

Department of Legislative Services  
Maryland General Assembly  
2016 Session

**FISCAL AND POLICY NOTE**  
**First Reader**

Senate Bill 417

(Senator Kelley, *et al.*)

Finance

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**Labor and Employment - Minimum Wage - Individuals With Disabilities (Ken Capone Equal Employment Act)**

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This bill eliminates, as of October 1, 2019, the authority for the Commissioner of Labor and Industry to allow a work activities center or other sheltered workshop to pay a subminimum wage to an employee with a disability. Beginning January 1, 2019, a work activities center or other sheltered workshop that pays an employee with a disability less than the required minimum wage may not receive State funds.

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**Fiscal Summary**

**State Effect:** The bill's requirements can be handled with existing budgeted resources, as discussed below.

**Local Effect:** None.

**Small Business Effect:** None. Since the Department of Labor, Licensing, and Regulation (DLLR) has not authorized any organization to pay subminimum wages to an individual with a disability, eliminating the authority to pay subminimum wages has no effect on businesses.

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**Analysis**

**Bill Summary:** The bill prohibits the Commissioner of Labor and Industry within DLLR from authorizing a work activities center or other sheltered workshop to pay an employee with a disability less than the minimum wage required unless the commissioner authorized the workshop to do so before October 1, 2016, and the commissioner prohibits the workshop from paying additional employees less than the minimum wage. Certificates

that the commissioner issues authorizing the payment of a subminimum wage to an employee with a disability must expire by October 1, 2019.

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

### **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 wage paid to the employee and the wage 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 it is 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.

**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. The Developmental Disabilities Administration (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:** Although 36 organizations in the State hold section 14(c) certificates issued by DOL, DLLR has not received any applications for State certificates from these workshops. Therefore, no workshops are currently authorized to pay disabled workers subminimum wages under the State's Wage and Hour law. DLLR advises that, despite outreach efforts to notify workshops with section 14(c) certificates of the State's requirement to apply to the Commissioner of Labor and Industry, the department has not received any applications. DLLR has also not received any complaints on subminimum wage violations for an individual with a disability. Thus, 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. The division can conduct any outreach and education efforts with existing resources.

DLLR is required to develop and implement a plan to phase out authorizations issued by the commissioner to pay the subminimum wage to an individual with a disability. As no such authorizations have been provided, DLLR's Division of Workforce Development and Adult Learning can develop and implement a plan and meet reporting requirements with existing resources.

DDA supports 8,695 individuals in congregate settings, and the Division of Rehabilitation Services (DORS) within the Maryland State Department of Education obtains services from organizations that provide both a rehabilitation component as well as a sheltered workshop component as part of their business. 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 and DORS provide financial support to workshops that pay 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 2019; in either case, the prohibition against such entities receiving State funds likely has no effect.

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### **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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