

Comment 1:

From: Michael Whitlock [<mailto:mwhitlock@hillcroft.org>]
Sent: Thursday, September 15, 2016 5:18 PM
To: DOL_PRA_PUBLIC
Subject: Written Comments for Control Number 1235-0001

To Whom it May Concern:

In your Federal Register / Vol. 81, No. 175 / Friday, September 9, 2016 / Notices 62537, comment was requested relating to the option to change 14 (c) certificate application forms numbered WH-226 and WH226A.

My first comment is regarding the reason stated in your Federal Register / Vol. 81, No. 175 / Friday, September 9, 2016 / Notices 62537 relates to the Paperwork Reduction Act (PRA) of 1995.

44 U.S.C.

United States Code, 2014 Edition

Title 44 - PUBLIC PRINTING AND DOCUMENTS

CHAPTER 35 - COORDINATION OF FEDERAL INFORMATION POLICY

SUBCHAPTER I - FEDERAL INFORMATION POLICY

Sec. 3501 - Purposes

The purposes of this subchapter are to—

minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government;

- By revising any forms to collect additional information, the governing body (Department of Labor) is going against the purpose of §3501 by placing an additional burden on a nonprofit organization (14 (c) certificate holders). The additional data will create an administrative burden during the application process. All administrative burdens translate into financial burdens for the nonprofit entity.
- All WIOA regulations will require oversight by the Designated State Agency to ensure 14 (c) certificate holders are in compliance. Providing additional documentation in the certificate application process adds an unnecessary layer of oversight and administrative burden.

Respectfully submitted,

Michael Whitlock

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Department response to Comment 1:

Section 14(c) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 214(c), provides that the Secretary of Labor may, to the extent necessary to prevent the curtailment of opportunities for employment, issue certificates to provide for the employment of individuals with disabilities whose earning or productive capacities are affected by their disability at commensurate subminimum wages.

When section 14(c) certificates are issued, the same certificate will authorize the employer to pay subminimum wages to workers with disabilities that impair their performance on work subject to the FLSA, the McNamara-O’Hara Service Contract Act (SCA), the Walsh-Healy Public Contracts Act (PCA) and the Contract Work Hours and Safety Standards Act (CWHSSA). As a result, employers who seek to pay wages less than the minimum wage rate are required to submit information sufficient to demonstrate they are entitled to receive such a certificate.

The Workforce Innovation and Opportunity Act (WIOA) amends the Rehabilitation Act of 1973, 29 U.S.C. § 720 *et seq.*, to add section 511, which prohibits employers from paying any individual with a disability **who is age 24 or younger** at a subminimum wage unless certain conditions, generally related to the furnishing of pre-hire vocational services and career counseling, are met. See 29 U.S.C. § 794g. WIOA also provides that employers may not continue to pay any individual with a disability a subminimum wage unless he or she is provided with career counseling services and informed of training opportunities every six months in the first year of employment and annually thereafter. *Id.* In addition, WIOA prohibits State and local educational agencies from contracting with section 14(c) certificate holders to operate a program for individuals age 24 or younger under which work is compensated at a subminimum wage. *Id.*

The Secretary of Labor possesses authority to enforce the terms under which individuals are employed at a subminimum wage under the provisions of the FLSA. Additionally, Section 511 of the WIOA states that its provisions “shall be construed in a manner consistent with the provisions of the Fair Labor Standards Act of 1938 (29 U.S.C. 201 *et seq.*), as amended before or after the effective date of this Act.” Section 511 requires payment of the minimum wage by employers with section 14(c) certificates who have not met the requirements of that section for each employee who would otherwise be eligible for payment at a subminimum wage. Additionally, the Secretary of Labor’s authority to review the relevant documentation to determine whether an employee is eligible to be paid a subminimum wage under the WIOA is established by section 511(e)(2)(B) of the Rehabilitation Act, as well as section 11 of the FLSA, 29 U.S.C. 211. Section 511(e)(2)(B) gives “the designated State unit or the Department of Labor” the right to review such documentation “in such a manner as may be necessary to fulfill the intent of this section, consistent with regulations established by the designated State unit or the Secretary of Labor.” Section 11 of the FLSA provides authority to investigate “wages, hours and other conditions and practices of employment” in order to enforce its statutory requirements. *See also* 29 CFR 525.16.

The WIOA also created an Advisory Committee which evaluated the use of subminimum wages under section 14(c) and advised Congress and the Secretary of Labor on policies and practices that it believes will lead to a significant and systematic reduction in the misuse of the 14(c) certificate program. The Advisory Committee recommended that the Wage and Hour Division engage in stronger oversight of 14(c) certificates and use stricter standards for issuance of new certificates and renewals of existing certificates.

The 14(c) certificate program applies to a wider universe of employees than is provided for in WIOA. The PRA burdens submitted by the Department of Labor are needed to effectively oversee and enforce the section 14(c) certificate program and to ensure that employers fulfill their statutory obligations under WIOA. This rationale is detailed in the supporting statement. The Department issued a letter to current certificate holders to invite their participation in the process of redesigning the information collection and provided the public with a 60-day open comment period.

The Department of Labor agrees that reducing the burden on the public is an important goal of the Paperwork Reduction Act. The Department is, however, tasked with aligning the important goal of reducing burden on the public with the important goal of engaging in strong oversight of 14(c) certificates and using standards for issuance of certificates that minimizes the inappropriate use of such certificates. The Department believes that the new forms submitted to OMB will require the least amount of burden to the public that allows the Department to also meet its goal of proper oversight of the 14(c) certificate program.

Comment 2:

From: Chris Salter [mailto:csalter@mwsservices.org]
Sent: Tuesday, October 11, 2016 7:45 PM
To: OIRA_submission@omb.eop.gov
Cc: DOL_PRA_PUBLIC
Subject: comment on Final Draft of WH-226 and WH-226A

I am writing to comment on the Final Draft of the proposed WH-226 and WH-226A, Application to Employ Workers a Special Minimum Commensurate Wages.

The proposed changes to the Application to Employ Workers a Special Minimum Commensurate Wages place an unreasonable burden on the applicant. We estimate that the new form will double the amount of time that it takes us to complete the applications.

Specifically, item #7 on the WH-226A requires the completion of eleven columns of information for each worker. The previous application asked for only four columns of information.

Please reduce the amount of information required for workers on item #7 on the WH-226A.

Thank you for your consideration,

Chris

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Department response to Comment 2:

The Department of Labor believes that the proposed changes to item #7 on the WH-226A, collecting additional wage and work history data for individual workers who were paid a subminimum wage by the employer during the most recently completed fiscal quarter, will better align the collection of data with the statutory authority for the issuance of certificates under section 14(c) of the Fair Labor Standards Act (FLSA) where necessary to prevent the curtailment of opportunities for employment for workers with disabilities. The data from the proposed forms will provide the Department with additional information to indicate if 14(c) employers are paying proper subminimum wages and are operating in compliance with the new conditions required by the Workforce Innovation and Opportunity Act (WIOA). The WIOA amends the Rehabilitation Act of 1973, 29 U.S.C. § 720 *et seq.*, to add section 511, which prohibits employers from paying any individual with a disability who is age 24 or younger at a subminimum wage unless certain conditions, generally related to the furnishing of pre-hire vocational services and career counseling, are met. *See* 29 U.S.C. § 794g. WIOA also provides that employers may not continue to pay any individual with a disability a subminimum wage unless he or she is provided with career counseling services and informed of training opportunities every six months in the first year of employment and annually thereafter. *Id.*

Under WIOA, Congress also created an Advisory Committee which evaluated the use of subminimum wages under section 14(c) and advised Congress and the Secretary of Labor on policies and practices that it believes will lead to a significant and systematic reduction in the misuse of the 14(c) certificate program. The Advisory Committee recommended that the Wage and Hour Division engage in stronger oversight of 14(c) certificates and use stricter standards for issuance of new certificates and renewal of existing certificates.

The proposed changes to the forms generally reflect a shift in focus towards collecting more individual employee data in the WH-226 and WH-226A that can be used to enhance enforcement of the section 14(c) certificate program and to help ensure employers are complying with their statutory obligations under WIOA. Data points, such as the employee's commensurate wage rate for the job in which he or she worked the most hours and the average number of hours worked per week by that worker, are relevant for purposes of assessing whether the certificate is needed to prevent the loss of employment opportunities for that individual with disabilities. Moreover, much of the data requested in part 7 of the WH-226A is information that section 14(c) employers are already required to maintain.

To mitigate the burden of reporting additional employee data, the Department proposed a reduction in the number of prevailing wage and time study samples provided on the WH-226. The Department also issued a letter to current certificate holders to invite their participation in the process of redesigning the information collection and provided the public with a 60-day open comment period. The Department received and carefully reviewed comments from the general public about the proposed changes to this information collection and made several changes to the proposed information collection based on the feedback received.

The Department is tasked with aligning the important goal of reducing burden on the public with the important goal of engaging in strong oversight of 14(c) certificates and using standards for issuance of certificates that minimize the inappropriate use of such certificates. The Department believes that the new forms submitted to OMB will require the least amount of burden to the public that allows the Department to also meet its goal of proper oversight and enforcement of the 14(c) certificate program.

Comment 3:

October 11, 2016
Office of Management and Budget
Information and Regulatory Affairs
Attn: OMB Desk Officer for DOL-WHD
Room 10235
725 17th Street, NW
Washington, DC 20503

Via E-mail to: OIRA_submission@omb.eop.gov

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: Comments on Proposed Revisions to Forms WH-226 and WH-226A by the Wage and Hour Division (Control No: 1235-0001)

Dear Office of Management and Budget:

The National Disability Rights Network (NDRN) welcomes the opportunity to offer the forgoing additional comments on the proposed revisions to Forms WH-226 and WH-226A used by the U.S. Department of Labor, Wage and Hour Division, for applicants who seek a certificate to pay subminimum wage under section 14(c) of the Fair Labor Standards Act (FLSA). NDRN offered comments and recommendations to the initial proposed revisions to these forms in October 2015.

NDRN is the non-profit membership association of the Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies located in all 50 states, the District of Columbia, the five United States territories, and for Native American Tribes located in the Four Corners region. The 57 P&A and CAP agencies are authorized under various federal statutes to ensure the civil and legal rights of people with disabilities through legal representation and related advocacy services; to monitor the delivery of

services, supports and other assistance to people with disabilities; and to investigate incidents of abuse and neglect of individuals with disabilities in a variety of facilities and settings.

The work of the P&A/CAP system includes monitoring and advocating for individuals with disabilities working in sheltered workshops, many of whom are paid subminimum wages under section 14(c). P&A agencies further represent individuals with disabilities in employment discrimination cases, file complaints with the Wage and Hour Division for possible 14(c) violations, and undertake other legal and advocacy work to protect the employment rights of individuals with disabilities.

NDRN supports the P&A Network through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate in society by exercising choice and self-determination. While NDRN ultimately aims for the elimination of all unequal treatment for workers with disabilities, including the end of the 14(c) subminimum wage, it also seeks to ensure that current 14(c) requirements are aggressively followed and enforced. NDRN has written two papers on sheltered workshops and subminimum wages, and administered a program for the Social Security Administration for P&A agencies to monitor entities acting as representative payees after the discovery of exploitation of workers with disabilities by a representative payee in Iowa.

NDRN thanks the Department of Labor for the diligence undertaken to revise these forms and in responding to previous comments.

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**Additional Comments and Recommendations Submitted by
the National Disability Rights Network on
Proposed Information Collection Activities of the Department of Labor, Wage and
Hour Division under Section 14(c) of the Fair Labor Standards Act**

Control Number: 1235-0001

The National Disability Rights Network (NDRN) supports the efforts of the U.S. Department of Labor, Wage and Hour Division, to update WH-226 and WH-226A to ensure the effective implementation and oversight of the section 14(c) subminimum wage program. NDRN appreciates the consideration and responses provided by the Wage and Hour Division to comments previously submitted as part of this proposed information collection revision. NDRN offers the following additional comments and recommendations regarding the proposed revisions to WH-226 and WH-226A.

**WH-226 Revised Item 1: Representation and Written
Assurances**

In response to comments, the Wage and Hour Division moved the representation and written assurances to the first item on the form. The Division stated that the move emphasizes the importance of the attestations and written assurances. NDRN fully supports this change and

thanks the Division for the decision to highlight the importance of the assurances through placement as Item 1.

The Division decided not to include a specific attestation to further stress that misrepresentation or false statements by the applicant are grounds for revocation of a 14(c) certificate. While NDRN understands the Division's choice not to include such a specific reference since the regulations as a whole are provided in the assurance, NDRN believe that entities applying for 14(c) certificates may not fully apprise themselves of all provisions of the regulations upon application, and should be made explicitly aware of the penalty for making any misrepresentation or false statement on the application.

WH-226 Revised Item 7: Number of Workers with Disabilities

The Division added language in Item 7 that the information about the total number of workers with disabilities who worked for the employer refers to those paid a subminimum wage. NDRN appreciates the clarification that the information sought is only for employees paid a subminimum wage.

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WH-226 Revised Items 9 and 11: Prevailing Wage Survey for Workers Paid Hourly or Piece Wage Rates

In response to comments, the Division revised Items 9 and 11 on WH-226 (as well as wording in other items), to require applicants to provide information on the job or contract for which the applicant employs the largest number of workers. NDRN appreciates the inclusion of the word "job" in recognition that not all 14(c) certificate holders enter into contracts with other entities.

NDRN remains concerned, however, that revised WH-226 reduces the information an applicant must provide from four contracts in the current form, to the largest single job/contract in the revised form. An applicant may have a number of contracts or jobs of similar size, and limiting information to the largest contract would not enable a proper assessment regarding the employer's adherence to the certificate for other equally large contracts or jobs. By limiting the information to one job or contract, an applicant could cherry-pick among various jobs or contracts and include only information from the most compliant job or contract. NDRN encourages the Division to require applicants to provide information for more than one job or contract to prevent self-selection bias by the applicant.

WH-226 Revised Items 10 and 12: Work Measurement and Time Studies for Workers Paid Hourly Wage Rates

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WH-226A Revised Item 7: Employee Information Chart

In Items 10 and 12 of proposed WH-226 the applicant is required to attach a “work measurement or time study for one currently employed worker with a disability who is paid an hourly subminimum wage for the same contract and job reflected in Item” 9(b) or 11(b) as appropriate. In a prior comment NDRN expressed concern about limiting the example to one employee. The Division addressed this concern in the supporting statement for the current revisions.

NDRN understands the explanation offered by the Division that one example of a time study is deemed sufficient to assess problems, and that the Division proposes to ask for information for every employee paid a subminimum wage in new Item 7 of WH-226A.

While NDRN supports the request for information for employees paid a subminimum wage in Item 7 in WH-226A, NDRN still believes that a request for only one example of a work measurement or time study in WH-226 is too small to ensure a meaningful assessment of the proper implementation of 14(c) certificates. Though one example may reveal honest mistakes or a misunderstanding by the employer about how to conduct a proper work measurement or time study, a less honest employer who seeks to evade the requirements of the 14(c) certificate could simply ensure that the one example selected was completed properly, thus preventing

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the discovery of intentional errors unless the Division conducted an investigation of the employer. The limited ability to discover errors in the application process based on one example is especially a concern for employers paying a large number of workers a subminimum wage.

NDRN therefore continues to recommend that either the applicant provide more than one work measurement or time study example, or preferably that the Division randomly select from the employees listed in Item 7 on WH-226A and request that the applicant provide a copy of the work measurements or time study for those individuals selected by the Division. Sending additional copies should not impose an extra burden on applicants as 14(c) certificate holders must maintain such documentation.

NDRN supports Item 7 in WH-226A as stated previously, but recommends that the Division revise questions (e), and (g) through (j) in Item 7. Under these questions if the employee worked multiple jobs at a subminimum wage for the employer, the applicant needs to only report information on the job the employee worked the most hours. If two jobs are available

at an employer with all employees paid under a 14(c) certificate working the most hours on one job/contract, the Division will not receive information about the second job/contract. NDRN believes the Division should require that the applicant provide information about all jobs worked under a subminimum wage, not just the job for which the most hours were worked.

WH-226 Revised Item 16: the Workforce Innovation and Opportunity Act (WIOA)

The Division added Item 16 to WH-226 to account for new requirements in section 511 of the Workforce Innovation and Opportunity Act (WIOA). Under section 511 of WIOA a 14(c) certificate holder may not pay an employee age 24 and younger a subminimum wage unless documentation is provided that the individual completed certain pre-employment transition planning, counseling, and received (if eligible) vocational rehabilitation services, including the provision of information and referral services. For employees of any age already paid subminimum wages under section 14(c), or who may be paid such wages in the future, the employer must ensure certain counseling, information and referral, and training opportunities are made available within the first six months of employment at a subminimum wage, and annually thereafter.

NDRN supports the inclusion of Item 16 to better ensure the enforcement of the new requirements of section 511.

Paragraph (b)(2) of section 511 also prohibits a State educational agency (SEA) and a local educational agency (LEA) from entering into contracts or other arrangements with a certificate holder to operate a program to pay a subminimum wage to individuals age 24 or younger.

Though proposed Item 5 of WH-226 would identify whether the applicant is an SEA/LEA, it would not address the prohibition of agreements between education agencies and entities

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holding a 14(c) certificate as Item 5 only asks if the applicant is an SEA/LEA. In order to better ensure compliance with the section 511(b)(2) provision, NDRN suggests that the Division add a question to Item 16 inquiring whether the applicant has entered, or intends to enter, into a contract or arrangement with an SEA/LEA to pay individuals who are 24 years of age or younger less than a subminimum wage.

Modernizing Language

NDRN appreciates the Division using the term “subminimum wage” as opposed to “special minimum wage.” As the Division notes in the supporting statement, the term “special” can have a negative connotation for workers with disabilities.

Department Response to Comment 3:

The Department of Labor appreciates NDRN's support of several of the proposed changes to the WH-226 and WH-226A. With regard to NDRN's suggestion to include a specific attestation to stress that misrepresentations or false statements are grounds for revocation of the certificate, the Department declines to add additional attestations to the application. The Department believes the addition is unnecessary as the consequences of misrepresentations are clear in the regulations and in other communications with certificate holders.

NDRN requests that the Department collect additional documentation to support the need for a certificate and compliance with the requirements of section 14(c), such as requiring employers to submit information about more of their contracts, provide more than one sample of time studies, and provide information about all jobs the employee has worked. The Department takes very seriously the important goal of the Paperwork Reduction Act and balancing the burden to the public through information collection and the important goal of engaging in strong oversight of 14(c) certificate holders. To mitigate the increased information collection of employee data on the WH-226A, the Department proposed a reduction in the number of prevailing wage and time study samples required by the WH-226. While the Department acknowledges that collecting more samples of prevailing wage surveys, time studies, and employee data for multiple jobs may provide additional insights into an employer's practices and specific employee situations, the Department also recognizes the burden of such information collection upon certificate applicants. Accordingly, the Department has sought to minimize the burden on employers while collecting the type of additional information about individual workers employed under section 14(c) certificates and the employer's subminimum wage calculations that is important for the Department to engage in the effective administration and enforcement of the program. The Department also notes that the certificate application process is not the sole means of the Department to determine an employer's level of compliance with the provisions of the 14(c) program.

NDRN also suggests adding a question concerning whether the applicant is contracting with a local or State educational agency. However, the Department of Education has enforcement authority over WIOA's prohibition on local and state educational agencies contracting with 14(c) certificate holders. *See* 81 F.R. 55722-55723 (Aug. 19, 2016).

The Department believes that the new forms submitted to OMB require a reasonable burden to the public that allows the Department to meet its goal of proper oversight of the 14(c) certificate program.