Disability Employment: Outdated Laws Leave People with Disabilities Behind in Today's Economy

Minority Staff Report

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U.S. Senator Patty Murray, Ranking Member
United States Senate Committee on Health, Education, Labor, and Pensions

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EXECUTIVE SUMMARY

October of each year marks National Disability Employment Awareness Month in the United States. While modest gains have been realized in government and private sector employment of people with disabilities, the analysis of nationwide outcomes shows that employment of people with disabilities lags far behind their peers. Moreover, compared to every other group tracked by the U.S. Bureau of Labor Statistics (BLS), employment outcomes for people with disabilities are far lower. This report from the Democratic staff of the U.S. Senate Committee on Health, Education, Labor, and Pensions (HELP Committee) examines disability employment outcomes using data from the BLS, summarizes disability employment law, describes programs that are out of step with modern disability employment policy in the United States, and provides an update on the Committee's oversight of state practices to implement the Workforce Innovation and Opportunity Act (WIOA) and the Rehabilitation Act of 1973 (Rehabilitation Act).

The Democratic staff of the Committee received reports that state vocational rehabilitation (VR) agencies were not complying with key requirements of WIOA and the Rehabilitation Act. To investigate these reports, the Ranking Member of the HELP Committee wrote to the administrative head of each of the 79 general, blind, and combined state VR agencies requesting information related to three areas: informed choice of VR clients, case-by-case analysis of an employment setting, and referral procedures related to AbilityOne. Based on these responses, the HELP Committee Democratic staff found that state VR agencies are complying with the dual requirements to refer clients to the job they choose while also using WIOA funds to support and promote competitive integrated employment.

The report makes four recommendations for future action, including that Congress should modernize the AbilityOne program to bring it into alignment with modern disability employment policy and should phase out the authority that permits employers to pay people with disabilities wages that are less than the federal minimum wage.

SECTION 1: EMPLOYMENT OUTCOMES FOR PEOPLE WITH DISABILITIES

Advancements made in the law for people with disabilities during the past 45 years have been remarkable. In 1973, Congress enacted the **Rehabilitation Act of 1973 (Rehabilitation Act)**,[1] a landmark civil rights law that prohibited discrimination on the basis of a disability in employment by federal agencies and federal contractors and requires those employers to engage in affirmative action to promote the employment and advancement of people with disabilities. In 1975, Congress enacted the Education for All Handicapped Children Act of 1975,[2] later renamed the **Individuals with Disabilities Education Act**,[3] which paved the way for all children with disabilities to receive a free appropriate public education in the least restrictive environment. Fifteen years later, the **Americans with Disabilities Act (ADA)**[4] provided broad civil rights protections for millions of people with disabilities in this country, including in state and local government and private sector employment, and mandated community integration.[5] Then, in 2008, Congress enacted the **Genetic Information Nondiscrimination Act of 2008 (GINA)**,[6] which prohibited discrimination on the basis of genetic information, including in employment. In 2014, Congress enacted the **Workforce Innovation and Opportunity Act (WIOA)**[7] to strengthen and improve the workforce system of the United States to better support people with disabilities by focusing on increasing competitive integrated employment for people with disabilities, limiting the use of discriminatory subminimum wages, and requiring that 15 percent of vocational rehabilitation funds be used to help people with disabilities transition from high school to higher education or the workforce.[8]

Taken together, these five laws represent ***modern national disability employment policy for the United States*** that provides free appropriate public education in the least restrictive environment, prohibits discrimination in federal, state, and local government programs, contracts, and employment, promotes accessibility, requires accommodations for workers with disabilities, and creates a workforce system designed to increase labor force participation and employment of people with disabilities in the public and private sectors.

The federal government is the largest employer of individuals with disabilities in the United States and has taken steps to increase recruitment, hiring, and retention of people with disabilities in the federal workforce.[9] For example, in 2000, President William J. Clinton issued an Executive Order that set the goal for the federal government to hire 100,000 people with

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[1] 29 U.S.C. 701 et seq.
[2] Public Law 94–142; 89 Stat. 773.
[3] 20 U.S.C. 1400 et seq.
[4] Public Law 101-336; 104 Stat. 337.
[5] *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999).
[6] 42 U.S.C. 2000ff et seq.
[7] 29 U.S.C. 3101 et seq.
[8] *Id*
[9] *Federal Employees*, Dept. of Labor, https://www.dol.gov/odep/topics/FederalEmployment.htm (last visited Oct. 25, 2018).

disabilities over five years.[10] President Barack Obama issued three more Executive Orders throughout his presidency relating to increasing employment for individuals with disabilities. First, in 2010, President Obama issued an Executive Order directing the federal government to take additional steps to achieve the hiring goals of President Clinton's Executive Order.[11] This included directing the Office of Personnel Management (OPM) to design model recruitment and hiring strategies for agencies to increase employment of people with disabilities, directing each federal agency to develop its own plan for promoting employment opportunities for individuals with disabilities, with performance measures and numerical goals for employment of individuals with disabilities and targeted disabilities, increasing the use of Schedule A hiring authority, and maintaining a focus on retention of employees with disabilities.[12] Second, in 2011, President Obama issued an Executive Order instructing OPM to encourage the use of special hiring authority for people with disabilities, conduct barrier analyses, and support special emphasis equal opportunity employment programs to promote diversity in the workforce.[13] Lastly, in 2014, President Obama issued an Executive Order requiring certain federal government contractors to pay the same minimum wage to workers with disabilities as all other workers.[14]

Federal agencies have also taken steps to support employment of people with disabilities. The U.S. Equal Employment Opportunity Commission (EEOC), in implementing the Rehabilitation Act, has required federal agencies to set goals for hiring people with specific disabilities that are associated with high rates of unemployment and underemployment.[15] The EEOC also created the Leadership for the Employment of Americans with Disabilities (LEAD) Initiative to encourage federal agencies to recruit, hire, and promote people with severe disabilities.[16]

As the HELP Committee has noted previously, because of these laws and executive branch actions, "we now have a new generation of young adults with disabilities, the 'ADA generation,' who have high expectations for themselves and who are ready, willing and able to pursue a good career in high-growth sectors of our Nation's economy that will allow them to become and stay part of the middle class."[17] The benefits of employment on the financial, psychological, social, and societal wellbeing of people with disabilities are well documented,[18] as is the desire of people with disabilities to work.[19] But pervasive underemployment and unemployment deny

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[10] Executive Order 13163; 29 U.S.C. 791 note.
[11] Executive Order 13548; 75 Fed. Reg. 45039.
[12] Executive Order 13548; 29 U.S.C. 791 note.
[13] Executive Order 13583; 42 U.S.C. 200e note.
[14] Executive Order 13658; 79 Fed. Reg. 9851.
[15] U.S. Equal Employment Opportunity Commission, (N.D.), *"Questions and Answers: Promoting Employment of Individuals with Disabilities in the Federal Workforce."*
[16] U.S. Equal Employment Opportunity Commission, (N.D.), *"The LEAD Initiative."*
[17] Senate HELP Committee, (2012), "Unfinished Business: Making Employment of People With Disabilities a National Priority."
[18] *e.g.*, Graetz, Brian. (1993). "Health consequences of employment and unemployment: Longitudinal evidence for young men and women" *Social Science & Medicine* 36 (6): 715.; Schur, L. (2002). "The Difference a Job Makes: The Effects of Employment among People with Disabilities." *Journal of Economic Issues* 36(2), 339-347.
[19] *e.g.*, Kruse, D. and Schur, L. (Jan. 2003). "Employment of People with Disabilities Following the ADA." *Industrial Relations* 42(1): 31-66; Schur, L., Kruse, D. and Blanck, P. (2005). "Corporate Culture and the employment of persons with disabilities." *Behavioral Sciences and the Law* 23(1): 3-20; & Wagner,

many people with disabilities these benefits.[20]

EMPLOYMENT RATES HAVE INCREASED OVERALL, BUT CONTINUE TO LAG FOR PEOPLE WITH DISABILITIES

Employment outcomes among people with disabilities have been persistently lower than employment outcomes among people without disabilities.[21] This is observed in labor force participation, unemployment, and underemployment measures—and cannot be explained by differences in educational attainment or other characteristics.[22]

Labor Force Participation Rates

According to the U.S. Bureau of Labor Statistics' (BLS) labor force participation information—that is, the number of workers employed plus individuals actively seeking work, relative to the working age population as a whole—people with disabilities participate in the workforce at a far lower rate when compared to the general population.[23] In September of 2018, there were 258.3 million individuals of working age in the United States.[24] Of this group, 30.3 million were people with disabilities.[25] A comparison of workers with disabilities to the overall population shows that working age people with disabilities participated in the workforce at a rate of ***less than one third*** of the general population.

- **For working age adults without disabilities, the labor force participation rate was 68.2 percent.**
- **For working age adults with disabilities, the labor force participation rate was 21.4 percent.**

People with disabilities participate in the workforce at a rate far lower than any other group tracked by the BLS (see Figure 1).[26] A review by the Economic Policy Institute stated that people with disabilities do not have lower participation rates because they opt out of the workforce to claim disability benefits.[27]

M., Newman, L., Cameto, R., Levine, P., & Marder, C. (2007). "*Perceptions and Expectations of Youth With Disabilities. A Special Topic Report of Findings from the National Longitudinal Transition Study-2 (NLTS2).*" Menlo Park, CA: SRI International.

[20] BLS, (June 21, 2018) "*Persons with a Disability: Labor Force Characteristics Summary*" (stating that in 2017 18.7 percent of persons with a disability were employed while the employment ratio for those without a disability was 65.7 percent).

[21] Yelin, E., & Trupin, L. (2003). Disability and the characteristics of employment. *Monthly Labor Review*, 126, 20-31; & Houtenville, A., Stapleton, D., Weathers, R., and Burkhauser, R. (Eds.). (2009). *Counting working-age people with disabilities: What current data tell us and options for improvement*. Kalamazoo, MI: W.E. UpJohn Institute for Employment Research.

[22] *Id.*

[23] BLS, (Sept. 2018), "*Employment Situation*."

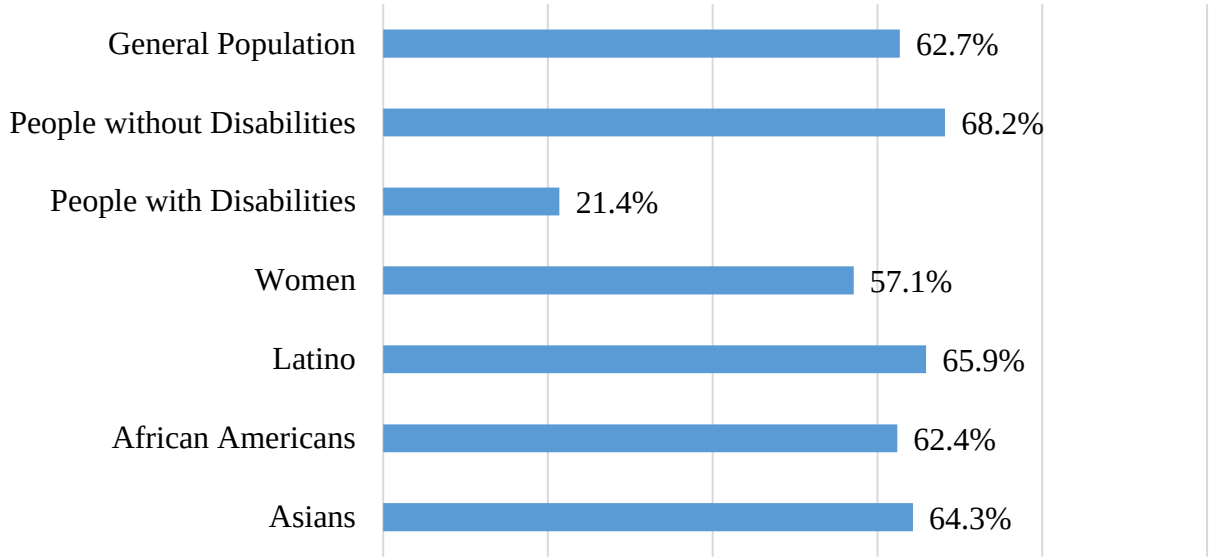
[24] *Id., Individuals with Disabilities Living in the Community.*

[25] *Id.*, Table A-6.

[26] *Id., Table A-1, Table A-2, Table A-3, Table A-6, Workforce Participation Rates, Not Seasonally Adjusted.*

[27] Economic Policy Institute, (Sept. 24, 2015), *"Disability and Employment Revisited."*

Figure 1. ***September 2018 Workforce Participation Rates***



Source: BLS, September Employment Situation.

Unemployment Rates of People with Disabilities

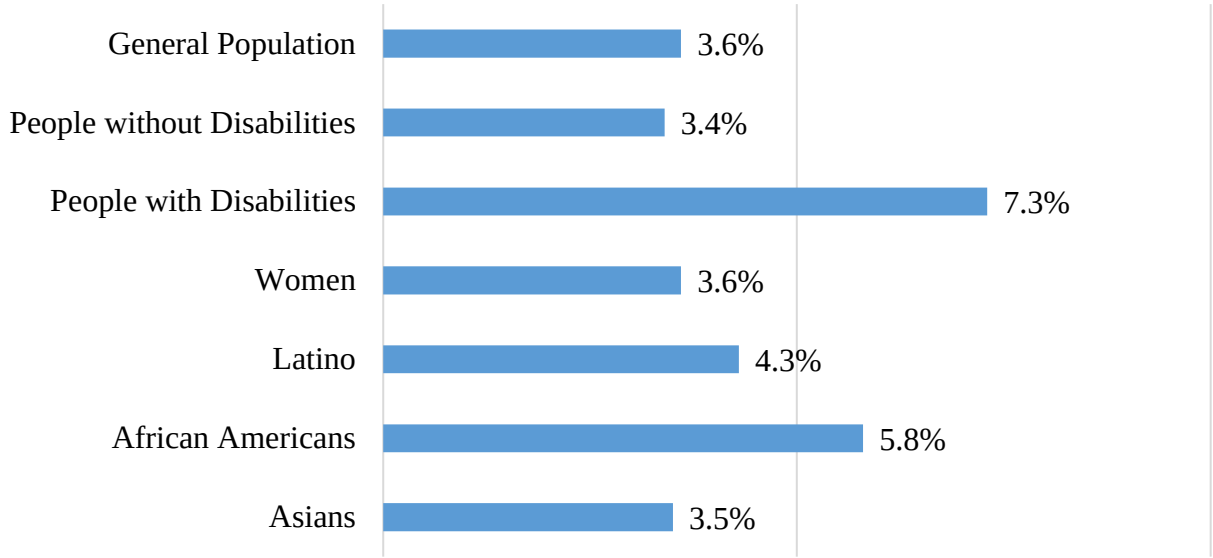
In addition to participating in the workforce at a much lower rate than persons without disabilities, people with disabilities are more often unemployed than people without disabilities. According to the BLS, in September of 2018 there were 5.8 million individuals of working age unemployed in the United States.[28] A comparison of workers with disabilities against the overall population shows that working age people with disabilities are unemployed at ***more than double*** the rate of the general population.[29]

- **For working age adults without disabilities, the unemployment rate was 3.4 percent.**
- **For working age adults with disabilities, the unemployment rate was 7.3 percent.**

People with disabilities are unemployed at a rate far higher than any other group tracked by the BLS (see Figure 2).[30] These finding cannot be explained by differences in educational attainment.[31] Employment rates for individuals with disabilities, although improved since September 2017,[32] remained consistently lower compared to people without disabilities.

[28] BLS, (Sept. 2018), *Employment Situation, Table A-1.*
[29] *Id., Table A-6, Unemployment Rate, Not Seasonally Adjusted.*
[30] *Id., Table A-1, Table A-2, Table A-3, Table A-6, Unemployment Rate, Not Seasonally Adjusted.*
[31] BLS, (June 21, 2018) *"Persons with a Disability: Labor Force Characteristics — 2017."*
[32] BLS, (Sept. 2018), *Employment Situation, Table A-6.*

Figure 2. ***September 2018 Unemployment Rates***



Source: BLS, September Employment Situation.

Other Characteristics Related to Employment for People with Disabilities

According to the BLS' annual report on workers with disabilities,[33] labor force participation and unemployment are not the only negative outcomes among employment statistics for people with disabilities (see Figure 3).[34]

- People with disabilities who are employed are more likely to be employed part time, compared to workers without disabilities.[35]
- People with disabilities who are employed are more likely to be self-employed, compared to workers without disabilities.[36] While self-employment is an important source of jobs for people with disabilities, the full cost of health insurance and long-term care insurance falls to the self-employed individual. These benefits are particularly important for people with disabilities.
- People with a disability are less likely to have completed a bachelor's degree or higher than those without a disability. While it is noted above that education attainment does not explain differences between people with disabilities and their peers in labor force participation and unemployment, educational attainment is positively associated with likelihood of employment.[37]
- People with disabilities are more likely to be employed in service, production, transportation, and material moving occupations, and less likely to be employed in

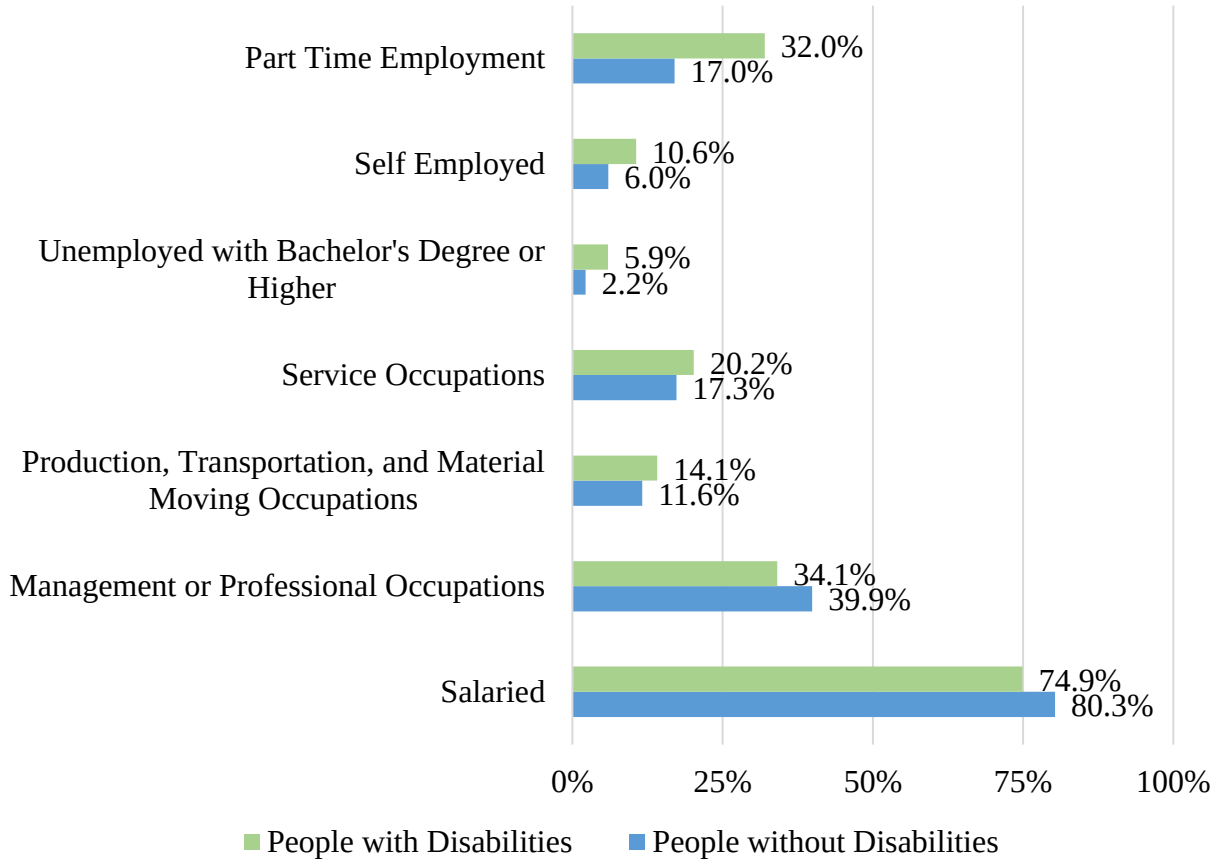
[33] BLS, (June 21, 2018), "Persons with a Disability: Labor Force Characteristics — 2017."
[34] *Id.*
[35] *Id., Table 2.*
[36] *Id., Table 4.*
[37] BLS, (June 21, 2018), *"Persons with a Disability: Labor Force Characteristics — 2017."*

management, professional, and related occupations than those without disabilities[38]—wages in management and professional occupations are often higher than other fields.[39]

- People with disabilities are less likely to be employed in salaried positions than those without a disability.[40]

While certain indicators, such as the employment-to-population ratio,[41] have shown fairly consistent growth for people with disabilities, employment outcomes for people with disabilities lag far behind when compared to their peers. These poor employment outcomes have devastating consequences on the economic independence of people with disabilities in the United States.

Figure 3. ***Selected Employment Characteristics***



Source: BLS, Persons with a Disability: Labor Force Characteristics — 2017.

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[38] *Id.*
[39] BLS, (May 2017), *"National Occupational Employment and Wage Estimates."*
[40] BLS, (June 21, 2018), *"Persons with a Disability: Labor Force Characteristics — 2017."*
[41] National Trends in Disability Employment, (Sept. 7, 2018), *"nTIDE August 2018 Jobs Report: Return to Positive Trend for Employment of Americans with Disabilities."*

SECTION 2: DISABILITY EMPLOYMENT POLICY IN THE UNITED STATES

During the past 45 years, Congress has worked to expand employment opportunities for people with disabilities by updating, reauthorizing, and broadening laws that serve people with disabilities—with the central aim of modernizing disability employment policy by promoting competitive integrated employment. Congress has created a combination of programs that provide supports and services to workers with disabilities, tax credits to incentivize private businesses to hire, affirmative action hiring in the federal government, and improved workforce training. As a result, we have seen labor force participation of people with disabilities modestly increase and unemployment and underemployment modestly decrease.

EMPLOYMENT FIRST: A MODERN APPROACH TO DISABILITY EMPLOYMENT

Employment First is a framework initially created by state-level policymakers to develop innovative models and systems to support competitive integrated employment for people with disabilities, including people with the most significant disabilities.[42] Competitive employment means that workers are paid the higher of minimum or competitive wages comparable to workers without disabilities performing the same task.[43] Integrated employment means that the job setting is found typically in the community and where the employee with a disability primarily interacts with other employees without disabilities.[44] The goal of Employment First is to align policies and systems to better support competitive integrated employment as the first and best option for employment services for individuals with disabilities.[45] In summary, as the HELP Committee Democratic staff have previously stated, "The policy assumption [of Employment First] is that all individuals with disabilities, despite the level of severity of their disability, should be provided with support, training, and opportunities to work within the general labor force."[46]

While Employment First grew out of state-level efforts, its success has resulted in the U.S. Department of Labor adopting and supporting the system[47] and Congress embedding it in federal laws, including the ADA, Rehabilitation Act, and WIOA. According to the University of Minnesota's Institute on Community Living, 36 states have adopted Employment First policies.[48] These efforts consistently show that people with disabilities can work successfully in the

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[42] Senate HELP Committee, (2012), *"Unfinished Business: Making Employment of People With Disabilities a National Priority."*
[43] 34 CFR §§361.5(c)(9)(ii).
[44] *Id.*
[45] U.S. Departments of Labor & Health and Human Services, (Sept. 11, 2015), *"Memorandum of Agreement Between the U.S. Department of Labor, Office of Disability Employment Policy and U.S. Department of Health and Human Services, Administration for Community Living."*
[46] Senate HELP Committee, (July 2012), "Unfinished Business: Making Employment of People with Disabilities a National Priority."
[47] U.S. Department of Labor, Office of Disability Employment Policy.
[48] Gunty, A., Dean, K., Nord, D., Hoff, D., & Nye-Lengerman, K. (2017). "Employment First: An Update on National Progress." *Research and Training Center on Community Living*.

community with accommodations and, in some cases, assistance. States have consistently looked to federal policy to support this work.

WORKFORCE INNOVATION AND OPPORTUNITY ACT AND STATE VOCATIONAL REHABILITATION AGENCIES

Employment First concepts were incorporated into WIOA by Congress in 2014, including through amendments to the Rehabilitation Act. The Rehabilitation Act governs a network of 79 state vocational rehabilitation (VR) agencies that provide services and supports to people with disabilities seeking employment. Among the purposes of the state VR program is enabling eligible individuals with disabilities to engage in employment and achieve economic self-sufficiency.[49] WIOA was passed as a bipartisan effort to increase access to employment, including for individuals with disabilities, and to strengthen the workforce system. The Rehabilitation Act, as amended by WIOA, placed extensive emphasis on competitive integrated employment in order to support Employment First policies under the law.

Competitive integrated employment of people with disabilities, including people with the most significant disabilities, is a central purpose of the amendments to the Rehabilitation Act made by WIOA.[50] In general, jobs in so-called "sheltered workshops" and with "community rehabilitation providers" will not meet the definition of an integrated setting.[51] These jobs are generally not found in the community and employees with a disability do not interact with other employees without disabilities in comparable positions on a regular and routine basis.[52] Under WIOA, placement of a person with a disability into a sheltered workshop is not considered a successful case closure and federal funds under WIOA may not be used to provide services in that setting.[53] State VR agencies have a responsibility to perform due diligence in determining whether a particular job meets the integrated location criteria.[54]

While the integrated settings requirement has been in place since 2001,[55] since enactment of WIOA in 2014, states have been reevaluating their policies as they work to implement the new law. This reevaluation has prompted some state VR agencies to change policies and procedures to ensure compliance with all requirements of the law, including not provided VR services in segregated employment settings to clients with disabilities[56]—which is rarely permitted under WIOA. As states have changed policies, state VR agency staff have been trained on the new requirements of the law and how WIOA interacts with the state VR system, including how

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[49] 29 U.S.C. 701(b).
[50] 29 U.S.C. 701(b)(2).
[51] State Vocational Rehabilitation Services Program, 81 Fed. Reg. 55630, 55638 (2016) (to be codified at 34 C.F.R. pt. 361, 363, 397).
[52] U.S. Department of Education, (Jan. 18, 2017), *"RSA: Integrated Location Criteria of the Definition of 'Competitive Integrated Employment' FAQs."*
[53] Workforce Innovation Technical Assistance Center, (N.D.), *"'FAQs' Resources and Strategies for Competitive Integrated Employment*."
[54] 34 C.F.R. 361.5(c)(32)(ii).
[55] 66 FR 7249, 7252 (Jan. 22, 2001).
[56] Correspondence with the HELP Committee.

WIOA emphasizes competitive integrated employment while restricting the use of funding for services in segregated employment settings. Enforcement of the law and additional training to state VR agency staff likely explain reduced referrals to employers that rely on segregated employment settings.

Informed client choice is also a fundamental requirement of WIOA and the state VR systems.[57] The Rehabilitation Act requires, among other things, state VR agencies to have policies and procedures in place to inform and empower the client in the selection of their desired employment outcomes, the services that may be provided to achieve their employment outcomes, and where such services may be provided.[58] While informing and empowering the client to make decisions about outcomes and services, the state VR agency must also comply with other requirements of the law. WIOA limits what services a state VR agency may provide in settings that are not integrated.[59] Accordingly, if a client has an uncompensated employment goal, desires employment located in a segregated setting, or seeks employment that does not pay competitive wages, state VR agencies must, first, ensure the individual receives information on opportunities to pursue competitive integrated employment through the VR program and, then, refer these individuals to extended employment providers or other federal, state, or local programs that can meet their needs.[60]

ABILITYONE

AbilityOne is a federal contract set-aside program created in 1938 providing contracts exclusively to nonprofit agencies using a certain percentage of labor from individuals who are blind or have significant disabilities. AbilityOne's current authorizing legislation (the Javits-Wagner-O'Day Act of 1971[61]) provides government-wide authority for noncompetitive acquisitions of supplies (e.g., parachute equipment, note pads) and services (e.g., food service, custodial, and grounds maintenance) produced by these nonprofit agencies. Two central nonprofit agencies help administer the program: National Industries for the Blind (employment for people who are blind) and SourceAmerica (employment for people with significant disabilities other than blindness). These two central nonprofit agencies enter into agreements with other nonprofit agencies (e.g., Goodwill) to provide AbilityOne supplies and services to federal customers.

By law, to participate in the AbilityOne program, at least 75 percent of a nonprofit agency's overall direct labor hours must be performed by people with disabilities.[62] As a result of this ratio requirement, the AbilityOne program is the largest source of employment for people who are

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[57] 29 U.S.C. 722(d).
[58] 29 U.S.C. § 701.
[59] Workforce Innovation Technical Assistance Center, (N.D.), *"'FAQs' Resources and Strategies for Competitive Integrated Employment*."
[60] See 34 C.F.R. 361.37(b)(1-3); WIOA added additional criteria for youth with disabilities seeking sheltered employment.
[61] 41 U.S.C. 46 et seq.
[62] U.S. AbilityOne Commission, (Mar. 22, 2013), *"Direct Labor Ratio Requirements."*

blind or have a significant disability,[63] but this employment is often in segregated settings. In FY2016, 47,000 individuals with disabilities were employed under AbilityOne contracts and accounted for $3.2 billion of federal procurements.[64]

While the AbilityOne program is a source of employment for some people with disabilities, the statutory scheme for the AbilityOne program is inherently in conflict with modern disability employment policy. In their report to Congress and the Administration, the National Council on Disability describes this conflict: "The 75 [percent] direct labor ratio requirement is in tension with recent evolutions of disability law and policy including: (1) the ADA and *Olmstead* which require public entities, including employment service systems, to avoid the unnecessary segregation of individuals with disabilities, and to make services available in the most integrated setting appropriate; and (2) WIOA, which preferences work in competitive integrated employment as the desired outcome of vocational rehabilitation services."[65]

SUBMINIMUM WAGES FOR PEOPLE WITH DISABILITIES

Compounding the conflict between AbilityOne and modern disability employment policy is the practice of AbilityOne contractors paying some employees less than the federal minimum wage (subminimum wage). Executive Order 13658, signed by President Obama in 2014, requires federal contractors who provide ***services*** to the government, including AbilityOne contractors who provide services, to pay at least $10.35 per hour to their employees. However, AbilityOne contractors who produce ***goods*** are permitted to pay wages lower than the federal minimum wage[66] required under the Fair Labor Standards Act (FLSA).[67] Section 14(c) of the FLSA allows for employers to request a certificate from the U.S. Department of Labor to pay lower wages to people with disabilities (14(c) certificate). According to an analysis by the National Council on Disability, 48 percent of all AbilityOne employers hold 14(c) certificates (see Figure 4).[68] In some instances, AbilityOne contractors pay less than half of a state's minimum wage,[69] whereas in other instances AbilityOne contractors pay wages in excess of the state and federal minimum wage but less than wages paid by other employers that produce similar products in that area.[70] While one of the AbilityOne central nonprofits, National Industries for the Blind, has encouraged its affiliates to pay workers at least federal minimum wage,[71] the second central nonprofit, Source America, has not taken enough action to end subminimum wage payments within its affiliate network.

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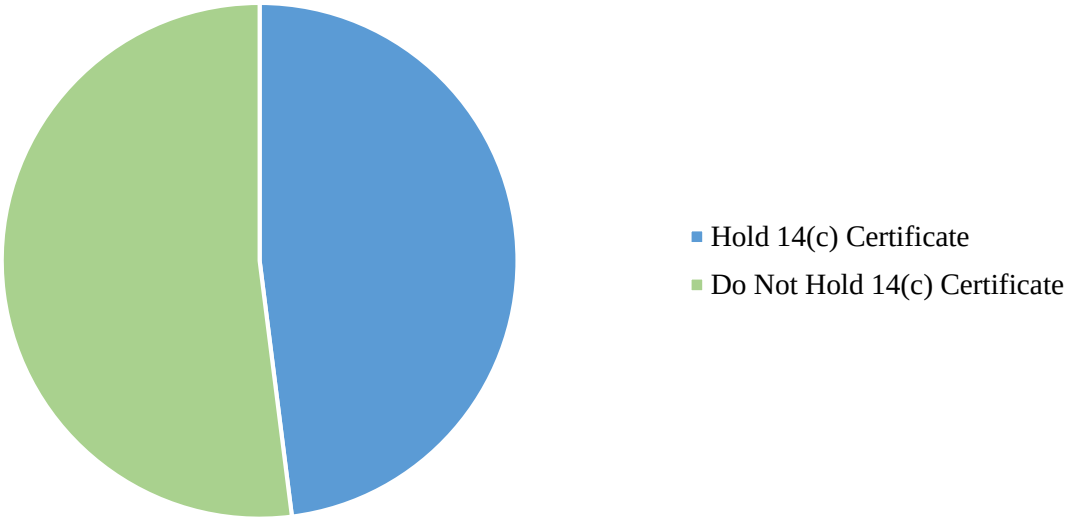
[63] U.S. Government Accountability Office, (May 2013), *"Employing People with Blindness or Severe Disabilities: Enhanced Oversight of the AbilityOne Program Needed."*
[64] U.S. AbilityOne Commission, (2017), *"Fiscal Year 2016 Performance and Accountability Report."*
[65] National Council on Disability, (Oct. 16, 2018), *"National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future,"* at 31.
[66] *Id.*
[67] 29 U.S.C. 201 et seq.
[68] National Council on Disability, (Oct. 16, 2018), *"National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future,"* at 54.
[69] The Baltimore Sun, (June 14, 2014), *"'Subminimum wage' for disabled workers called exploitative."*
[70] National Council on Disability, (Oct. 16, 2018), *"National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future."*
[71] *Id.*

Figure 4. ***AbilityOne Nonprofits with 14(c) Subminimum Wage Certificates***



Source: National Council on Disability, July 2018.

Whether paid to an employee of an AbilityOne contractor or some other private sector employer that holds a 14(c) certificate, subminimum wages for people with disabilities are discriminatory and inconsistent with competitive integrated employment under WIOA and the community integration mandate under the ADA. Democratic Senators have repeatedly raised concerns about subminimum wages; for example, in April 2018, seven Democratic Senators wrote to Secretary of Labor Alexander "Alex" Acosta citing particularly appalling examples of subminimum wage employment.[72] The Senators wrote:

> "Subminimum wage employees at some Goodwill Industries sites, for example, have reported earning as low as 22, 38, or 41 cents per hour. One former worker said she felt 'like a second-class citizen' working at the organization.[73] A *USA Today* report on the use of 14(c) certificates in New York found workers earning as little as 16 cents per hour at organizations that were simultaneously doling out tens of thousands of dollars in bonuses to their executives.[74] In particularly egregious abuses of the subminimum wage, law enforcement has discovered sheltered workshops that essentially amount to sweatshops."[75]

Continuing to permit 14(c) certificates to be issued and subminimum wages to be paid to people with disabilities is inconsistent with modern disability employment policy. For this reason,

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[72] Senators Warren, Casey, Murray, Van Hollen, Hassan, Duckworth, and Sanders, (Apr. 23, 2018), *Letter to DOL Secretary Acosta on Oversight and Enforcement of 14(c) Waivers.*
[73] NBC News, (June 25, 2013), *"Disabled workers paid just pennies an hour- and it's legal."*
[74] PressConnnects, Reilly, S., (July 3, 2014), *"Watchdog report: Workers with disabilities earn pennies per hour."*
[75] USA Today, (June 12, 2013), *"Feds: Rhode Island wrongly separated disabled students."*

Congressional Democrats have introduced the Raise the Wage Act which, among other things, would phase out 14(c) of the FLSA.

SECTION 3: HELP COMMITTEE OVERSIGHT OF WIOA IMPLEMENTATION, INCLUDING ABILITYONE JOBS

Since 2014, the Senate HELP Committee's Democratic staff has closely monitored the work of the U.S. Departments of Labor, Education, and Health and Human Services, other federal agencies, and states to implement WIOA. As part of its oversight work, Senator Murray, the Ranking Member of the HELP Committee, requested the U.S. Government Accountability Office (GAO) examine a series of issues related to WIOA implementation affecting disability employment, including how multiple federal agencies worked together to shift disability employment programs from one Department to another.

In February 2018, GAO released its first report. The report entitled *Workforce Innovation and Opportunity Act: Federal Agencies' Collaboration Generally Reflected Leading Practices, but Could Be Enhanced* explored collaboration between the U.S. Departments of Labor, Education, and Health and Human Services to implement WIOA. The GAO report documented how the Obama Administration's collaboration across federal agencies to implement WIOA generally reflected best practices.[76] This collaboration led to a smooth transition of programs and a well-conceived regulatory framework to implement the law. The report also made several recommendations to the U.S. Departments of Labor, Education, and Health and Human Services regarding collaboration.

In October 2018, GAO released two additional reports. A report entitled *Students with Disabilities: Additional Information from Education Could Help States Provide Pre-Employment Transition Services* explored what state VR agencies have done to spend WIOA funds that must be set aside to provide pre-employment transition services to youth.[77] Acknowledging the importance of early intervention, WIOA emphasized services to youth in order to achieve better employment outcomes. The GAO report documented how this policy has led to state VR agencies serving more students by providing more work-based learning experiences—a key objective of the Senate HELP Committee when developing WIOA. The report also made several recommendations to the U.S. Department of Education.

A report entitled *Vocational Rehabilitation: Additional Federal Information Could Help States Serve Employers and Find Jobs for People with Disabilities* explored what state VR agencies have done to work with employers to place people with disabilities into jobs.[78] The report found increased coordination between state VR agencies and other state workforce agencies, expanded

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[76] U.S. Government Accountability Office, (Feb. 8, 2018), *"Workforce Innovation and Opportunity Act: Federal Agencies' Collaboration Generally Reflected Leading Practices, but Could Be Enhanced."*
[77] U.S. Government Accountability Office, (Oct. 2018), *"Students with Disabilities: Additional Information from Education Could Help States Provide Pre-Employment Transition Services*."
[78] U.S. Government Accountability Office, (Oct. 2018), *"Vocational Rehabilitation: Additional Federal Information Could Help States Serve Employers and Find Jobs for People with Disabilities."*

services to employers, and noted that "almost all VR agencies […] reported that they help employers keep their employees by providing job retention assistance to individuals with disabilities"[79]—key objectives of the Senate HELP Committee when developing WIOA. Because the AbilityOne program requirements are generally inconsistent with modern disability employment policy, including Employment First, the report highlights that WIOA's requirements restrict when a state VR agency may refer a person with a disability for employment to an AbilityOne contractor. The report further notes the requirement that state VR agencies respect a client's informed choice about seeking employment in a segregated setting, including with an AbilityOne contractor in a position that does not meet the integrated setting requirement of WIOA. While GAO reported several states have reduced referrals or not referred clients to AbilityOne contractors, GAO did not examine why this might be the case. There are reasons, consistent with WIOA, to explain why a state VR agency would have reduced or not referred a client to an AbilityOne contractor. For example, if all AbilityOne jobs within a given state do not meet the integrated setting requirement, then a state VR agency should not refer a client unless the individual client requests a referral for the position in a segregated setting based on an informed choice. Unfortunately, GAO's methodology was insufficient to provide this level of detail. The report made several recommendations to the U.S. Departments of Labor and Education.

These three reports raise a series of issues the HELP Committee should continue to monitor as the U.S. Departments of Labor, Education, and Health and Human Services, other federal agencies, and states continue to implement WIOA, including the role of community rehabilitation providers in the provision of pre-employment transition services for youth.

HELP COMMITTEE MINORITY INVESTIGATION: STATE VR AGENCIES POLICY AND PRACTICE IN RELATION TO ABILITYONE CONTRACTORS

After Senator Murray requested the GAO investigations, AbilityOne contractors reported to HELP Committee Democratic staff that 19 state VR agencies were not complying with requirements of the law and regulations related to job referrals and were disregarding the informed choice of clients.[80] Moreover, in response to the U.S. Department of Education's request for public comment, a trade association for community rehabilitation providers and some sheltered workshops wrote "Currently, 19 states–19 states–are declining to refer people with disabilities [to AbilityOne positions.]"[81] In a hearing of the House Committee on Education and the Workforce entitled *Helping Americans Get Back to Work: Implementation of the Workforce Innovation and Opportunity Act*, Congressman Lloyd Smucker (R-PA-16) asserted that "19 state vocational rehabilitation agencies have stopped making placements to nonprofit agencies for

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[79] *Id., at 12.*
[80] Meetings with HELP Committee Staff (Aug. 16, 2017; Mar. 8, 2018; June 13, 2018); Email to HELP Committee Staff (June 22, 2017).
[81] ACCSES, (Sept. 20, 2017), Public Comment Letter to Docket ID: ED-2017-OS-0074-0001.

AbilityOne program jobs."[82] In summary, through a series of preliminary meetings, calls, and emails, the Senate HELP Committee's Democratic staff received reports that:[83]

- Some state VR agencies refuse to refer clients for a job with an AbilityOne contractor when the position meets the definition of competitive integrated employment under the law and regulations.

- Some state VR agencies refuse to conduct a case-by-case analysis of an employment setting when an employer, including an AbilityOne employer, believes the position meets the integrated setting requirement in law.

- Some state VR agencies disregard the informed choice of their client when the client chooses to seek employment in a setting that is not integrated, including in some AbilityOne positions.

- Some states have a policy prohibiting VR agency staff from referring clients, under all circumstances, for possible employment with AbilityOne contractors.

Investigation: Seeking Written Information from Each State VR Agency

If these reports were true, they would represent a failure in the 19 states with respect to the U.S. Department of Education's enforcement of WIOA and provision of technical assistance. In response to these reports, on June 11, 2018, the Ranking Member of the HELP Committee wrote to the administrative head of each of the 79 general, blind, and combined state VR agencies requesting a response, in writing, to address the issues raised by AbilityOne contractors and trade associations. Specifically, the Committee sought the following information:

1. If a job with an AbilityOne contractor meets the definition of competitive integrated employment, would the state VR agency refer a client for that employment opportunity?

2. If an employer, including an AbilityOne business, were to identify a position for employment as meeting the integrated location criteria, would the state VR agency conduct a case-by-case analysis of the potential employment setting, to determine if the setting meets the definition of competitive integrated employment?

3. If a client chooses to seek employment in a setting that is not integrated, such as an AbilityOne setting that is not integrated, would the state VR agency respect the client's informed choice and follow the referral procedures described in regulations to close the case?

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[82] U.S. House of Representatives, Committee on Education and the Workforce, Subcommittee on Higher Education and Workforce Development, (June 15, 2017), *Question from Congressman Smucker, "Helping Americans Get Back to Work: Implementation of the Workforce Innovation and Opportunity Act."*
[83] Meetings with HELP Committee Staff (Aug. 16, 2017; Mar. 8, 2018; June 13, 2018); Email to HELP Committee Staff (June 22, 2017).

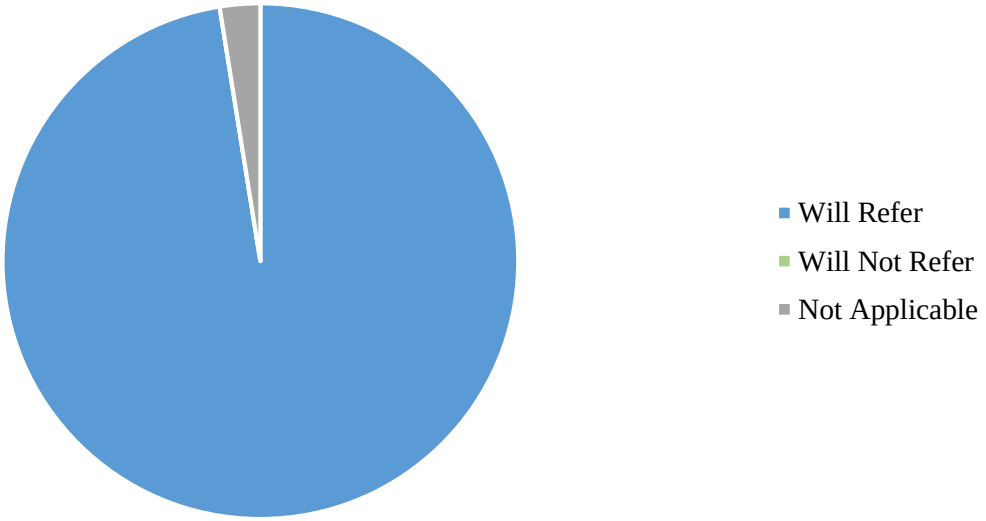
4. Does the state have a policy prohibiting the state VR agency from referring clients for possible employment with AbilityOne?

By June 26, 2018, all 79 state VR agencies had responded in writing, representing a 100 percent response rate.

Findings: States are Complying with the Competitive Integrated Employment Requirement and Informed Choice Requirement of WIOA

In response to the first question, 77 state VR agencies wrote they would refer a client for a job with an AbilityOne contractor if the job met the definition of competitive integrated employment under Sec. 7(5) of the Rehabilitation Act and its implementing regulations at 34 C.F.R. 361.5(c)(9) (see Figure 5). Two state VR agencies explained they do not have AbilityOne contractors within their jurisdiction, but both agencies would be willing to refer a client if such an employer were an option.

Figure 5. ***State Agency Referrals to an AbilityOne Position that is Competitive Integrated Employment***

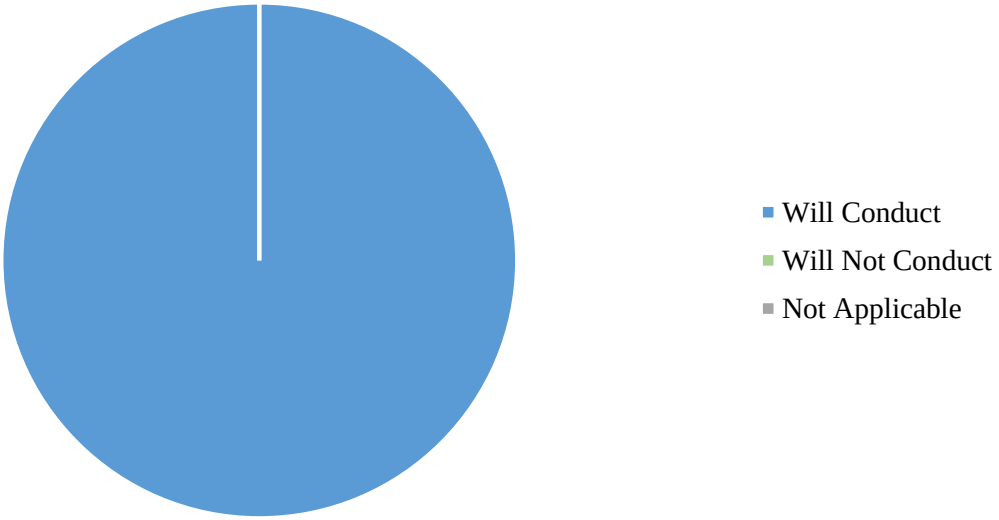


In response to the second question, all 79 state VR agencies wrote that the agency conducts case-by-case analyses of any position an employer asserts as meeting the definition of competitive integrated employment (see Figure 6). After receiving the letter from HELP Committee Ranking Member Patty Murray (D-WA), one of the state VR agencies reported that staff had reviewed their state-level guidance and policy documents on competitive integrated employment and updated their field guidance to clarify instruction to state VR employees. These updated documents were provided to the Committee. The state VR agency explained that this action was meant to improve compliance with WIOA.

Several state VR agencies noted in the responses to the Committee that the final rule implementing WIOA's amendment to the Rehabilitation Act required that states "must apply the integrated location criteria in a consistent manner and on a case-by-case basis to any work

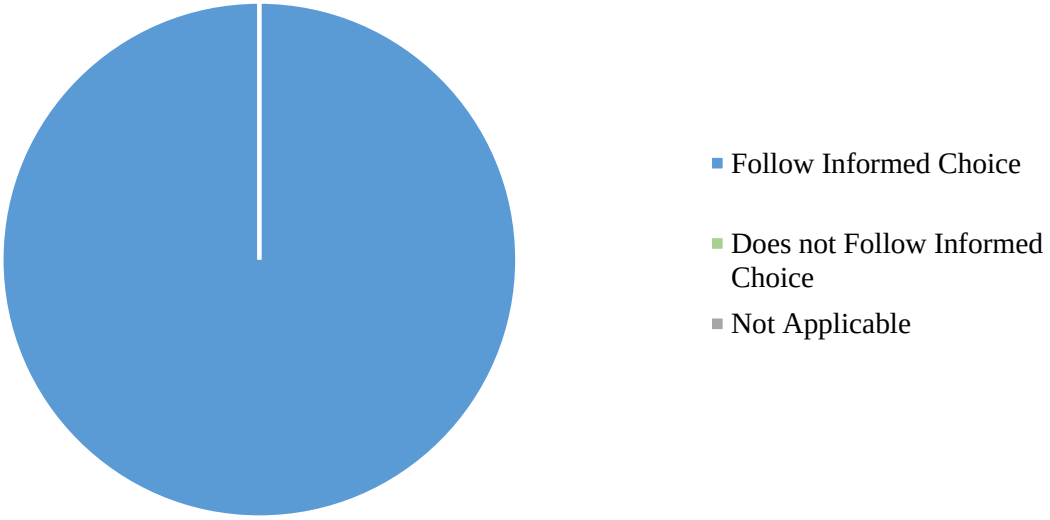
setting, including settings operated by community rehabilitation providers that exclusively serve other persons with disabilities." [84]

Figure 6. ***State Agency Conducts Case-by-Case Analysis of Integrated Employment Setting***



In response to the third question, all 79 state VR agencies wrote that when a client chooses to seek employment in a job that does not pay competitive wages or is not in an integrated setting, the state VR agency respects the client's informed choice and follows the referral procedures described in regulations at 34 C.F.R. 361.37(b) to close the case (see Figure 7).

Figure 7. ***State Agency Follows Informed Choice Requirements for Non-Integrated Settings***

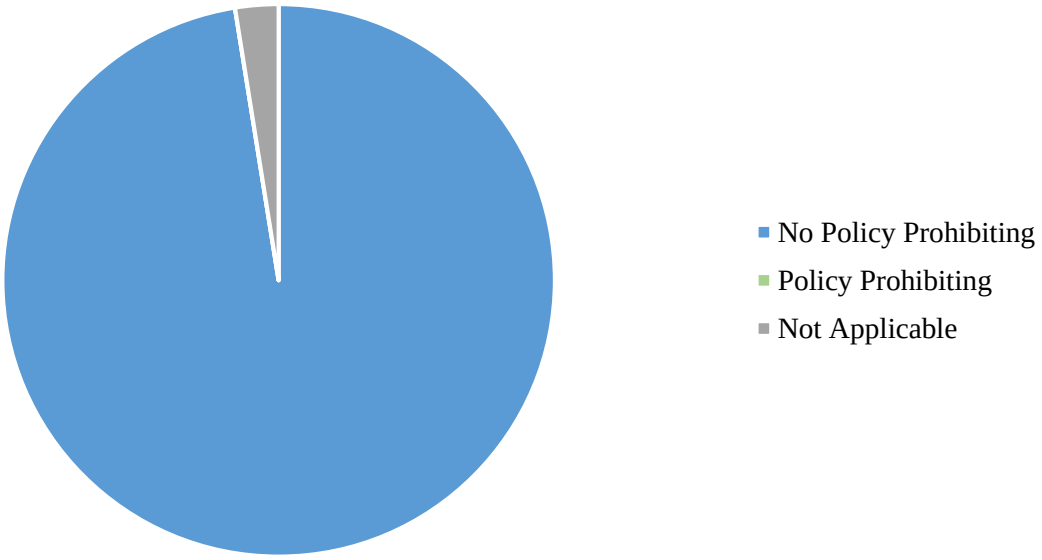


[84] See Federal register, Aug. 19, 2016, Vol. 81, No. 161, at 55643.

Several state VR Agencies noted in the responses to the Committee that while funds under WIOA generally may not be used to pay for follow along services and supports in settings that are not integrated or not competitive, the state has established separate programs, outside of WIOA and the Rehabilitation Act, that may fund such services for an extended duration.

In response to the fourth question, 77 state VR agencies wrote there was no state policy prohibiting the state VR agency from referring a client to a job with an AbilityOne contractor (see Figure 8). However, two state VR Agencies noted in the responses to the Committee that this question was not applicable because no AbilityOne contractor operates within the jurisdiction of the state VR Agency.

Figure 8. ***State Agency Policy Prohibiting Referral to AbilityOne***



Several state VR agencies noted that the work site, regardless of the employer, must either meet the competitive integrated employment definition under the law and its implementing regulations, or, if the AbilityOne job setting did not meet that definition, the person with a disability must request a referral to other service providers consistent with the informed choice procedures in regulation.

SUMMARY OF FINDINGS

The Senate HELP Committee's Democratic staff found that no state VR agency reported that they (a) refuse to refer a client with a disability to a job with an AbilityOne contractor when the position meets the definition of competitive integrated employment, (b) refuse to conduct a case-by-case analysis of a job setting when requested by an employer, (c) disregard the choice of their client to work in a segregated employment setting, or (d) prohibit referrals to AbilityOne contractors. In this regard, state VR agencies are complying with the dual requirements to refer clients to the job they choose while also using WIOA funds to support and promote competitive integrated employment.

SECTION 4: CONCLUSIONS AND RECOMMENDATIONS

The Javits-Wagner-O'Day Act—which governs the AbilityOne program—is not aligned with modern disability policy and mostly incompatible with the Rehabilitation Act, which governs the state VR agencies use of WIOA funds. According to GAO's report, state VR agencies have reduced referrals of clients to the AbilityOne program since the enactment of WIOA.[85] As states have modified their VR programs to implement WIOA, referrals to segregated settings should decline, including to jobs with AbilityOne contractors, which rarely satisfy the integrated setting requirement and pay some employees noncompetitive wages.

The AbilityOne program represents an antiquated model of disability employment that was created 80 years ago when there was little expectation that people with disabilities—let alone people with significant disabilities—could be contributing members to our economy and our community by earning competitive wages alongside their peers without disabilities. Moreover, subminimum wage payments to people with disabilities, including at AbilityOne contractors, is government sponsored discrimination that is inconsistent with modern disability employment policy.

RECOMMENDATIONS

Based on the Senate HELP Committee Democratic staff investigation, Democratic staff make the following recommendations.

AbilityOne and the Javits-Wagner-O'Day Act

As it stands, the AbilityOne program is not aligned with the goals of competitive integrated employment in modern disability employment policy, including Employment First, and too many AbilityOne contractors pay their employees with disabilities wages below minimum wage under an exception to the FLSA.[86] This exception is on its face discriminatory against people with disabilities. Moreover, reports from the Inspector General for the U.S. AbilityOne Commission have identified a myriad of management and performance problems within the agency.[87] Federal agencies,[88] expert advisory committees,[89] and organizations representing

[85] U.S. Government Accountability Office, (Oct. 2018), *"Vocational Rehabilitation: Additional Federal Information Could Help States Serve Employers and Find Jobs for People with Disabilities."*
[86] 29 U.S.C. 214(c).
[87] Inspector General of the U.S. AbilityOne Commission, (Oct. 16, 2017), *"Top Management and Performance Challenges Report."*
[88] National Council on Disability, (Oct. 16, 2018), *"National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future"*; Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, (Sept. 15, 2016), *Final Report of the Advisory Committee to the U.S. Secretary of Labor, U.S. Senate HELP Committee, and U.S. House of Representatives Committee on Education and the Workforce*.
[89] Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, (Sept. 15, 2016), *"Final Report of the Advisory Committee."*

people with disabilities and state VR agencies[90] have recommended the Javits-Wagner-O'Day Act and the AbilityOne program be updated.

- **RECOMMENDATION 1: Congress should modernize the Javits-Wagner-O'Day Act to ensure the AbilityOne program promotes competitive integrated employment, eliminate the use of discriminatory subminimum wages within AbilityOne, and modify the structure of the AbilityOne program to address its longstanding management and performance problems.**

Section 14(c) of the FLSA: Subminimum Wages for People with Disabilities

Section 14(c) of the FLSA allows the Secretary to permit employers, including AbilityOne contractors, to pay people with disabilities less than minimum wage only "to the extent necessary to prevent curtailment of opportunities for employment [...] of individuals […] whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury." The HELP Committee Democratic Staff find insufficient evidence that paying subminimum wages is necessary to prevent the curtailment of employment opportunities for people with disabilities, which is a requirement of issuing 14(c) certificates. Moreover, subminimum wages for people with disabilities are discriminatory and inconsistent with modern disability policy, including Employment First, the purposes of WIOA, and the integration mandate of the ADA. Last year, 32 Senate Democrats introduced the Raise the Wage Act, which includes a responsible phase-out of subminimum wages for people with disabilities and an increase in the federal minimum wage to $15 per hour for all workers. Moreover, after extensive interviews of people with disabilities, 14(c) certificate holders, parents, families, self-advocates, national subject matter experts, and other providers across 26 states, the National Council on Disabilities recommended phasing out 14(c) certificates, issuing a two-year moratorium on any new 14(c) certificates, and increasing U.S. Department of Labor oversight of the program during the phase-out.[91] Furthermore, organizations representing people with disabilities have made similar recommendations about section 14(c) of the FLSA.[92]

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[90] Association of People Supporting Employment First, Autistic Self Advocacy Network, National Council on Independent Living, National Disability Rights Network, National Federation of the Blind, TASH and United Spinal Association, (2015), *"Stop Federal Contractors from profiteering off people with disabilities"*; Council of State Administrators of Vocational Rehabilitation, (2018), *"Letter to Secretary DeVos."*

[91] National Council on Disability, (Oct. 16, 2018), *"National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future."*

[92] AAPD, (2018), *"Our Focus"*; Association of People Supporting Employment First, (2015), *"APSE's public testimony to the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities"*; Association of Programs for Rural Independent Living, (2013) *"APRIL and NCIL support S1356, the Workforce Investment Act (WIA) of 2013"*; American Civil Liberties Union, Association of Persons in Supported Employment, Autistic Self-Advocacy Network, Autism Society, Bazelon Center for Mental Health Law, Disability Power & Pride, Institute for Community Inclusion, Japanese American Citizens League, National Association of the Deaf, National Association of State Directors of Developmental Disabilities Services, National Coalition for Mental Health Recovery, National Council on Independent Living, National Down Syndrome Congress, National Fragile X Foundation, National Disability Institute, National Disability Rights Network, National Organization on Disability, National Organization of Nurses with Disabilities, Not Dead Yet, Physician Part Caregivers, Quality Trust for Individuals with Disabilities, Service Employees International Union, TASH, and United Spinal Association, (2014) *"Disability Orgs Call on President to Include Workers with Disabilities in Executive Order."*

- **RECOMMENDATION 2: Congress should responsibly repeal section 14(c) of the FLSA, consistent with the phased approach included in the Raise the Wage Act.**

- **RECOMENDATION 3: The Secretary of Labor should no longer issue new 14(c) certificates until such time as Congress has repealed section 14(c) of the FLSA.**

U.S. Department of Education

The GAO reports make clear that state VR agencies are continuing to implement changes to the workforce system made by WIOA. Any change in WIOA regulations would destabilize state work, create confusion, and delay full implementation of this law—which is vital for workers with and without disabilities. Moreover, based on the Senate HELP Committee Ranking Member's correspondence with state VR agencies, ***it is clear that states understand their obligations under the law*** to conduct an individualized assessment of a job that an employer, including an AbilityOne contractor, believes to satisfy the competitive integrated employment definition in law and regulation. This requirement is not new—it has been in place since 2001 and state VR agencies have a firm understanding of the law. State VR agencies understand the definition of an integrated setting, including at the "work-unit" level, which reflects Congressional intent to ensure funds under WIOA are supporting employment of people with disabilities alongside their peers. To the extent that individual staff of a state VR agency are not complying with the requirements to (a) promote competitive integrated employment, (b) respect the informed choice of clients, and (c) conduct case-by-case analysis of an employment setting, that would represent an implementation problem best addressed through technical assistance. ***Individual deviation from law or regulation is not a problem with the statutory or regulatory framework of WIOA—it is a problem of implementation***. If this is encountered, people with disabilities and employers should contact their state VR agency to resolve the issue at the state-level—and the U.S. Department of Education's Rehabilitation Services Administration should support that work by providing one-to-one technical assistance to states that request such support.

- **RECOMMENDATION 4: The regulations promulgated by the U.S. Department of Education should not be changed at this time. Technical assistance should be provided by the Rehabilitation Services Administration to support state-level implementation of the law and existing regulations.**