



EMPLOYMENT FIRST - EMPLOYMENT NOW

SB 417: Ken Capone Equal Employment Act
February 11, 2016 – Senate Finance Committee
Position: SUPPORT

Maryland APSE is the state chapter of the **Association of People Supporting Employment First (APSE)**, the only national membership organization focused exclusively on integrated employment with 39 chapters that are the driving force for implementing Employment First policies and practices nationally. Through advocacy and education, Maryland APSE advances employment and self-sufficiency for all people with disabilities.

Maryland APSE commends the General Assembly's commitment to increasing the workforce participation of people with disabilities in competitive, integrated employment at the same wages as those without disabilities. Throughout the Ken Capone Equal Employment Act, there is language that significantly strengthens the ability of people with disabilities to fully participate in the state's workforce and escape lives characterized by chronic poverty and isolation.

Maryland APSE also praises efforts within the Equal Employment Act to address issues related to sub-minimum wage and segregated employment. APSE has clearly and emphatically stated its position on sub-minimum wage and segregated employment and the need to phase it out. Continued reliance on the 14(c) program is in clear violation of the ADA, Olmstead, and of civil rights statutes that apply to other Americans. It is an outdated program rooted in low expectations that people with disabilities are not capable workers; this policy is discriminatory and exploitative.

Maryland APSE STRONGLY SUPPORTS SB 417: Ken Capone Equal Employment Act

Maryland APSE is supportive of legislative and policy actions regarding sub-minimum wages that contain the following elements:

- Eliminating the use of sub-minimum wage by new entrants into the adult service system
- Ending the issuance of new special wage certificates for organizations.
- Creating an end date by which sub-minimum wage would be discontinued.
- Prohibiting the use of sheltered employment settings as part of transition services.
- Ending the placement in a job at sub-minimum wage as an acceptable outcome for transition services under IDEA.

Rationale for a Phase-Out of 14(c) Programs

APSE has clearly stated its view that sub-minimum wage is unnecessary to promote employment opportunities for people with disabilities. As detailed in its 2009¹ Policy Statement on sub-Minimum wage:

Bad job matches are the real issue: For every individual, there are jobs and tasks we are good at and those we are ill-suited for. People with disabilities are no different. The work that individuals are required to perform at sub-minimum wage is nothing more than simply a bad match for their skills, abilities, and interests - and in fact the sub-minimum regulations reinforce this. In order for an individual with a disability to be paid sub-minimum wage, the individual's disability must impair their capacity to earn wages or productivity for the specific work being performed (not every job). Furthermore, a blanket assumption of sub-minimum wage for all types of work is not permitted, and the regulations specifically note that there may be other types of work or other employment settings where the individual is entitled to the minimum wage.

Productivity rate is not a fair basis for wages: Sub-minimum wage is based on the concept that production rate is the sole or primary criteria on which a business bases compensation and values a worker. This is a simplistic notion, not at all based on the realities of operating a business and managing employees, particularly in the 21st century economy. Individuals are valued as employees for a wide range of abilities, gifts and talents: their customer service skills, their ability to get along with co-workers, their reliability, the quality of work, etc. The argument that the value of an employee should be solely based on a "production rate" is an outdated concept. The productivity standard is discriminatory towards people with disabilities: People with disabilities are among the few groups whose pay is based strictly on a productivity rate. It is discriminatory that individuals with disabilities are subjected to such a standard, while most workers are not.

Sub-minimum wage is at odds with national disability policy: The existence and use of sub-minimum wage is a reflection of viewing people with significant disabilities as incapable of being fully integrated into the general labor force, a view that is at odds with the national disability policies that have developed over the past 40 years.

Sub-minimum wage is being used to support a more costly service delivery model: Research indicates that over time, supported employment is cost efficient - for every \$1 of costs

¹ <http://www.apse.org/wp-content/uploads/docs/APSE%20Subminimum%20Wage%20Policy%20Statement%2010.09%5B1%5D.pdf>

taxpayers and workers invest into supported employment, more than \$1 is returned in the form of monetary benefits. Studies² of all 231,000 individual supported employment cases closed by public Vocational Rehabilitation between 2002 and 2007 found that the average supported employee generated a net monthly benefit to taxpayers of \$251 per individual, and a benefit-cost ration of 1.46. Further, supported employees were cost-efficient regardless of their primary disability or presence of secondary conditions. Additionally, studies indicate that supported employment is significantly less expensive than sheltered workshops.

Advancing Opportunities for Competitive Integrated Employment (CIE)

Federal policy has been rapidly changing to encourage policies that help people with significant disabilities obtain competitive integrated employment (CIE), which is full or part-time work compensated at no less than the federal minimum wage (or state or local minimum wage, if higher) at the customary rate for similar work; and the employee interacts with other persons who are not individuals with disabilities. Federal policy includes:

- A.** The ADA's integration mandate, as interpreted by the Supreme Court's decision in *Olmstead v. L.C.*, requires states to provide services in integrated settings.
- B.** The Individuals with Disabilities Education Act (IDEA) requires post-school employment transition programs with a goal of employment.
- C.** The Centers for Medicare and Medicaid Services (CMS) has provided guidance to states about funding supported employment through Medicaid home and community based service Waivers.
- D.** A new CMS rule (the Home and Community-Based Services (HCBS) Settings Rule) establishes integration requirements and emphasizes the opportunity for HCBS participants to work in CIE.
- E.** The Workforce Innovation and Opportunity Act (WIOA) prioritizes CIE for people with disabilities, particularly transition age youth and requires a robust collaboration between Vocational Rehabilitation and high school transition programs to prepare youth with significant disabilities to succeed in the labor market.
- F.** The recently-enacted ABLE Act allows people with disabilities to remain eligible for benefits such as employment supports while saving more money than previously allowed for disability-related expenses (including employment training and supports) without impacting their eligibility for benefits, including long term services and supports through Medicaid.

² Citera, R. (2000). The Cost-Efficiency of Supported Employment Programs: A Literature Review. *Journal of Vocational Rehabilitation*. 14(1), 51-61.

Citera, R. (in press). Supported Employment's Cost-Efficiency to Taxpayers: 2002 to 2007. *American Journal on Intellectual and Developmental Disabilities*.

Citera, R. (2007). The Cumulative Cost-Effectiveness of Supported and Sheltered Employees with Mental Retardation. *Research & Practice for Persons with Severe Disabilities*. 32(4), 247-252.

Other states, including Maine, Massachusetts, New Hampshire, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington, have committed to improve access to CIE for people with significant disabilities.

Studies show that CIE promotes the health and welfare of people with significant disabilities. People with significant disabilities who work in CIE have improved health, fewer hospital stays, stronger connections to family and friends, and more confidence in daily activities and routines.

Maryland's Developmental Disabilities Administration already has a Work First Policy for people with significant developmental disabilities. By guaranteeing equal protection under the law to the minimum wage, individuals with disabilities will be empowered to maximize employment, economic self-sufficiency, independence, and full inclusion and integration into society.

Employment First as the Primary Service Option

Employment in the general workforce must be the first and preferred outcome in the provision of publicly-funded services for all working age citizens with disabilities, regardless of level of disability.

Underlying Principles

- The current low participation rate of citizens with disabilities in the workforce is unacceptable.
- Access to “real jobs with real wages” is essential if citizens with disabilities are to avoid lives of poverty, dependence, and isolation. It is presumed that all working age adults and youths with disabilities can work in jobs fully integrated within the general workforce, working side-by-side with co-workers without disabilities, earning minimum wage or higher.
- As with all other individuals, employees with disabilities require assistance and support to ensure job success and should have access to those supports necessary to succeed in the workplace.
- All citizens, regardless of disability, have the right to pursue the full range of available employment opportunities, and to earn a living wage in a job of their choosing, based on their talents, skills, and interests.
- Implementation of Employment First principles must be based on clear public policies and practices that ensure employment of citizens with disabilities within the general workforce is the priority for public funding and service delivery.

- Inclusion or exclusion of the specific term “Employment First” does not determine whether a public system or agency has adopted Employment First principles. Such a determination can only be made in examining whether the underlying policies, procedures and infrastructure are designed for and ultimately result in increased integrated employment in the general workforce for citizens with disabilities.

Characteristics of Successful Employment First Implementation

- Measurable increases in employment of citizens with disabilities within the general workforce, earning minimum wage or higher with benefits.
- Greater opportunities exist for citizens with disabilities to pursue self-employment and the development of microenterprises.
- Employment is the first and preferred option when exploring goals and a life path for citizens with disabilities.
- Citizens with disabilities are employed within the general workforce, regardless of the severity of disability and assistance required.
- Young people with disabilities have work experiences that are typical of other teenagers and young adults.
- Employers universally value individuals with disabilities as an integral part of their workforce, and include people with disabilities within general recruitment and hiring efforts as standard practice.
- Individuals with disabilities have increased incomes, financial assets, and economic wealth.
- Citizens with disabilities have greater opportunities to advance in their careers, by taking full advantage of their individual strengths and talents.
- Funding is sufficient so that quality services and supports are available as needed for long-term employment success.
- A decision not to consider employment in the community for an individual is reevaluated on a regular basis; the reasons and rationale for this decision are fully documented and addressed in service provision.

We thank the committee for your time and would like to offer our organization as a resource at any time.

Maryland APSE strongly urges a FAVORABLE report on the Ken Capone Equal Employment Act.

APPENDIX: Timeline / Current Landscape

The practice of paying workers with disabilities less than the Federal minimum wage dates back to the 1930s, under **Section 14(c) of the Fair Labor Standards Act of 1938**³, when there were virtually no employment opportunities for disabled workers in the mainstream workforce. Modern advancements in vocational rehabilitation, technology, and training provide workers with disabilities with greater opportunities. When provided the proper rehabilitation services, training, tools and expectations, employees with disabilities can be as productive as non-disabled employees.

Times are changing nationwide, and APSE believes Maryland should take a proactive approach to meaningful systems change that achieves Equal Employment Rights for its citizens with disabilities. Just last week, on **February 3, 2016**⁴, the Autistic Self Advocacy Network (ASAN), Disability Rights Ohio (DRO), and National Federation of the Blind (NFB) won a landmark Department of Labor decision against sheltered workshops:

"In a groundbreaking opinion issued yesterday, the U.S. Department of Labor found that a sheltered workshop in Ohio had violated federal minimum wage laws by underpaying three of its workers with disabilities, including one autistic man. The opinion followed a petition that Autistic Self Advocacy Network filed along with Disability Rights Ohio, the National Federation of the Blind, and the Baltimore law firm of Brown, Goldstein & Levy, LLP. Seneca Re-Ad, a sheltered workshop run by the Seneca County Board of Developmental Disabilities, had been paying the complainants, Joe Magers, Pam Steward, and Mark Felton, an average of \$2.50 an hour for more than three years. An outdated exception to federal minimum wage laws, known as Section 14(c) of the Fair Labor Standards Act, allows certain employers to pay less than minimum wage to people with disabilities if they can show that the disabilities prevent them from being as "productive" as the average nondisabled worker. Although federal law allows workers with disabilities to file a petition for review of their wages by the U.S. Department of Labor, Felton, Magers, and Steward are among the first workers with disabilities ever to use the petition process to fight for fair wages. This low level of enforcement means that many workshops have paid people below-minimum wages based simply on the assumption that people with disabilities are not as productive as people without disabilities, using flawed productivity measurements as "documentation." An administrative law judge for the Department of Labor found that Felton, Magers, and Steward, and Felton were entitled to back pay to make up the difference between their past wages and minimum wage, and to minimum wage going forward."

³ <http://www.dol.gov/whd/workerswithdisabilities/about.htm>

⁴ <http://autisticadvocacy.org/2016/02/asan-disability-rights-ohio-and-national-federation-of-the-blind-win-landmark-department-of-labor-decision-against-sheltered-workshop/>

In **August of 2012**⁵, the National Council on Disability (NCD), an independent Federal agency tasked with making recommendations to the President about disability-related policy matters, released its report on subminimum wage and supported employment. The NCD unanimously recommended that the Department of Labor immediately stop issuing new special wage certificates. In addition, NCD recommended that the “Section 14(c) program be phased out.”

In its **October 2014 Annual Progress Report**⁶, the National Council on Disability also stated: "NCD opposes Section 14(c). The Council also understands that an immediate repeal of Section 14(c) will be disruptive for many who have operated in this framework for years. To account for systems changes to enhance existing resources and creating new mechanisms for supporting individuals in obtaining integrated employment and other non-work services, the Council proposes a gradual phase-out approach rather than an immediate repeal. This will allow those who have been in the program for many years with time to transition to a supported employment environment."

Programs, such as the Vermont Conversion Institute, exist to help entities holding Section 14(c) certificates transition their business models in order to ensure integrated, meaningful employment that provides compensation of at least the Federal minimum wage for all of their employees. Vermont does not have any Section 14(c) certificate holders in the State. Twenty-two States were represented at the **Seventh Conversion Institute Forum in 2013**⁷, where entities holding Section 14(c) certificates learned strategies from others that had already transitioned their businesses, in order to seamlessly make the change themselves.

On **February 12, 2014**⁸, President Obama signed an Executive Order to raise the minimum wage for all workers under future federal service contracts, which included workers with disabilities. According to a White House memo detailing the order: “Under current law, workers whose productivity is affected because of their disabilities may be paid less than the wage paid to others doing the same job under certain specialized certificate programs. Under this Executive Order, all individuals working under service or concessions contracts with the federal government will be covered by the same \$10.10 per hour minimum wage protections.”

⁵ <https://www.ncd.gov/publications/2012/August232012>

⁶ https://www.ncd.gov/progress_reports/10312014

⁷ <http://tacene.org/event/vermont-conversion-institute-time-change-sheltered-workshop-conversion>

⁸ <https://www.whitehouse.gov/the-press-office/2014/02/12/fact-sheet-opportunity-all-rewarding-hard-work>

On **April 8, 2014**⁹, the Department of Justice reached a landmark settlement agreement with Rhode Island that resolved violations of the Americans with Disabilities Act (ADA) for approximately 3,250 Rhode Islanders with intellectual and developmental disabilities (I/DD). "The landmark ten year agreement was the nation's first statewide settlement to address the rights of people with disabilities to receive state funded employment and daytime services in the broader community, rather than in segregated sheltered workshops and facility-based day programs. ... The agreement significantly advances the department's work to enforce the Supreme Court's decision in *Olmstead v. L.C.*, which requires persons with I/DD be served in the most integrated setting appropriate. As a result of the settlement, 2,000 Rhode Islanders with I/DD who are currently being served by segregated programs will have opportunities to work in real jobs at competitive wages. Additionally, over the next ten years, 1,250 students with I/DD will receive services to help transition into the workforce."

On **October 21, 2014**¹⁰, U.S. Secretary of Labor Tom Perez expressed hope that states would follow the federal government's lead in moving away from paying people with disabilities less than minimum wage, stating: "I think we have seen that it can be done and that's going to be up to every state, but we wanted to set an example." The Office of Disability Employment Policy (ODEP) of the Department of Labor continues to support the development and implementation of new innovative tools and strategies, like Customized Employment and the Discovery process, that have resulted in the successful training and employment of individuals with significant disabilities, allowing them to obtain competitive integrated employment at minimum wage or higher.

On **May 7, 2015**¹¹, Governor Maggie Hassan signed Senate Bill 47 into law, making New Hampshire the first state to make it illegal for people with disabilities to be paid less than minimum wage. "New Hampshire has a strong tradition of treating all of our citizens with respect and dignity, and by making New Hampshire the first state to prohibit employers from paying subminimum wages to people who experience disabilities, Senate Bill 47 helps build on that tradition," Hassan said. Currently, no Section 14(c) certificates are held by any entity in the State of New Hampshire. By using innovative strategies, the 3 entities that held Section 14(c) certificates in 2013 transitioned their business models to ensure that all employees are meeting their full vocational potential, proving that transition is possible and that Section 14(c) certificates are unnecessary.

⁹ <http://www.justice.gov/opa/pr/departments-justice-reaches-landmark-americans-disabilities-act-settlement-agreement-rhode>

¹⁰ <https://www.disabilitycoop.com/2014/10/21/labor-secretary-subminimum/19779/>

¹¹ <http://governor.nh.gov/media/news/2015/pr-2015-05-07-sb-47.htm>

On **July 21, 2015**¹², in honor of the 25th Anniversary of the Americans with Disabilities Act (ADA), U.S. Secretary of Labor Tom Perez and bi-partisan governors Jack Markell (D-DE) and Dennis Daugaard (R-SD) penned a letter encouraging all state governments and governors to focus on the alignment of policies, practices and funding resources to prioritize competitive integrated employment as the preferred outcome of day and employment services for all individuals with significant disabilities.

Lane v. Brown – 12-CV-00138 – (D. Or. 2012)

"On **September 8, 2015**¹³, the United States entered into a settlement agreement with the State of Oregon to vindicate the civil rights of individuals with intellectual and developmental disabilities (I/DD) who are unnecessarily segregated in sheltered workshops, or at risk of such unnecessary segregation. The settlement agreement with Oregon resolves a class action lawsuit by private plaintiffs in which the Department moved to intervene in May 2013. The lawsuit alleged that the State's employment service system over-relied on segregated sheltered workshops to the exclusion of integrated alternatives, such as supported employment services, and placed individuals, including youth, at risk of entering sheltered workshops. As a result of the proposed settlement, over the next seven years, 1,115 working-age individuals with I/DD who are currently being served in segregated sheltered workshops will have opportunities to work in real jobs at competitive wages. Additionally, at least 4,900 youth ages 14-24 years old will receive supported employment services designed to assist them to choose, prepare for, get, and keep work in a typical work setting. Half of the youth served will receive, at a minimum, an Individual Plan for Employment through the State's Office of Vocational Rehabilitation Services. Correspondingly, the State will reduce its reliance on sheltered workshops and implement policies and capacity-building strategies to improve the employment system to increase access to competitive integrated employment and the opportunity for people with I/DD to work the maximum number of hours consistent with their abilities and preferences. The settlement agreement was approved by U.S. Magistrate Judge Janice Stewart of the District of Oregon, who is presiding over the lawsuit, on December 29, 2015."

Facility based 14(c) work, often called "sheltered workshops," has failed its promise to train people with disabilities to obtain integrated employment. According to the **September 2001**¹⁴ investigation by the Government Accountability Office into the 14(c) program, only approximately 5% of sheltered workshop employees left to take a job in the community. The results from the thorough investigations conducted by the Government Accountability Office – "Stronger Federal Efforts Needed for Providing Employment Opportunities and Enforcing Labor Standards in Sheltered

¹² <http://www.dol.gov/odep/pdf/EmploymentFirstGovernors.pdf>

¹³ http://www.ada.gov/olmstead/olmstead_cases_list2.htm

¹⁴ General Accounting Office (GAO), September 2001, Special Minimum Wage Program, Centers Offer Employment and Support Services to Workers with Disabilities, But Labor Should Improve Oversight GAO-01-886, Page 4

Workshops, Report to the Congress, Comptroller General of the United States” (HRD-81-99) and “Report to Congressional Requesters, Special Wage Program: Centers Offer Employment and Support Services to Workers With Disabilities, But Labor Should Improve Oversight” (GAO-01-886) – explain that due to lack of capacity, training, and resources, the Wage and Hour Division is incapable of enforcing compliance with the subminimum wage provision. Furthermore, significant appropriation that would be required to improve oversight of the regulation would be better spent improving employment outcomes for people with disabilities.

Businesses with workforces that include employees with significant disabilities consistently report that these employees’ performance equals or exceeds that of their coworkers without disabilities. People with disabilities who want to be part of the mainstream workforce, contribute to society and support themselves find it demeaning and discriminatory to be subjected to productivity studies that reduce their wages.

The Ken Capone Equal Employment Act would guarantee equal rights and equal pay for all workers with disabilities in Maryland, and responsibly phase out the discriminatory practice of paying people with disabilities less than the minimum wage that is guaranteed to their non-disabled peers.