment outcomes. The Center shall coordinate assistance with the ten state grantees and their leadership teams and support grantees in their systems change efforts.