

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 417

(Senator Kelley, *et al.*)

Finance

Economic Matters

Individuals With Disabilities - Minimum Wage and Community Integration (Ken Capone Equal Employment Act)

This bill phases out, beginning October 1, 2016, the authority for the Commissioner of Labor and Industry to authorize a work activities center or other sheltered workshop to pay a subminimum wage to an employee with a disability. It also restricts the authority of a work activities center or other sheltered workshop to pay a subminimum wage and/or a subprevailing wage to an employee with a disability. Beginning October 1, 2020, the Developmental Disabilities Administration (DDA) may not fund providers that pay individuals less than the minimum wage under a specified federal certificate.

Fiscal Summary

State Effect: The Department of Labor, Licensing, and Regulation (DLLR), DDA, and the Department of Disabilities (DOD) can implement the bill with existing resources. Revenues are not affected.

Local Effect: None.

Small Business Effect: Minimal. Organizations that pay subminimum wages to individuals with disabilities will no longer be able to do so after October 1, 2020. However, beginning October 1, 2020, organizations authorized to pay subminimum wages by DLLR prior to October 1, 2016, that continue to hold federal certificates will be able to pay wages less than the federal prevailing wage to individuals with disabilities.

Analysis

Bill Summary: As of October 1, 2016, the Commissioner of Labor and Industry may not authorize a work activities center or other sheltered workshop to pay an employee with a disability a subminimum wage unless the center or workshop was authorized to do so before that date. As of October 1, 2020, the commissioner may not authorize a center or workshop to pay a subminimum wage under any circumstances.

A work activities center or sheltered workshop may continue to pay subminimum and/or subprevailing wages to an employee with a disability under specified circumstances. Between October 1, 2016, and October 1, 2020, a center or workshop may continue to pay an employee with a disability a subminimum wage only if the employer already has an authorization to do so and provides specified notifications to the employee, has a supplemental plan in place, and meets other criteria specified in the bill. Beginning October 1, 2020, a center or workshop may pay a *subprevailing* wage authorized by federal law to an employee with a disability if the center or workshop was authorized to pay a *subminimum* wage before October 1, 2016, and the center or workshop maintains the federal certificate.

The bill repeals the exemption from the provisions related to authorization to pay a subminimum wage to an employee with a disability that currently applies to a blind individual who works in a sheltered workshop of Blind Industries and Services of Maryland.

DDA and DOD, in partnership with relevant State agencies, must develop and implement a plan to phase out DLLR's authorizations for payment of a subminimum wage to an employee with a disability by October 1, 2020, and the bill specifies what the plan must include. DDA and DOD must engage statewide organizations affected by the bill in implementing the plan. By October 1, 2017, DDA and DOD must submit the plan to the Governor and the General Assembly, and by October 1 of each of the following three years (2018, 2019, and 2020), DDA and DOD must report to the Governor and the General Assembly on the benchmarks, outcomes, and funding or resource recommendations of the phase-out.

Each individual who is being paid a specified subminimum wage and the individual's resource coordinator, in consultation with the individual's team members, must develop a supplemental plan that addresses how community integration and employment will be accomplished. The supplemental plan must include a specified recommendation, a description of services and supports to meet the individual's needs in the most integrated setting appropriate, a list of barriers, and status and progress updates. The resource coordinator must use appropriate communication devices and techniques to facilitate the individual's involvement in developing the supplemental plan. DDA, in consultation with

interested stakeholders, must develop the planning protocol and format for the supplemental plan. The individual and the individual's resource coordinator and team must discuss integrated employment settings annually and as requested by the individual. The resource coordinator must document specified discussions and recommendations in the individual's annual individual plan, and DDA must track the progress of individuals with a supplemental plan and submit a summary of the data collected by September 1 of three successive years (2018, 2019, and 2020) to the Governor and the General Assembly.

A new employee being paid a specified subminimum wage must be informed by the employer of opportunities to obtain competitive, integrated employment; have a supplemental plan; be engaged in work consistent with specified factors; choose the employer and the employment; and be informed of the employee's right to choose when to work.

DDA and DOD must conduct a study of employees who earn at least the federal minimum wage but less than the federal prevailing wage of pay for a nondisabled employee under a federal certificate that authorizes the payment of a wage that is less than the wage otherwise required for the employees under federal law. DDA and DOD must make determinations and consult with State agencies and stakeholders as specified. By October 1, 2017, DDA and DOD must report their findings and recommendations to the Governor and specified committees of the General Assembly.

Current Law:

Maryland Wage and Hour Law

The Maryland Wage and Hour Law is the State complement to the federal Fair Labor Standards Act (FLSA) of 1938. State law sets minimum wage standards to provide a maintenance level consistent with the needs of the population. State law specifies that an employee must be paid the greater of the federal minimum wage (which is currently \$7.25 per hour) or \$8.25 per hour. Under Chapter 262 of 2014, the State minimum wage is scheduled to increase on an incremental basis over the next three years to:

- \$8.75 per hour as of July 1, 2016;
- \$9.25 per hour as of July 1, 2017; and
- \$10.10 per hour as of July 1, 2018.

However, an employer may pay an employee a wage that equals 85% of the State minimum wage for the first six months that the employee is employed if the employee is younger than age 20. Additionally, an employer of an amusement or a recreational establishment, including a swimming pool, that meets specified conditions may pay an employee a wage that equals the greater of \$7.25 or 85% of the State minimum wage.

Exceptions to the minimum wage requirement also exist for a training wage and a disabled employee of a sheltered workshop. A disabled employee does not include a blind individual who works in a sheltered workshop of Blind Industries and Services of Maryland. The Commissioner of Labor and Industry may authorize a work activities center or other sheltered workshop to pay a mentally or physically disabled employee less than the minimum wage. To authorize this subminimum wage, the commissioner must issue a State certificate that sets wages for the workshop's employees, accept a federal certificate for the workshop, or grant an exception for the workshop in specified circumstances. The commissioner must accept a federal certificate if a workshop submits it to the commissioner within 10 days after receiving it. The acceptance of a federal certificate does not apply automatically to an individual who continues to be employed at a workshop upon completing a training program that the workshop runs. The certificate that the commissioner issues must state the effective period of the certificate. The commissioner may revoke the acceptance of a federal certificate under specified conditions.

If an employer pays less than the wages required, the employee may bring an action against the employer to recover (1) the difference between the wages paid to the employee and the wages required; (2) an additional amount equal to the difference as liquidated damages; and (3) legal fees. The court must award these differences in wages, damages, and counsel fees if the court determines that an employee is entitled to recovery. However, if an employer shows to the satisfaction of the court that the employer acted in good faith and reasonably believed that the wages paid to the employee were not less than the required wages, then the court must award liquidated damages of an amount less than the difference in wages or no liquidated damages.

A person who violates the State's Wage and Hour Law is guilty of a misdemeanor and on conviction is subject to a fine of up to \$1,000.

Fair Labor Standards Act

With some exceptions, similar to State law, FLSA requires that a worker be paid a minimum hourly wage and that overtime compensation be paid to employees who work more than 40 hours in a week.

Section 14(c) of FLSA authorizes an employer, after receiving a certificate from the U.S. Department of Labor (DOL) Wage and Hour Division, to pay subminimum wages (wages less than the federal minimum wage) to a worker who has a disability for the work being performed. A worker who has a disability for the job being performed is one whose earnings or productive capacity is impaired by a physical or mental disability. Section 14(c) does not apply unless the disability actually impairs the worker's earning or productive capacity for the work being performed. Subminimum wages must be

commensurate wage rates, so they are based on the worker's individual productivity in proportion to the wage and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work. All subminimum wages must be reviewed and adjusted, if appropriate, at periodic intervals.

Many work activities centers and sheltered workshops operate under federal contracts that are governed by a subminimum prevailing wage that can be paid to employees with disabilities. The prevailing wages paid to these employees are different from the prevailing wages established for federal public works projects under the federal Davis-Bacon statute.

Background: According to the U.S. Census Bureau, in 2014, approximately 145,000 individuals with a disability were employed year-round in the State, of whom about 53% were employed full time. Approximately 24,400 individuals with a disability were unemployed, and 167,500 were not in the labor force. The median earnings in Maryland in 2014 of a worker with a disability was \$27,072, while the median earnings of a worker without a disability was \$40,583.

As of January 1, 2016, DOL reports 36 organizations within Maryland hold section 14(c) certificates and are eligible to pay 3,469 workers subminimum wages.

The Workforce Innovation and Opportunity Act

The Workforce Innovation and Opportunity Act (WIOA) was signed into federal law on July 22, 2014, replacing the Workforce Investment Act of 1998. WIOA became effective July 1, 2015, and the State has until July 1, 2016, to conform to WIOA. WIOA is designed to help job seekers access the employment, education, training, and support services needed to succeed in the labor market and to match employers with the skilled workers they need to compete in the global economy.

WIOA made several changes to FLSA section 14(c), including:

- placing limitations on the payment of subminimum wages by any employer holding FLSA section 14(c) special wage certificates;
- requiring people with disabilities working in section 14(c) programs to have access to competitive integrated employment services, including vocational rehabilitation services;
- requiring that anyone age 24 or younger may not start at subminimum wage unless it is documented that the person received transition services, has applied for vocational rehabilitation services and was unsuccessful, and has been provided counseling and referral to other resources with the goal of competitive integrated employment; and

- barring 14(c) certificate holders from employing any person at subminimum wage unless the person has received career counseling; access to the vocational rehabilitation agency; and information about self-advocacy, self-determination, and peer mentoring opportunities from an entity without a financial interest in the person's employment outcome.

Additionally, WIOA established the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities (ACICIEID) and required the committee to prepare findings, conclusions, and recommendations on:

- ways to increase employment opportunities for individuals with specified disabilities in competitive integrated employment;
- the use of the FLSA section 14(c) certificate program for individuals with disabilities; and
- ways to improve oversight of the use of such certificates.

Each of the four subcommittees of ACICIEID examined the section 14(c) subminimum wage certificate program and made 25 recommendations in a [report](#). Their recommendations included providing more monitoring and oversight of the section 14(c) certificate program, phasing out the section 14(c) certificate program, restricting eligibility in the program, and ceasing to accept new employer certificate applications.

Home and Community-based Services

The federal Centers for Medicare and Medicaid Services issued regulations in January 2014 that define the settings in which states are allowed to pay for Medicaid Home and Community-based Services (HCBS). The purpose of these regulations is to ensure that individuals receive Medicaid HCBS in settings that are integrated in and support full access to the greater community. This includes opportunities to seek employment and work in competitive and integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree as individuals who do not receive services from a Medicaid waiver. Each individual is given choice regarding services and who provides them. DDA within the Department of Health and Mental Hygiene is currently analyzing community settings to determine which settings need to be transitioned to conform to HCBS rules. Until DDA has completed its analysis, it does not know whether work activities centers and other sheltered workshops will need to cease operations or be modified in a way to conform to HCBS rules.

Legislation in Other States

Recently, some states have considered legislation regarding their policies on section 14(c) certificates. For example, New Hampshire enacted legislation in 2015 to prohibit the use of section 14(c) certificates.

State Fiscal Effect: There are 36 organizations within Maryland that hold section 14(c) certificates and are eligible to pay approximately 3,500 workers subminimum wages. DLLR has approved applications for State certificates from each of these workshops, so they are currently authorized to pay disabled workers subminimum wages under the State's Wage and Hour law too. DLLR advises that phasing out the subminimum wage that an employer may pay an employee with a disability in a work activities center or other sheltered workshop has no fiscal effect on the Division of Labor and Industry as the division can conduct any outreach and education efforts with existing resources.

DDA and DOD can develop and implement a plan to phase out the subminimum wage and conduct a study with existing resources. DDA can develop the planning protocol and format for an individual's supplemental plan and track the progress of the plan with existing resources. In addition, DDA already develops plans for individuals with disabilities that contain employment elements similar to those required under the bill; therefore, implementing the plans under the bill can also be handled with existing resources.

DDA supports 8,695 individuals in congregate settings. DDA does not know whether work activities centers and other sheltered workshops conform to HCBS rules, so DDA may find that these workshops will have to cease operations, potentially affecting the placement of individuals with disabilities who are served by DDA. Additionally, ACICIEID has recommended that the federal government phase out section 14(c) certificates. Thus, even if DDA provides financial support to workshops that pay a subminimum wage, the Department of Legislative Services assumes that either the State will no longer be using sheltered workshops that do so or that the federal government will have phased out section 14(c) certificates by fiscal 2021; in either case, the prohibition against DDA funding providers that pay individuals a subminimum wage likely has no effect.

Additional Information

Prior Introductions: None.

Cross File: HB 420 (Delegate Waldstreicher, *et al.*) - Economic Matters.

Information Source(s): Department of Commerce; Maryland State Department of Education; Department of Budget and Management; Department of Disabilities; Department of General Services; Department of Health and Mental Hygiene; Department of Labor, Licensing, and Regulation; Blind Industries and Services of Maryland; U.S. Department of Labor; U.S. Census Bureau; Department of Legislative Services

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