

2011

Sub-Minimum Wage or Sub-Human? The Potential Impact on the Civil Rights of People with Disabilities in Employment

Laura C. Hoffman

Follow this and additional works at: <http://lawcommons.luc.edu/pilr>

 Part of the [Civil Rights and Discrimination Commons](#), [Disability Law Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Laura C. Hoffman, *Sub-Minimum Wage or Sub-Human? The Potential Impact on the Civil Rights of People with Disabilities in Employment*, 17 Pub. Interest L. Rptr. 14 (2011).

Available at: <http://lawcommons.luc.edu/pilr/vol17/iss1/4>

This Feature is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Public Interest Law Reporter by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

Loyola Public Interest Law Reporter

FEATURE ARTICLE

**SUB-MINIMUM WAGE OR
SUB-HUMAN? THE
POTENTIAL IMPACT ON THE
CIVIL RIGHTS OF PEOPLE
WITH DISABILITIES IN
EMPLOYMENT**

by LAURA C. HOFFMAN

In Jan. 2011, the National Disability Rights Network (“NDRN”)¹ documented an investigation of several employment practices it found to be de-

structive to ensuring equality in employment for people with disabilities.² Among these practices is the use of a sub-minimum wage.³ There is no set pay for the sub-minimum wage, but Section 14(c) of the Fair Labor Standards Act (“FLSA”) allows employers to pay individuals with disabilities less than minimum wage in certain situations.⁴

Not everyone disagrees with the use of a sub-minimum wage for the disabled. In fact, a recent proposal in Congress would perpetuate the sub-minimum wage for people with disabilities through the reauthorization of the Workforce Investment Act. This has reignited the debate on the use of sub-minimum wage, dividing even disability advocates.⁵

A recent proclamation by President Barack Obama acknowledged the importance of employing the disabled.⁶ On the heels of this proclamation, a competing legislative proposal attempts to overrule the legal use of sub-minimum wage for the disabled.⁷

Dr. Marc Mauer, President of the National Federation of the Blind, stated, “The Fair Wages for Workers with Disabilities Act is a long-overdue effort to correct an injustice written into a law meant to protect all American workers from abuse and exploitation. Workers with disabilities were excluded from the protections of the Fair Labor Standards Act because of the false belief that we cannot be as productive as Americans without disabilities.”⁸

HOW SUB-MINIMUM WAGE FOR THE DISABLED HAS EVOLVED

Today, paying employees with disabilities a sub-minimum wage is legal under the FLSA.⁹ The idea, however, originated as part of President Franklin D. Roosevelt’s New Deal.¹⁰ The practice was born into federal legislation through the National Industrial Recovery Act (“NIRA”) of 1933-1935, the precursor to the FLSA.¹¹ The NIRA provided people with disabilities limited wages that were proportional to their productivity through a certificate system without a wage floor.¹² The U.S. Supreme Court in 1935 declared the NIRA unconstitutional, however, placing a moratorium on sub-minimum wage.¹³

After some modifications, the FLSA essentially reestablished the practice of using sub-minimum wage for the disabled.¹⁴ Like the NIRA, the FLSA set the sub-minimum wage at 75 percent of the federal minimum wage.¹⁵ In 1966,

Loyola Public Interest Law Reporter

Congress amended the FLSA and lowered the sub-minimum wage of people with disabilities to 50 percent.¹⁶ The hope was that employers would hire more disabled veterans if they could pay them less than the average worker.¹⁷ Generally, the FLSA considers an individual disabled when the individual's productivity is impaired by a physical or mental limitation with some exclusions.¹⁸ Because this reduces productivity, the law allows employers to pay these workers with disabilities a lower wage.¹⁹

Although there have been changes to the FLSA, none of them has eliminated the use of sub-minimum wage.²⁰ This is despite the fact that congressional hearings in 1994 determined the sub-minimum wage to be part of an ineffective system.²¹ Until recent challenges, the last attempt to change the FLSA occurred in 2001.²²

WHY ELIMINATE THE SUB-MINIMUM WAGE FOR THE DISABLED?

Some disability advocates favor eliminating the sub-minimum wage and various other employment practices that single out workers with disabilities. They argue that these are contradictory to promoting and ensuring the equal employment opportunity of people with disabilities. These advocates contend that federal disability law after the FLSA has created greater protections in securing civil rights.²³ By expanding federal disability rights in employment, it seems logical to eliminate the sub-minimum wage as well.²⁴

Among the advocates for eliminating the sub-minimum wage for people with disabilities is former New York Gov. David Patterson.²⁵ Even with federal disability law protection, those supporting new legislation to eliminate the sub-minimum wage suggest that federal disability law has largely been an unfulfilled promise.²⁶

Sub-minimum wage for the disabled is often incredibly low.²⁷ Disabled people earning sub-minimum wage can make as little as 10 percent of the standard minimum wage and up to 50 percent at the most.²⁸ The total weekly earnings of those employed in sheltered workshops – or workplaces that hire disabled workers exclusively or primarily – is nearly one-third lower than those working in integrated work environments.²⁹

Another argument against the use of a sub-minimum wage is that individuals with disabilities cannot succeed in being financially independent because the sub-minimum wage fosters dependence.³⁰ “The lack of a true minimum wage for many workers with disabilities keeps them in a life of perpetual poverty. It leaves them dependent on family or government programs just to meet their basic needs of food, shelter, and medical care.”³¹ Because employers can pay people with disabilities below minimum wage, the disabled often become more dependent on the government for their needs.³²

ELIMINATING THE SUB-MINIMUM WAGE MAY BE THE BETTER OPTION

The NDRN suggests that eliminating sub-minimum wage would lessen the dependency of the disabled.³³ “Earning at least the minimum wage, if not a living wage, would allow workers with disabilities to support themselves and reduce the amount of aid they receive from government sources.”³⁴ Even when individuals with disabilities do receive some employment benefits, employers are often counting these benefits towards the wages of the disabled and minimizing their wages to reflect receipt of these benefits.³⁵

Technology has also enabled people with disabilities to overcome many of the challenges that previously prevented them from participating in traditional employment opportunities.³⁶ Individuals with disabilities who are working in competitive or traditional environments are often making two to three times as much income compared to those working in sheltered workshops and earning sub-minimum wages.³⁷ While supporters of the sub-minimum wage claim that individuals with disabilities placed in these working environments will eventually move up to become minimum wage workers, this rarely occurs.³⁸

FAVORING THE SUB-MINIMUM WAGE

Despite the arguments against a sub-minimum wage for the disabled, there are several arguments for its continued use. To begin with, the number of individuals with disabilities impacted is actually minimal.³⁹ According to the 2001 report by the U.S. Government Accountability Office, the majority of people with disabilities are earning regular wages, not the lower sub-minimum wage under the FLSA.⁴⁰ Additionally, supporters of the sub-minimum wage argue for the autonomy of the disabled—that the FLSA gives them the right to de-

cide whether or not to engage in employment that pays less due to the nature of the services.⁴¹

While a number of disability advocacy organizations strenuously oppose the use of a sub-minimum wage and seek its elimination, other organizations do not.⁴² One national disability organization, The Arc,⁴³ worries that abolishing the sub-minimum wage “would entail multiple and comprehensive policy reforms and service delivery expansions.”⁴⁴

Another argument raised is that, even though some individuals with disabilities are earning sub-minimum wages, they are at least being provided with gainful employment when they would otherwise be unemployed.⁴⁵ It is also argued that the idea of employing individuals with disabilities in working environments where they receive sub-minimum wages is designed to allow them eventually to become removed from this system.⁴⁶

IS A SUB-MINIMUM WAGE THE PROBLEM OR THE SOLUTION?

Because it appears Congress may become embroiled in a policy battle between those advocating for the continuance of the sub-minimum wage and those seeking its elimination, the global reaction to this issue may be instructive. Several countries have taken legislative measures to eliminate sub-minimum wages.⁴⁷ These countries have either increased wages, resulting in minimum wages in sheltered workshops, or completely abandoned the use of sheltered workshops as they currently function.⁴⁸

In 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities.⁴⁹ Among the Convention’s provisions for ensuring the rights of the disabled is Article 27, which specifies the protection of employment rights.⁵⁰ Article 27(1) provides: “States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.”⁵¹

Further, recent attention has surrounded the issue of sub-minimum wage in Canada. According to University of Ottawa law professor Ravi Malhotra, several provinces continue to perpetuate this employment practice, which can also

reinforce the stereotypes of the disabled.⁵² Professor Malhotra indicated that the time has come to change the framework by which we examine legal issues related to the disabled by embracing a “social model” of disability.⁵³ The social model embraces removing physical barriers that exist in a structure as a hindrance to employment for the disabled.⁵⁴ Examples of this include assistive technology and other structural modifications to a work environment.⁵⁵ This differs from the widely accepted medical model.⁵⁶ Unlike the social model, the medical model emphasizes the “physical or mental limitations” of an individual as the source of disability rather than environmental barriers.⁵⁷

The presence of opposing legislative proposals in the United States suggests that our nation continues to struggle over the meaning of employment rights for the disabled. However, a global perspective suggests a shift to both the elimination of the practice of sub-minimum wage and a change in the way Americans view disability. A sub-minimum wage can be classified in one of two ways: either a valiant attempt to provide equality or the extension of a history of discrimination.

NOTES

- 1 NAT'L DISABILITY RIGHTS NETWORK, <http://www.ndrn.org/> (last visited Oct. 31, 2011).
- 2 *Segregated & Exploited: A Call to Action! The Failure of the Disability Service System to Provide Quality Work*, NAT'L DISABILITY RIGHTS NETWORK, (Jan. 2011), available at <http://www.napas.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf> [hereinafter *Segregated & Exploited*].
- 3 *Id.*
- 4 *Id.*
- 5 Michelle Diament, *Plan To Regulate Subminimum Wage Sparks Debate*, DISABILITY-SCOOP.COM, (July 19, 2011), <http://www.disabilityscoop.com/2011/07/19/plan-subminimum-wage/13562/>.
- 6 The White House, Office of the Press Secretary, *Presidential Proclamation—National Disability Employment Awareness Month*, (Oct. 3, 2011), <http://www.whitehouse.gov/the-press-office/2011/10/03/presidential-proclamation-national-disability-employment-awareness-month> (“During National Disability Employment Awareness Month, we recognize the skills that people with disabilities bring to our workforce, and we rededicate ourselves to improving employment opportunities in both the public and private sectors for those living with disabilities.”).
- 7 Michelle Diament, *Congressmen Call For End To Subminimum Wage*, DISABILITY-SCOOP.COM, (Oct. 5, 2011), <http://www.disabilityscoop.com/2011/10/05/congressmen-end-subminimum/14181/>; *U.S. Representatives Stearns and Bishop Introduce Fair Wages for Workers with Disabilities Act*, NAT'L FEDERATION OF THE BLIND, (Oct. 4, 2011), <http://www.nfb.org/NewsBot.asp?MODE=VIEW&ID=856> [hereinafter *U.S. Representatives*]. See also Governor David Paterson Urges Immediate Passage of Fair Wages for Workers with Disabilities Act, BUSINESS

Loyola Public Interest Law Reporter

WIRE, (Oct. 10, 2011), <http://finance.yahoo.com/news/Governor-David-Paterson-Urges-bw-2316613120.html?x=0&.v=1>.

8 *U.S. Representatives*, *supra* note 7.

9 29 U.S.C. § 201, et seq.

10 *Segregated & Exploited*, *supra* note 2, at 11 (“The use of sub-minimum wage as an employment practice for the disabled was introduced in President Roosevelt’s Executive Order issued on February 17, 1934.”).

11 William Whittaker, CONG. RESEARCH SERV., RL 30674, TREATMENT OF WORKERS WITH DISABILITIES UNDER SECTION 14(C) OF THE FAIR LABOR STANDARDS ACT (2005) available at http://digitalcommons.ilr.cornell.edu/key_workplace/209.

12 *Segregated & Exploited*, *supra* note 2, at 11.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 Whittaker, *supra* note 11, at 3.

19 *Id.*

20 *Id.* at Summary.

21 *Id.*

22 *Id.*

23 *Segregated & Exploited*, *supra* note 2, at 8.

24 *Id.*

25 *Former Gov. David Paterson, Blind Community Fight Sub-Minimum Wage For Disabled Workers*, HUFFINGTON POST (July 26, 2011), http://www.huffingtonpost.com/2011/07/26/disabled-workers-minimum-wage_n_909991.html (“On the eve of the twenty-first anniversary of the Americans with Disabilities Act, it is more than appropriate that we call for the language that would reauthorize the practice of paying sub-minimum wages to Americans with disabilities to be stricken from the Workforce Investment Act.”).

26 *U.S. Representatives*, *supra* note 7 (“Courage and creativity are required to replace the misguided benevolence that has historically shaped policies toward people with disabilities with real opportunity for our equal employment and full participation in the workplace.”).

27 *Segregated & Exploited*, *supra* note 2, at 8.

28 *Id.*

29 *Id.* (“Reports on sheltered workshops often show that workers take home about \$175 each month, while those working in traditional jobs take home about \$456 each week.”).

30 *Id.* at 28.

31 *Id.*

32 *Id.* (“This forces them to continue to rely on federal benefits such as SSI and Medicaid which themselves require recipients to be poor.”).

33 *Id.*

34 *Id.*

35 *Id.* at 29.

36 *Id.*

37 *Id.*

38 Michael Callahan, *The Productivity Fallacy: Why People Are Worth More Than Just How Fast Their Hands Move*, EMPLOYMENT FIRST GEORGIA/EFG, <http://www.employmentfirstgeorgia.org/Resources/The-Productiveity-Fallacy.aspx>.

39 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-886, SPECIAL MINIMUM WAGE PROGRAM: CENTERS OFFER EMPLOYMENT AND SUPPORT SERVICES TO WORKERS WITH DISABILITIES, BUT LABOR SHOULD IMPROVE OVERSIGHT (2001), available at <http://www.gao.gov/new.items/d01886.pdf>.

40 *Id.*

41 Callahan, *supra* note 38.

42 Diament, *supra* note 5.

43 ARC, <http://www.thearc.org/> (last visited Oct. 20, 2011).

44 *Employment Issues for People with Disabilities*, ARC, <http://www.thearc.org/page.aspx?pid=2589> (last visited Oct. 20, 2011).

45 Callahan, *supra* note 38.

46 *Id.*

47 Alberto Migliore, *Sheltered Workshops*, INT'L ENCYCLOPEDIA OF REHAB. (J.H. Stone & M. Blouin, eds., 2011), <http://cirrie.buffalo.edu/encyclopedia/en/article/136/> ("In 1996 British Columbia (Canada) and in 2000 New Zealand repealed their respective legislation that allowed sheltered workshops to pay workers with disabilities below the minimum wage. As a result, sheltered workshops had to either increase the wages to at least minimum wage or to discontinue their work programs (Butterworth et al. 2007).").

48 *Id.*

49 *Convention on the Rights of Persons with Disabilities*, UN ENABLE, <http://www.un.org/disabilities/default.asp?navid=14&cpid=150> (last visited Nov. 23, 2011).

50 *UN Convention on the Rights of Persons with Disabilities*, UNITED NATIONS (2006), available at <http://www.un.org/disabilities/convention/conventionfull.shtml>.

51 *Id.*

52 Ravi Malhotra, *Manitoba Law Discriminatory*, WINNIPEG FREE PRESS (Aug. 24, 2011), <http://www.winnipegfreepress.com/opinion/westview/manitoba-law-discriminatory-128301633.html>.

53 *Id.*

54 *Id.*

55 *Id.*

56 Aaron Gottlieb, et al., *Employment of People with Disabilities*, INT'L ENCYCLOPEDIA OF REHAB., (J.H. Stone & M. Blouin, eds., 2011), available at <http://cirrie.buffalo.edu/encyclopedia/en/article/123/>.

57 *Id.*