CSAVR

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General Session 3

>> LISA HINSON‑HATZ: Can I get everyone's attention? We stand between you and lunch. If you could ‑‑ thank you. We'll have everybody come back and find their seats. We've got a traffic jam up at the front.
(Chuckles.)

Welcome back. I hope you talked to somebody new when you had your coffee break, welcomed one of the new directors. Are you guys ready? Hello!

>> AUDIENCE MEMBER: I'm ready!

>> LISA HINSON‑HATZ: If I could get folks to focus in. Hello! What did you do in grade school, put your hand up? Well, I just want to Tanya and the panel, I had a lot of clarity moments in there. I'm pleased to preside over a session on the overview and discussion of federal regulations on Section 511 and the limitations on the use of sub‑minimum wage. Very leased to be here with two individuals to talk about this subject, the first being on my right, Suzanne Mitchell, the chief of the VR program unit and Helen Applewhaite who is the branch chief of the FMLA and other acts wage and hour division. I would like to welcome them and take it away, ladies!
(Applause.)

>>HELEN APPLEWHAITE: Thank you, Lisa. I want to thank the Department of Education, CSAVR, everyone for inviting us from the Department of Labor wage and hour division to be participating today. One of the things that has been really meaningful about this whole process has been the partnership that we've built between the department F he had case and the Department of Labor and specifically my division. We have been working collaboratively over the past several months especially over the last several weeks both leading up to this presentation and also working to see where we might do additional future venues jointly and also work together on guidance materials that we might get out to you jointly to navigate the landscape of Section 511. We've both from the Department of Labor and Department of Education put out some guidance from the Department of Labor we issued what we call a field assistance bulletin that is available on our web site and I know as we get toward the end of the presentation when everyone is all settled and ready we will provide that information specifically and Suzanne I know the Department of Education has put out their regulations?

>>SUZANNE MITCHELL: That's correct, we have loved the opportunity to work with the wage and hour division and I know a number of folks out there have a lot of questions for us and we're referring to information and guidance put out by wage and hour. We have been working together as Helen said for quite some time now, even in the early stages of developing the regulations and so we look forward to continuing this collaboration and our ability to answer your questions, some of which cross over our two departments.

>>HELEN APPLEWHAITE: That's right.

>>SUZANNE MITCHELL: So we have jointly answered a number of questions already and we still have a number of questions that have come into our RSA questions mailbox that we will continue to address working together through our various offices in RSA through our office of general council and the solicitors office and the Department of Labor and the wait a minute and hour division so we would ask for patience but know that we are working hard to get answers out there to you as quickly as we can.

Joe, I didn't have any bottle of wine under my chair!
(Laughter.)

I'm waiting anxiously! Helen?

>>HELEN APPLEWHAITE: I think one of the starting places that we wanted to start today is to go over a few key definitions that ‑‑ make sure we are all talking about the same thing.

Under Section 511 an entity is simply an employer that holds a special wage certificate under Section 14C of the Fair Labor Standards Act. The way the statute and the regulations are written as put forward it actually specifically includes a contractor or a subcontractor but I would note from the Department of Labor standpoint from my division we would only allow the payment of a sub‑minimum wage if the entity in question employer, subcontractor or contractor each would have to have their own 14C certificate. Special wage certificate means a certificate that's issued under the Section 14C provisions of the Fair Labor Standards Act and authors a payment of a ‑‑ authorizes a sub‑minimum wage where the disability embarrass productivity specifically and very specific conditions have to be metaphore that to apply. The federal minimum wage is what is at question with Section 511. The federal minimum wage is the rate applicable under Section 6A1 of the Fair Labor Standards Act and it's currently $7.25 an hour.

Some of the questions that have arisen have been whether it allies to all entities that hold a 14C certificate and the answer is yes it does. Under Section 511 it makes no exceptions or districts on the type of entity that holds the certificate. We issue certificates to four different types of certificates. The first one is to work centers or community rehabilitation programs, CRPs. These by far hold the most certificates under Section 14C of the FLSA. We currently have 2500 certificates and CRPs hold 2200 of those or 2249 for the exact number. Hospitals and residential care facilities may also hold certificates and employ patient workers under those certificates. Business establishments can also apply for and receive certificates under Section 14C and we issue certificates under the schoolwork experience program in both businesses and the certificate programs, they are much fewer in numbers, businesses it's around 80 and SWEP certificates it's around 50 currently. Entities may include state‑operated or private rehabilitation programs and they be for profit or not for profit and none of that matters. The Section 511 provisions would apply the same regardless of the status of that particular entity.

Section 511 prohibits an entity that is a 14C certificate holder from paying a sub‑minimum wage to an individual with a disability unless certain additional restrictions are met. It focuses on the payment of a sub‑minimum wage, it does not look at the nature of the work setting.

Some of the things that Section 511 does not do is it does not change the purpose of the Rehabilitation Act, it doesn't promote sub‑minimum wage employment, it also does not eliminate sheltered workshops or eliminate Section 14C of the FLSA or the payment of a sub‑minimum wage.

Section 511, and I'm going to give you a brief overview and Suzanne is going to go in depth. Section 511 requires that youth with disabilities satisfy service‑related requirements prior to starting work at a sub‑minimum wage.

It also requires that individuals of any age, including youth, have to satisfy certain on going service‑related requirements in order for them to continue to be paid a sub‑minimum wage under Section 14C.

It also requires that VR agencies and local education agencies document that the individual with a disability has completed the required services. It also has specific requirements for 14C certificate holders. It requires that they review and in certain instances maintain documentation received by the individuals with disabilities prior to being able to pay the sub‑minimum wage or to continue to pay the sub‑minimum wage. It also requires 14C certificate holders to inform employees that are working at a sub‑minimum wage of certain training opportunities, peer mentoring, self‑advocacy, self‑determination opportunities available to them and they are required to provide that information at required intervals. It also permits VR agencies or the Department of Labor to review documentation required to be maintained by the 14C certificate holder related to these new Section 511 requirements.

>>SUZANNE MITCHELL: Okay, so can you hear me? Okay. So I'm going to talk a little bit about some of the specific requirements beginning with the specific requirements under Section 511 for youth. There are different requirements set out for youth and then for individuals of any age who are continuing in employment at sub‑minimum wage so we will begin by talking about the requirements that are specific to youth. So prior to beginning employment at a sub‑minimum wage a youth has to complete certain requirements and activities and receive documentation of those. So a youth will have to receive as applicable preemployment transition services under the VR program or transition services under IDEA and that youth also must apply for VR services and either be determined ineligible or eligible and they also must receive career counselling and information and referral services prior to being allowed to be hired at sub‑minimum wage. An individual could be determined ineligible for services if they, for example, informed their VR counselor that their vocational goal was to become employed at sub‑minimum wage. Normally in the course of providing VR counselling or counselling to an applicant of VR we would try to encourage them to look at competitive, integrated employment but after we have presented information and they have made an informed choice if they are just set on employment in a nonintegrated setting, for example, or in an integrated setting at sub‑minimum wage, then we would find that individual ineligible for the VR program because they would not be pursuing an employment outcome in competitive, integrated employment.

If the youth is determined eligible for VR services then they must have an approved individualized plan for employment and they must have been working toward that employment goal on their plan for a reasonable period of time and generally this would be based on services that they receive that would support them obtaining their employment goal and appropriate supports to achieve that as well. If the individual does not achieve that employment goal or is unsuccessful in achieving that employment goal, then their case would be closed and regardless of whether the individual is ineligible or eligible for services with the VR program they still as a youth would need to receive career counselling and information and referral services.

So we got a number of questions in the NPRM following the publication of the NPRM related to "reasonable period of time" and what does that constitute? Some thought we should include reasonable period of time to be equal to that that is provided for individuals seeking employment which is up to 24 months of supported employment services. Others felt it should be based on the individual's need for services and we aware of with that. We think it should be based on the disability‑related needs as well as the needs for the individual in order to complete their services on the IPE. So we did not want to put any parameters nor did the law allow us to put any parameters on reasonable period of time so that's going to be a decision that has to be made with the VR counselor and the individual prior to closing their case out as unsuccessful. For supported employment goals, of course, we do have the standard of up to 24 months of supported employment services so you can kinda use that as a standard for the reasonable period of time along with some of the other aspects of supported employment that we will be talking about on Wednesday. Now, there are also requirements for individuals of any age for the DSUs and in order for an individual of any age including a youth to remain employed at sub‑minimum wage they have to go through certain activities, complete certain activities ask receive documentation of those ‑‑ of the completion of those activities as well and those activities include career counselling and information and referral services. The DSU may provide these services directly or they can contract these services out to another provider as long as that provider is not a Section 14C certificate holder and the DSU is charged with providing the documentation to the individual of the completion of those services. There is also a section in 511 that provides for services that a DSU must provide if a small business employer, someone who has 15 or fewer employees and employees individuals at sub‑minimum wage, they would then be able to refer individuals to the DSU to provide certain activities that are normally provided by the 14C certificate holder. Those services would include information about self‑advocacy, self‑difference and peer mentoring training in the geographic area of the individual who is seeking to maintain sub‑minimum wage employment. I know we had questions, what if there is no one available in a geographical area and we made the comment ‑‑ we believe that there are a lot of, actually, independent living centers and others that might be available in the state but things could be provided virtually as well via electronic means or online services to meet that requirement. That was one of the questions we had over the course of the addressing the questions that have come in. Other responsibilities under Section 511 would include time intervals and there are specific time intervals that must be met in terms of providing these services. For individuals with disability who are hired at sub‑minimum wage prior ‑‑ or as of ‑‑ excuse me on or after July 22nd, 2016, those individuals would have to receive services once every six months for their first year of employment and then annually thereafter. For individuals who are hired or employed prior to July 22nd, 2016, they would be required to receive these services at least once prior to July 22nd, 2017 and then annually thereafter for the duration of their employment at sub‑minimum wage. To ensure that the required intervals for the provision of the required services are met, it's important for the DSU and the 14C employer to work together so that the employer can provide some contact information or the identity of the individual in order to meet the required intervals. If the 14C certificate holder can provide the DSU the date at which the employee was employed then that would help the DSU in meeting the six months interval for the new employee every six months and then the annual thereafter. So that would be one instance in which it would be helpful for the DSU and the 14C entity to communicate. Again, this would have to be done, you know, recognizing state and federal privacy laws as well in terms of releasing that information. The career counselling and information and referral services an area that we have received a lot of questions about, what's the content? What does this mean? Is it to the same degree as the vocational rehabilitation counselling that we normally provide? Section 511 did not prescribe a definition of career counselling and we do not wish to be overly prescriptive about that as well, realizing that different states have different resources available to them to do this. So just generally what we can say is that career counselling and information and referral services must be provided by the DSU in a manner that facilitates independent decision making and informed choice on the part of the individual. It also cannot be for sub‑minimum wage employment by an entity to holds a 14C certificate and it cannot be employment related services that are compensated at a sub‑minimum wage or that can result in employment at a sub‑minimum wage.

These are specifically pointed out in the Act and in our regulations and for youth, the career counselling and information and referral services must be provided within thirty days of when that youth becomes known to the DSU as seeking sub‑minimum wage employment. This was done so as not to delay the youth's opportunity to enter sub‑minimum wage employment if that's their informed choice.

The career counselling and information and referral services should be provided by professionals who have generally a broad knowledge of the labor market and career development, individuals who have knowledge about individuals with disabilities and their specific employment‑related needs or their disability‑related needs. They should have some specific knowledge about the resources and programs that would be available to the individual to assist them in achieving their employment goals and assisting them in finding their career options. It can include ‑‑ we had a couple of comments that asked that we require that it include benefits counselling. There is no requirement in the Act for that but we do believe that's a good thing, so we've included in our regulations that it may include benefits counselling, particularly as it relates to the interplay between earned income and the income‑based benefits, financial benefits, medical benefits, et cetera.

Career counselling and information and referral services maybe offered in a variety of settings. We have had a number of questions about how can we possibly meet this requirement with in some cases thousands of individuals who are going to be referred to us and we've offered through a number of telephone conversations with some of our states some alternatives as to how this may occur. The career counselling can either be provided by the DSU or it can be contracted out. It can be provided in a group setting or individually to an individual, and it's an area where the DSUs and the Section 14C certificate holders or the CRPs should get together and discuss how they want to handle this. The benefit of providing it in a group setting, for example, you may be able to go on the work site of the employer and if they can provide the time and place, provide group counselling or group information for a large number of individuals and then meet with them individually to answer specific career‑related questions or to maybe help them apply for VR afterwards and to, again, be able to assist them more individually. But it can be a timesaving and more efficient way to perhaps approach this as a group setting. Some states in particular have contracted out the functions of career counselling and information and referral to an appropriate provider outside of the VR agency as well. Section 14C certificate holders must inform all individuals with disabilities employed at sub‑minimum wage regardless of age of self‑advocacy ‑‑ I'm sorry, that's yours!

>>HELEN APPLEWHAITE: That's fine!

>>SUZANNE MITCHELL: I'm moving right on into hers!

>>HELEN APPLEWHAITE: We said we are collaborating, right?

>>SUZANNE MITCHELL: We are!

>>HELEN APPLEWHAITE: And we talk weekly, sometimes daily! That's right, in addition to the requirements for DSUs, 14C certificate holders have a specific requirement and that's that they must inform all individuals regardless of age that are employed at sub‑minimum wage of self‑advocacy, self‑determination and peer mentoring training opportunities that are available to them in the local geographic area. They are also required to ensure that the entity that provides that type of peer mentoring self‑advocacy and self‑determination is not a 14C certificate holder. In addition, 14C certificate holders are required to do this for individuals who are hired at a sub‑minimum wage on or after July 22nd, 2016, every six months during the first year of employment. For all others, they are required to provide the information annually, which means by July 22nd, 2017 and every year thereafter. I think we're back to you, Suzanne!

>>SUZANNE MITCHELL: Okay! Section 511 ‑‑ let me just add to that, I think one of the questions that has come up is, you know, if somebody is provided in the instance of requirements of the DSU, to provide career counselling and information and referral and they provide it, say, on August 30th of 2016, obviously they have provided it for someone who is already employed prior to the July 22nd, 2017 date. The question is when do they do it in the next year? Well, prior to the August 30th date in the next year. So it's going to be based on when the individual actually receives the service, but in that first year, they definitely have to receive it prior to July 22nd, 2017 and I think the same thing applies for the requirements for the 14C entities as well, so just a little aside there.

I'm going to talk a little bit now about under Section 511 there is a documentation process that is required and this documentation process must take place between the DSU and the state educational agency, this must be developed or the DSU and the state educational agency can use an existing process to develop a way to document that a youth has received services and then a way to provide that documentation to the individual once they have received the services.

So there's a couple of nuances to the documentation process. The documentation itself must include very minimal information. We've said in our regulations, including the youth's name, the type of activity or service or the determination of eligibility, ineligibility, the name of the individual, obviously and the name of the individual who is providing the service and the determination as well as the appropriate signatures and dates and the method in which that documentation is transmitted to the youth. Again, we did not get overly prescriptive about this but there was a desire on the part of the VR agencies to have more specification about that. The documentation process can be ‑‑ can meet these minimum requirements or it can be more expansive. It's up to the DSU ask the state educational agency to determine that process. The documentation process must not sure that the DSU provides the documentation to the youth of all activities that are completed regardless of whether those activities were provided by the DSU or the LEA. The LEA will then provide any documentation of services, transition services and activities to the DSU. This must be done in a timely manner by the LEA in order to allow the DSU to provide the documentation to the youth in a timely manner and the specific outline of those time frames is in the regulations but essentially it's 30 calendar days for the local education agency to provide the information to the DSU and 45 days for ‑‑ that's inclusive of that thirty days for the designated state unit to provide that information, the completion documentation to the youth. Any documentation provided by the LEA to the DSU must comply about the confidentiality requirements of the family educational rights and privacy act, FERPA and the DSU and the LEA must maintain records and documentation in accordance with 2 CFR200.3333. The documentation process, if a youth with a disability refuses to partake of any of the services or activities or their guardian or their representative, that has to be documented. There is a process for minimum requirements for the documentation of that refusal of the youth. This must be provided to the youth within ten days of the youth's refusal so there is a little less time frame there. It's important to know that at the time ‑‑ if a youth refuses activities to participate in the activities that are required under Section 511, it's important that the VR counsel lore inform that youth or parent or guardian that this may result in them not being hired at sub‑minimum wage and I think you would say it will result ‑‑

>>HELEN APPLEWHAITE: I think I would!

>>SUZANNE MITCHELL: Okay, so I think it's important to point that out when you do run across a situation where someone is refusing to participate in the activities.

The documentation is also required for individuals of any age of the counselling for information and referral services or as applicable related to the small business provision that the DSU provides and that documentation also must be provided as soon as possible upon the completion of those activities and it must contain minimum information that you will find in Section 397.40 of the regulations and, again, that documentation must be retained by the DSU. The documentation requirements ‑‑

>>HELEN APPLEWHAITE: We're finishing each other's thoughts at this point, too. For youth employers are required to verify that requirements of Section 511 have been met within time frames prior to be able to pay a sub‑minimum wage or continuing to pay a sub‑minimum wage. So the 14C certificate holders would have to verify that all those have taken place within the required time frames.

Additionally at Section 511B2 and at 597 of the regulations LEAs and SEAs are prohibited from entering into a contract or other arrangement with an entity that holds a 14C certificate for the purposes of paying a sub‑minimum wage. Neither Section 511 nor part 397 prohibits an SEA or LEA from contracting with an entity that holds a 14C certificate if the youth is paid at or above the minimum wage or if the purpose is for something other than for work at a sub‑minimum wage, such as conducting transition services or preemployment transition services. Section 511 requires that you submit to documentation reviews. They can be by a contractor of the DSU or by the Department of Labor. The documentation reviews are to ensure that the employers are maintaining proper documentation as required under the section. If the DSU or its contractor would find any deficiencies while doing a documentation review the DSU would report that deficiency to the Department of Labor's wage and hour division.

>>SUZANNE MITCHELL: I think it's important to point out here, too accident because the question was asked, also, is the DSU required to do this and the way that it's written is that in terms of conducting these reviews, the 14C certificate holders must submit to these reviews. It doesn't necessarily require a mandate that the DSU conduct these reviews, although the intent ‑‑ it helps with the intent of Section 511 if these reviews are conducted and that may be something at the state level you may wish to work out with the Department of Labor wage and hour and determine who and when and how those reviews might be conducted.

>>HELEN APPLEWHAITE: In addition to the documentation review, the Department of Labor's wage and hour division has authority to enforce the terms under which individuals are paid on 14C certificates. We have enforcement authority under Section 14C of the FLSA as well as Section 6 which is the minimum wage requirements, Section 7, the overtime provisions and the Section 7 which has the record‑keeping provisions so both Section 7 and 14C require enforcement authority under the new regulations with regard to sub‑minimum wage. I would add to what Suzanne said with regard to referrals we would look at that and how we do our enforcement program and would welcome information that could help us partner together.

>>SUZANNE MITCHELL: Yeah.

>>HELEN APPLEWHAITE: Section 511 prohibits 14C certificate holders from paying sub minimum wages to individuals with disabilities until all of the requirements of Section 511 have been metaphore each one of the individuals that they employ. So if a 14C certificate holder fails to comply with a Section 511 requirement the wage and hour division could assess back wages at the full minimum wage amount for each affected employee. So, given this interaction between what the DSUs are doing and what the 14C certificate holders are required to do one of the things we wanted to specifically address in this conference is the coordination between 14C ‑‑ between the 14C certificate holders and the DSUs. It's essential for ensuring that the requirements of Section 511 are satisfied. It will help the DSUs in identifying the individuals with disabilities and providing them with the services that are required by Section 511 in a timely manner which means within the time frames required by the statute. It's before employment for youth 24 and younger and it's within six months and annually thereafter for new hires as of ‑‑ I think I'm saying it right, as of July 22nd, 2016 and it's annually for everyone who was already employed by Section 14C certificate holders and annually thereafter.

It can also be beneficial between ‑‑ coordination between the DSUs and other state agencies or service providers can also be beneficial in ensuring that all these new requirements are being met.

>>SUZANNE MITCHELL: So let's talk a little bit about such coordination and how that can exist and occur, because we've gotten questions related to that as well. The Section 14C certificate holders and the LEAs and other agencies or providers may inform the DSU ‑‑ we have had a number of questions about the how the DSU gets to know these individuals but they may inform the DSU through a referral with, again, informed consent and adhering to state and federal privacy requirements of the contact information for an individual who is seeking sub‑minimum wage or who is employed already at sub‑minimum wage. I think that a number of states already are receiving many, many referrals from their Section 14C certificate holders. Again another means of coordinating would be for the 14C certificate holders to provide information to the individuals who are employed at sub‑minimum wage about their DSU and the services that the DSU is required to provide to them and they can put them in touch with the DSU. The Section 14C certificate holders may permit the DSUs to conduct individualized or group counselling and referral services that are required under Section 511 at their work site if that's permitted and at a convenient time or at another appropriate location that would be convenient to both of them given the resources of the DSU and given the limitations that the employer might have in terms of providing this information to the employees and the DSUs may provide individualized counselling following any group sessions that might take place and in those group sessions at the conclusion of those group sessions, they can meet individually and provide the documentation that's required of the completion of the career counselling and information and referral services to the individual. Another thing that I think someone brought up that I thought was not necessarily a bad idea, with the informed consent of the individual, they might be able to fill this documentation out in trip indicate and provide one copy to the individual and if the individual agrees, one copy to the 14C entity and one copy to the DSU. So there is a number of things that the DSU and the 14C certificate holders could agree to do together. The DSU can also provide posters or information that might be circulated among the 14C employers that would inform individuals of their ‑‑ the activities that they need to complete to be in compliance with the requirements under Section 511 and not only to the 14C entities but to the agencies, state agencies and other providers that work with individuals with disabilities. I think that the DSUs may but they're not required to help the 14C entities with information about providers of self‑advocacy, self‑determination and peer mentoring opportunities, for example, these are ideal for centers for independent living and the 14C entities may or may not know of these resources so that's something that the DSU could provide to the 14C certificate holders. I think there is a couple of pieces just to remember that are critical in terms of coordination and one is that it should be planned and orderly, hopefully some of you may have begun planning the orderly progression of this when the Act was passed, realizing that it was going to become effective in two years, I think many have not. I think that's really a critical piece, that you should probably begin to work closely with your CRPs or your 14C entities in a planned and meaningful way so that you can help to utilize and leverage resources. Windows 10 that states out there, this is a new requirement, it is one that can create some chaos and some strange on your resources so to the extent that you're able to plan together that could be helpful. Then the other thing is that ‑‑ remember that for individuals that have to receive the career counselling and information and referral services that, again, these don't have to be provided all at once. They can be spread out according to the dates, the intervals as we talked about earlier. I know that many of the 14C entities perhaps have made in mass referrals to the state designated agencies with the expectation that they would be turned around immediately so know as long as you meet the time intervals you can stagger those, the only requirement is once you have completed the career counselling and information and referral services and documented that, the completion of that, that documentation will have to go to the individual if it's a youth within thirty days and for individuals of any age within 45 days or 90 days in extenuating circumstances.

>>HELEN APPLEWHAITE: One of the things we have been trying to do is get out information as effectively as we can. The Department of Education's final rule and preamble in implementing regulations are at 34CFR.397 and for those of us who are a little bit of regulatory geeks that's 81 Federal Register 55629.

One of the things I talked about earlier is the guidance that we put out from the Department of Labor and we issued a field assistance bulletin. This is a bulletin where we speak directly to our field enforcement staff of what they need to do with regard to implementation of Section 511 and our enforcement of it. It is a public document and we did it that way purposefully because we wanted to be sure that the guidance was out there and everyone had access to that. We sent a letter directly to our 14C certificate holders and we have provided more plain language guidance in the form of a fax sheet for those of you who don't like to look at regulations so much, hopefully the fax sheet is more plain language.

The guidance that we have issued is available on our web site. Once you get on the workers page all of the information that we have available regarding Section 511 and the employment under 14C certificates is included with the 14C holders who were maintain and that's another part of that orderly planned activity of just being aware of certificate holders in your state that there is an avenue to do that.

>>SUZANNE MITCHELL: I think one other thing that I should mention in terms of future guidance is we are currently working together on an FAQ document that will be forthcoming to you and it is a document that hopefully will continue to answer your questions and also address some of the issues for the 14C certificate holders so you can look forward to that document in the coming several weeks.

>>HELEN APPLEWHAITE: Thank you. I would add to that as well with regard to the frequently asked questions we're continuing to get questions both Suzanne and I am getting those and we are compiling those to look at those to make frequently asked questions as meaningful and up to date as we can make it with the new requirements that are out there. We are also continuing to look for opportunities to be able to provide guidance jointly, like at sessions like this.

>> LISA HINSON‑HATZ: Thank you very much for the presentation. I wanted to, again, take an opportunity for folks to come up and ask some questions that are either burning questions, clarifying questions and we do have a few that we can discuss and we have someone right up at the front.

>> AUDIENCE MEMBER: Chaz, from the WINTAC. Windows 10 that if a youth applies or wants to work at sub‑minimum wage and they refuse counselling and referral they are submitted to sub‑minimum wage. If an adult has been working for a period of time in a sub‑minimum wage environment and refuses to receive career counselling information and referral what would be the status of that adult's ability to work beyond that period of time when they refused and to ask it in a slightly different way if an employer could document that they provided an opportunity to an individual to an adult to receive career counselling but that individual refused and they had documentation of that on file, the refusal and the offer, would they be out of compliance in their 14C certificate?

>>HELEN APPLEWHAITE: At this stage, yes, if the individual refuses the counselling the employer would have the ability to pay ‑‑ they could continue to employ them and pay full minimum wage but the way that the Act is written it doesn't provide an exception for a refusal to receive the services that are required. So at this stage that employer would be out of compliance if they condition to pay a sub‑minimum wage to an employee who refused the career counselling after the required time frame.

>>SUZANNE MITCHELL: One of the related questions that has come in Chaz, this may be what you're going to ask next is does the DSU have to continue to document that refusal on an annual basis. Clearly if the DSU documents the refusal and the youth is no longer able to be employed at sub‑minimum wage, then there would probably be no need for that youth to come back ‑‑ that individual to come back for that counselling and information and referral service if they're no longer employed. However if it becomes known to the DSU that that individual is somehow employed at sub‑minimum wage at the point of that annual career counselling and information that is known to the DSU then they would be required again to get documentation of that refusal.

>> AUDIENCE MEMBER: And this is a quick one. When we refer to employers who employ less than think of teen individuals does that mean less than 15 staff members or less than 15 individuals receiving sub‑minimum wage employment?

>>SUZANNE MITCHELL: I think it's just 15 employees.

>>HELEN APPLEWHAITE: I think it's 15 employees, we will have it look at the statute.

>> AUDIENCE MEMBER: I don't feel so silly, then.

>>SUZANNE MITCHELL: There is a certificate holder not necessarily for each individual that's employed but they are a 14C certificate holder, so I would assume it's probably under 15 employees but we will check on that.

>> AUDIENCE MEMBER: Thank you.

>> AUDIENCE MEMBER: I'm Tim from Missouri, just wanted to make sure I heard this correctly. You indicated that state operated programs, state operated 14C programs are not exempt but some of the individuals that are referred to us are not there voluntarily. They are in a 14C program that may be in a maximum security, and given that we are supposed to provide career counselling in a situation that maximizes informed choice that presents a challenge. Any thoughts about how we would do this?

>>HELEN APPLEWHAITE: That's right at this stage there are no exceptions so the counselling would be required to be provided but I'm going to refer to Suzanne in terms of what that would look like.

>>SUZANNE MITCHELL: When this was written there were no exceptions to those 14C entities who were subject to the requirements under Section 511 so for those individuals who are employed and we do know that there are principal programs and other types of hospital programs and so forth that may pay sub‑minimum wages, to the extent we are aware, they still will require that information, that career counselling and information and referral services. That's a unique situation and I think we probably need to explore it further. But right now as the law stands there are no exceptions. For the 14C certificate holders.

>> AUDIENCE MEMBER: Thank you.

>> AUDIENCE MEMBER: I'm Renee I am from Hawaii. We provided employment services to our clients through a construction industry setting. Under ‑‑ there is no ‑‑ we were able to work it out with our state, we used the state youth program to work ‑‑ to do the contracts. There are no come men is your rate wages allowed under Davis Bacon which would cover for federal however the vet answer administration program does allow it. My question would be: Is the DOL ‑‑ would you consider being able to figure out some sort of wage program for construction, Davis Bacon for?

>>HELEN APPLEWHAITE: The Davis Bacon does not make an exception that permits the wages under Section 14C the Service Contract Act has allowed for it. I think the answer is there would have to be statutory change to the Davis Bacon Act to permit a sub‑minimum wage.

>> AUDIENCE MEMBER: So it has to be done through legislation?

>>HELEN APPLEWHAITE: That's right.

>>SUZANNE MITCHELL: If it is clear that they are set on entering sub minimum wage employment in a sheltered workshop that he would not be eligible for VR services and determined ineligible because they are not pursuing competitive, integrated employment.

>> AUDIENCE MEMBER: And they could meet other requirements and work in a sheltered workshop setting?

>>SUZANNE MITCHELL: Yes and, again, we have had questions about youth who are not in school and how are they handles in terms of preemployment transition services or transition services. Clearly if they're not in school or have recently exited school the documentation may exist within the local educational agency or the DSU of those services if they had been provided while the youth was in school and that documentation could be provided to the youth, but clearly in the instance where a youth may not have been in school for quite some time and that documentation is not available, that's why we refer to it as applicable and that individual at that point would have to apply for VR services, be an applicant for VR services and would still need to meet the documentation requirements for career counselling and information and referral. I'm not sure how that would play out on the labor side.

>>HELEN APPLEWHAITE: That's exactly what I was going to say. For us, we would ‑‑ if the individual has been documented to be ineligible for VR services regardless of the reasons we would be look to go whether they have documentation of the other requirements of youth have been met and if they have met those then employment having sub minimum wage for that youth would be permissible.

>>SUZANNE MITCHELL: Again, there are several nuances and scenarios that could be brought up and, you know, probably one of the things that could occur is that they would wait until they're 25. Before they become employed!

>>HELEN APPLEWHAITE: Or pay them full minimum wage.

>>SUZANNE MITCHELL: Yes, which is the entire intent of Section 511 is to limit the use of sub‑minimum wage. That's always an option.

>> AUDIENCE MEMBER: Can I ask two follow‑up questions? We're getting into the weeds over here in Wisconsin. How would we close them? For what reason that you have to report on the 911 and what if they're presumed an eligible SSDI or SSI case?

>>SUZANNE MITCHELL: One of the requirements under the VR program is that they will be pursuing competitive, integrated employment outcome or employment outcome under the VR program and if they are wanting to go into segregated employment settings or one which pays sub‑minimum wage and that is their choice, then they would not be eligible for the VR program because they would not be pursuing an employment outcome in competitive, integrated employment which is the purpose of the VR program.

>> AUDIENCE MEMBER: Thank you so much, this was very helpful. I'm hoping you can give a little more clarity on what "known to the DSU" means? We have ‑‑ in New Jersey we have several sheltered workshops, we do, land of the segregated settings, here, so
(Chuckles.)

It is what it is, I know! So there are several that are known to us because we get that information on a regular basis because we're in the Department of Labor. However, we have several other 14C certificates who are not known to us and I'm getting calls saying I'll send you a list and my feeling is unless they make that absolute referral and go through our process they are not known to us but I want to make sure I'm on the right page with that.

>>SUZANNE MITCHELL: Again, and this was a discussion that we had, there were ‑‑ some of our responders to the NPRM wanted the DSU, the VR agency to go out and seek these people out and we felt at that point that that could be a tremendous burden on the VR agency to do that. It's not required, some can too it and some have done that, having to seek these individuals out. So we use the term "who are known instead of who are referred or other terminology. Individuals who become known to the VR agency can become known to the agency through the VR process if they've been through part of the VR process they can become known if they've been through the process and been placed in, for example, segregated employment at sub‑minimum wage or in a sub‑minimum wage employment that then they would be known. We are asking agencies to go back to the time of the passage of the law which was July 22nd, 2014 in terms of tracking that. Suggesting that, that you do that. You can certainly go back further if you want to. The other aspects of who are known would be if they are referred by a Section 14C certificate holder who makes that referral to you, if they send you a list of individuals I would hope that they have cleared with that list of individuals the right to send that list of individuals to you, and that could be a situation where they become known to you. Again, as we've pointed out before, it's important in many instances to know the date of employment of that individual and some contact information so that you can follow‑up on that. A list is probably not going to constitute being fully known to you with just names. I think the best thing is if there is an agency or provider who notifies you or the individual self‑refers to you or the 14C provides information to you, those are situations in which they would become known to you.

>>HELEN APPLEWHAITE: And we would prefer when 14C's reach out that you let them know what to do and what is needed so that everyone can get the activities taking place that need to take place by the time frames that are required because from our standpoint when we look at the 14C certificate holder we're going back to those statutory time frames to see whether that counselling has taken place within the first six months of hire for new hires as of the effective date or within one year from the effective date.

>> AUDIENCE MEMBER: Hi, I'm Anna with Idaho. What is the requirement for 14C holders if an individual's production goes back and forth between below and above sub‑minimum wage.

>>HELEN APPLEWHAITE: 14C certificate holders are required to do regular monitoring. They are required to annually at least test for the prevailing wage for the type of job in that area and then also measure the productivity of the individual who is working at a sub‑minimum wage at least once every six months and more often than that if circumstances of how they're working changes. Flubbing wait on the amount of wage they're being paid and flubbing wait between the type of jobs they are doing as well.

>> AUDIENCE MEMBER: So if they are at sub‑minimum wage during any point during the six months they would be required?

>>HELEN APPLEWHAITE: Yes, what we would look at in that instance would be if there was sub‑minimum wage employment that took place touring that period of time after the counselling had been required to be provided and the counselling had not been provided we would look at the requirement for full minimum wage and require back wages for that portion.

>>SUZANNE MITCHELL: And related ‑‑ well, sort of, a related question that came in was what you have an individual who is employed part‑time at a competitive wage and employed part‑time at sub‑minimum wage and how would we treat that? Again for individuals who are employed at a sub‑minimum wage regardless of whether they're ‑‑ first of all I would question why they're at sub‑minimum wage if they're at a competitive wage in the competitive market but I think the other thing that comes into play here is regardless, if they are employed at sub‑minimum wage they would have to meet requirements under Section 511.

>> AUDIENCE MEMBER: Idaho sits in a unique situation in that we have a state‑funded program that pays for some of the sub‑minimum wage which is not enviable situation. However going back to the eligibility part, part of the eligibility to access sub‑minimum wage requires that it is actually a necessary strategy. So it goes in somewhat of a conflict with the idea that it's going back to informed choice decision. So if the strategy is necessary but we have no way of documenting it, then it is at a crossroads. So even though the VR program may say it's still an informed choice decision there would be no way for the referral at all. Because I understood it to be that it was no longer going to be an informed decision for the youth to be able to enter but that's not what I heard today. It seems like we have gone back to an informed choice decision but we have to open them up.

>>SUZANNE MITCHELL: I'm not totally clear on what you're asking but if an individual is at sub‑minimum wage and it's as a part of a strategy to achieve competitive integrated employment ‑‑

>> AUDIENCE MEMBER: No I'm saying under our state‑only program the VR counselors as part of the eligibility to say that they could not benefit from an integrated competitive employment we would have to be able to evaluate and determine that they cannot benefit from competitive integrated employment and I heard earlier that they can simply state that they don't want to participate, and then we would have no way of determining that they cannot.

>>SUZANNE MITCHELL: Again, this goes back to VR counselling. If an individual comes in and you have done an assessment to determine if they can benefit, if they come in and wanting to into employment and you want to do an assessment to see if they can actually enter competitive integrated employment and that assessment determines that they probably cannot and they choose not to at that point then, again, they can enter sub minimum wage employment and be determined ineligible. Again, if an individual comes in and they clearly, clearly state and, again, this is where the VR counselling comes in because I think you can provide information to help them make an informed choice about that, be it assessment, further counselling or whatever, but if at the end of the day if that individual clearly states that the only outcome they're looking for is sheltered employment at sub‑minimum wage, then they would be determined ineligible.

>> AUDIENCE MEMBER: Okay.

>>SUZANNE MITCHELL: I know that's sort of a ‑‑ it's a judgment call of sorts, but, you know, I think we have a responsibility in the VR program to ensure that we have done everything we can to assist an individual or assess an individual's ability to enter competitive integrated employment. Again, there is the element of informed choice but, again, it has to be informed choice not just choice.

>> AUDIENCE MEMBER: Just a follow‑up question and thank you for the information provided thus far.

I'm a little just ‑‑ could you just provide clarity on the coordination between the DSU and the Department of Labor in this process and I think I heard you say that the DSU is going to be responsible for reviewing documentation. Could you just talk a little bit about that and what constitutes a review and does the review of the documentation have to be documented?
(Laughter.)

>>SUZANNE MITCHELL: This is the federal government!
(Laughter.)

Let me clarify. The Act requires that a Section 14C certificate holder submit to review by either the DSU or the Department of Labor to review that documentation and must be maintained by the Section 14C provider. It does not mandate outright that the DSU must do this. This is why I said earlier this is a conversation that she had probably take place between the DSU and the wage and hour division of Labor.

>>HELEN APPLEWHAITE: Right.

>>SUZANNE MITCHELL: And if there is any documentation review of the 14C certificate holders that is something that could be worked out within the state as to whether you will do it, when you will do it. There is no specified time frame for it, it was put in the Act basically if you go back and look at it, I think it's in E, I think it's E of the Act but if you look at it it says the 14C's are required to submit to that documentation review and there is not really any other prescriptive language around that other than it can be done by the DSU or the Department of Labor.

>>HELEN APPLEWHAITE: From the wage and hour's standpoint if the DSU became aware of issues where there was question of documentation, we would always welcome that information. We have our regular enforcement program under Section 14C. Section 511 provision just ads ‑‑ it's kind of like belt and suspenders for us because we believe we have full authority under Section 14C to require the new limitations under Section 511 and what the statement in Section 511 actually does is really make it very, very clear we have authority to look at documentation related to this specific requirement. We can definitely help facilitate that.

>> LISA HINSON‑HATZ: One more quick questions.

>> AUDIENCE MEMBER: This may be really quick, Helen, Suzanne thank you, very informative. I'm Mark here in California. Our minimum wage is significantly higher than the federal minimum wage. This is an enforcement question for DOL. Will our providers, the employers of record be at risk if they don't get the services for their employees making more than the federal minimum wage but less than local or state minimum wage?

>>HELEN APPLEWHAITE: Not from the Department of Labor, I can give you a quick answer on that. We have the ability to enforce FLSA, $7.25 an hour. There is only one thing that I would throw in there, the Service Contract Act does have the permit for the payment of a wage rate and there may be a circumstance where there is a higher than federal regular rate and in those instances it would be required to be come men is your rate with the prevailing wage but under the Section 511 it is federal minimum wage.

>> LISA HINSON‑HATZ: Chaz has the last question.

>> AUDIENCE MEMBER: Going back to the refusal piece again refusing to pursue employment is not part of the eligibility determination process, do we have the disability service and required benefit, since services could potential Al reply to required services but not necessarily, if somebody came into a VR program and said I'm not interested in pursuing employment, would the VR program actually have to open the case and then determine ineligibility formally or could they document that the person is ineligible since they are refusing to pursue employment? Make sense?

>>SUZANNE MITCHELL: I think so. If they're refusing to pursue employment they're refusing to become employed and then none of this would become applicable because it has to be for individuals seeking employment at sub‑minimum wage or already willed at sub‑minimum wage.

>> AUDIENCE MEMBER: So there wouldn't be any 911 reporting, all you would have to do is document that they would be ineligible because they are refusing to pursue employment.

>>SUZANNE MITCHELL: I don't know why they would come if they ‑‑ I understand ‑‑ I get where you're coming from but I'm not sure why they would come to the VR program if they're not interested ‑‑

>> AUDIENCE MEMBER: Because they have to be found ineligible in order to enter into sub‑minimum wage employment which is why they're there to begin with.

>>SUZANNE MITCHELL: Right. If they're coming in and saying I'm not interested in pursuing employment ‑‑

>> AUDIENCE MEMBER: Because I want to enter into sub‑minimum wage.

>>SUZANNE MITCHELL: If they say because they want to enter sub‑minimum wage employment, again, we just went through the discussion of ineligibility and you could find the individual ineligible because they're not interested in pursuing ‑‑ the purpose of the VR program really is to for individuals to enter competitive ‑‑

>> AUDIENCE MEMBER: I'm asking for the VR folks here who will ‑‑ could CSAVR them time from processing an application and formally determining ineligibility if from a 14C holder's perspective if they had documentation in terms of a letter or something that said the person's not interested in pursuing, they are therefore ineligible does that suffice or do they have to go through the formal application and route? Am I getting that point across?

>>SUZANNE MITCHELL: They have to apply.

>> AUDIENCE MEMBER: Thank you.

>> LISA HINSON‑HATZ: I'm going to ‑‑ with that I'm going to end the session and I want to thank Helen and Suzanne for presenting.
(Applause.)

Any final thoughts? All right, we'll see you back at two.

(Lunch break.)

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