

Worth in the Workforce:  
How to Reform the Fair Labor Standards Act 14(c) Provisions for Persons with Disabilities

A Nation Divided?  
Assessing Freedom & The Rule of Law in a Post 2020 World

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## **Abstract**

The Fair Labor Standards Act (FLSA) 14(c) provisions have allowed employers to request certification to compensate persons with disabilities with subminimum wages for near 84 years. This practice has placed unnecessary limits on persons suffering with mental illness and developmental disabilities while seemingly creating a new class system within the American workforce. These provisions have incentivized business owners to view workers with disabilities as a liability for efficiency and seemingly degrades their personal worth. These provisions must be reformed to align with modern data involving the success of persons with disabilities in the workforce by phasing out these provisions over time and moving the American economy to a more market-based compensation structure across all industries.

In this paper, we will discuss the discriminatory nature of the FLSA 14(c) provisions based on new evidence that has been presented since these provisions were first passed into law. We will evaluate what components must be included in an effective solution. We will then consider three potential options to rectifying the problem at hand while evaluating both the positive and negative components of such considerations. We will conclude with some general recommendations on how to approach this topic from a market-based solutions model.

**Keywords:** Fair Labor Standards Act of 1938; subminimum wage; 14(c) provisions; market-based solutions.

## **Worth in the Workforce:**

### **How to Reform the Fair Labor Standards Act 14(c) Provisions for Persons with Disabilities**

#### **Policy Problem: The Discriminatory Nature of FLSA 14(c) provisions**

The 1938 Fair Labor Standards Act (FLSA) Section 14 (c) provisions have been in effect for nearly 84 years with the intent to allow employers with disabled workers to request a certificate from the Hours and Wages Division of the U.S. Department of Labor that authorizes the payment of commensurate wages relative to a disabled workers capacity to perform job requirements comparative to their non-disabled colleagues. The disabilities covered under these provisions include those workers suffering from “blindness, mental illness, developmental disabilities, cerebral palsy, alcoholism and drug addiction.”<sup>1</sup>

While they were originally meant to address the underemployment numbers of persons with disabilities during the Great Depression, the provisions for those suffering from mental illness and developmental disabilities no longer seem appropriate given what we now know about the functioning work capacity of those individuals within the workforce. As such, the FLSA 14(c) provisions now serve as a blatant violation of the discriminatory prohibitions within the Americans with Disabilities Act (ADA).<sup>2</sup>

#### **Evidence: What We Now Know About Workers with Mental Illness & Developmental Disabilities**

Those suffering from mental illness developmental disabilities have long been treated by society as subpar, or even subhuman; and as such, over the course of our history we have lacked the faith in their capacity to function in society – let alone in the business environment. In fact, there was a timeframe where we as a society would simply institutionalize, heavily medicate, or even sterilize certain individuals that fell within these categories – attempting to offset the continuation of such disabilities across society.

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<sup>1</sup> “Fact Sheet #39: The Employment of Workers with Disabilities at Subminimum Wages | U.S. Department of Labor,” accessed December 13, 2021, <https://www.dol.gov/agencies/whd/fact-sheets/39-14c-subminimum-wage>, 1.

<sup>2</sup> “Americans with Disabilities Act | U.S. Department of Labor,” accessed December 13, 2021, <https://www.dol.gov/general/topic/disability/ada>.

As time has progressed and innovation has increased, however, we have seen a shift away from this discriminatory notion that these individuals cannot function to the same capacity of their non-disabled counterparts. In fact, studies have shown that in certain professions those on the autism spectrum or those diagnosed with bipolar disorder tend to be very successful due to their highly creative and innovative nature.<sup>3</sup> While the need remains for societal reform in how we view persons with disabilities, how we compensate persons with disabilities should not be skewed by our bias against these individuals.

### **Alternative Policy Options: How We Can Empower Workers with Mental Illness & Development Disabilities**

A<sub>1</sub> - Eliminate 14 (c) Provisions Immediately for Workers with Mental Illness & Developmental Disabilities.

When considering public policy reform, the idea of repeal and replace because a common narrative of practice. In this respect, one option to end the discriminatory effects of 14(c) provisions would be to immediately terminate these provisions by way of executive order or legislative action. Earlier this year, President Biden signed an executive order that partially eliminated these provisions for federal contract workers by increasing wages to calculations based on \$15 per hour that would be increased with the Consumer Price Index annually with a general rounding principle of the nearest \$.05 per hour.<sup>4</sup>

A<sub>2</sub> - Gradually Phase Out FLSA 14 (c) Provisions for Workers with Mental Illness & Developmental Disabilities.

A secondary consideration would be to gradually phase out the FLSA 14(c) provisions over a four-year compliance adjustment period. Congressman Scott of Virginia recently introduced H.R. 2373, known as the “Transformation to Competitive integrated Employment Act”, which seeks to phase out 14(c) provisions while transitional to a “fair wage” system within

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<sup>3</sup> Alison Luciano and Ellen Meara, “Employment Status of People With Mental Illness: National Survey Data From 2009 and 2010,” *Psychiatric Services* 65, no. 10 (October 2014): 1201–9, <https://doi.org/10.1176/appi.ps.201300335>.

<sup>4</sup> “Executive Order on Increasing the Minimum Wage for Federal Contractors,” The White House, April 27, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/27/executive-order-on-increasing-the-minimum-wage-for-federal-contractors/>.

4 years.<sup>5</sup> H.R. 2373 would also prohibit an new certificates from being certified following enacted while grandfathering in recertification in so long as it does not extent the 4 year sunset date of the 14(c) provisions.<sup>6</sup> This model has been tested by several states already including in Texas in May 2019 with the passage of S.B. 753 which is to phase-out subminimum wage legality in the state by September of 2022.<sup>7</sup>

### A3 – Transition Worker Compensation to a Market-Based Model.

Another option to consider would transition worker compensation for all worker to a more market-based model. Understand this model, worker wages would begin at a living wage considering the basic cost-of-living requirements for the area. This option then would incentives employers and employees alike to be given increases in wages based on what they individually bring to the workplace instead of an arbitrary standard that government states is compensation that matches a nation-wide general minimum cost.

#### **Criteria: What an Effective Solution Must Accomplish**

Regardless of the solution that we attempt in solving this issue, it must be rooted in several common understandings:

- (1) An effective solution must not have exorbitant direct negative impact on the workforce or the global economy.
- (2) An effective solution must be driven by free enterprise and innovation.
- (3) An effective solution must value individual worth over monetary incentives.
- (4) An effective solution must be market-based.

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<sup>5</sup> “Text - H.R.2373 - 117th Congress (2021-2022): Transformation to Competitive Integrated Employment Act,” webpage, April 5, 2021, 2021/2022, <https://www.congress.gov/bill/117th-congress/house-bill/2373/text>.

<sup>6</sup> “Text - H.R.2373 - 117th Congress (2021-2022).”

<sup>7</sup> “Texas SB753 | 2019-2020 | 86th Legislature,” LegiScan, accessed December 13, 2021, <https://legiscan.com/TX/bill/SB753/2019>.

## **Projected Outcomes: Effects of Each Option**

AO<sub>1</sub> - Eliminate 14 (c) Provisions Immediately for Workers with Mental Illness & Developmental Disabilities.

Eliminating the 14(c) provisions immediately would have disastrous consequences on the market and the economy. The compliance costs for businesses would drastically increase as wages for 14(c) certified workers would increase thus tilting budgetary measures off current trajectories. Workforce availability and efficiency may also suffer as businesses adjust workers hours and to offset their newly imposed increase in minimum wage requirements.

AO<sub>2</sub> - Gradually Phase Out FLSA 14 (c) Provisions for Workers with Mental Illness & Developmental Disabilities.

Gradually phasing out 14(c) provisions while allowing for some grandfathering in the process would give businesses time to react to new imposed rules while adjusting overall spending and strategy long-term. It would also give businesses a buffer to consider options for innovation that may increase efficiency and increase profits to better balance budgetary requirements and maintain a skilled workforce.

AO<sub>3</sub> – Transition Worker Compensation to a Market-Based Model.

Transitioning to a more market-based model of worker compensation would keep wages relevant to local cost-of-living realities. Additionally, a market-based model would place value on the individual worker while providing compensation based on skill and expertise not just government mandated minimums.

## **Tradeoffs: The Good, The Bad, and Indifferent**

AO<sub>1</sub> - Eliminate 14 (c) Provisions Immediately for Workers with Mental Illness & Developmental Disabilities.

An immediate elimination of 14(c) provisions would likely see political backlash from both sides of the aisle as well as businesses across the economy despite the added “benefit” to those with mental illness and developmental disabilities. Advocacy groups of higher wages for persons with disabilities would likely be supportive of such a measure; however, time would tell what extent the economy would be immediately impacted through high compliance costs on businesses

and potentially higher welfare costs for local, state, and federal programs for those whose hours may be drastically reduced or eliminated as result. This option would also likely result in lawsuits across the country which would only further impact the economic deficits of this option.

#### AO<sub>2</sub> - Gradually Phase Out FLSA 14 (c) Provisions for Workers with Mental Illness & Developmental Disabilities.

A gradual phase out of these provisions would give businesses enough time to rethink their overall strategy and budget to reduce general overhead and wasteful spending while considering if ineffective, non-disabled employees exist within their workforce. This could, however, have some additional educational costs for employers and employees for legal compliance. This option also does not necessarily instill value back into the worth of the individual worker but rather determines what duties may need to be adjusted to best serve the new strategic drive on a given business unit.

#### AO<sub>3</sub> – Transition Worker Compensation to a Market-Based Model.

This option requires the least amount of political and economic backlash; and it would require businesses to be strategic about utilizing employees' strengths and educating employees weakness. A market-based model would base compensation at the most local, industry specific levels which would be more realistic to the locality in which the business resides. There would be some grandfathering that would be needed to ensure workers that have earned a high wage were valued for their time and expertise within in the company which has the potential to cause inflationary measures; but it would again require businesses to put more focus on best utilizing the value and worth of their employees – not just the functional positions to which their employees hold within their company.

#### **General Recommendations: Congressional Action Is Needed Now**

For far too long, we have allowed the discriminatory nature of the FLSA 14(c) provisions to disincentive worker participation for those with mental illness and development disabilities. Congress should take steps now to incentivize private industry to provide job training and continuing education opportunities for those that qualify for 14(c) provisions to assist with workplace assimilation for workers with mental illness and developmental disabilities. This would not only strengthen the capacity of the American workforce but would instill a greater sense of worth and belonging into those workers suffering from mental illness and development disabilities.



Congress should also pass legislation that directs the U.S Equal Employment Opportunity Commission (EEOC) to gradually phase-out 14(c) provisions and move to a more market-based payment structure across all industries. This would allow businesses the opportunity to adjust financial and strategic options that best suit their needs long-term while still properly compensating their employees in the process.

### **Conclusion**

While the very nature of the Fair Labor Standards Act of 1938 and its 14(c) provisions was to encourage employment of persons with disabilities, the discriminatory nature of these provisions is long overdue for reform. Congressional action should be taken with haste at addressing this issue while protecting economic stability and freedom, incentivizing education and innovation, and shifting to a more market-based model of worker compensation that increase worker accountability. Solely eliminating the 14(c) provisions and increasing wages to at least the federal minimum wage does not holistically solve the problem at hand; but in so long as we maintain a federal minimum wage, we should not be disincentivizing and discriminating workers with mental illness and developmental disabilities with a subminimum wage that overlooks individual worth and value.

Further research is needed to evaluate if the four-year phase-out timeframe is realistic. Additionally, clarification on the quantifiable nature of transitioning to a market-based compensation model across all industries would need to be determined prior to implementation so that a strategic plan of action could be taken moving forward.

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