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Memorandum

Date: January 30, 2014

To: Tom Perez, Secretary, United States Department of Labor
Claudia Gordon, White House Liaison to the Disability Community

From: Samantha Crane, Director of Public Policy, Autistic Self Advocacy Network

Subject: The President's authority to eliminate sub-minimum wage payment of individuals with disabilities employed by federal contractors and subcontractors

This memorandum analyzes the authority of the President to issue an executive order prohibiting payment of individuals with disabilities working on federal contracts and subcontracts at rates below the general minimum wage requirements applicable to other contract and subcontract workers. It concludes that payment of sub-minimum wages to contract and subcontract workers with disabilities is not required by statute, and that issuance of certificates allowing employers to pay sub-minimum wages to workers with disabilities is left to the discretion of the Department of Labor ("the Department"). As a result, to the extent that the President enjoys the authority to direct executive agencies to set a minimum wage for workers on all federal contracts, he may also direct those agencies to eliminate sub-minimum wage payment of contract workers with disabilities.

Background

The President has recently announced his intention to issue an Executive Order requiring workers on federal contracts and subcontracts to be paid a wage of no less than \$10.10 per hour.¹ In a recent interview, Attorney General Eric Holder stated that the President's authority to issue this order arose from his inherent constitutional authority to regulate the activities of the executive agencies, which are responsible for negotiating the terms of federal contracts and subcontracts.²

Pursuant to an exception in existing minimum wage laws, some federal contractors currently employ people with disabilities at a fraction of the federal minimum wage. Advocates have noted that the stated goal for the proposed Executive Order – to reduce poverty and increase contract worker productivity and morale by boosting wages – should apply equally to contract workers with disabilities earning below minimum wage. As a result, the Executive Order should require all workers – including those with disabilities who previously earned less than the minimum wage – be paid at least \$10.10 per hour.

¹ Jeanne Sahadi, *Obama's minimum wage order aims to send a message*, CNN MONEY, January 28, 2014, available online at <http://money.cnn.com/2014/01/28/news/economy/obama-executive-order-minimum-wage/>.

² *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary* (Jan. 29, 2014) (testimony of Eric Holder), available online at <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=138603a26950ad873303535a6306b77c> at 2:15:13-2:16:13.

No Statute or Regulation Requires Agencies to Permit Payment of Sub-Minimum Wages to Individuals with Disabilities Working on Federal Contracts.

As noted by Attorney General Eric Holder in recent congressional testimony, the President enjoys inherent constitutional authority to direct the activities of executive agencies, including their contracting activities, to the extent that such direction is not inconsistent with statute. No statute limits the President's authority to set a minimum wage for contract workers with disabilities that is equal to the minimum wage for workers without disabilities. As a result, to the extent that the President may issue an executive order setting a minimum wage for all workers on federal contracts, the President may also direct that this wage be paid to individuals with disabilities working on federal contracts who had previously been paid below the minimum wage.

The Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) establishes a nationwide minimum wage for employees.³ Section 14(c) of the FLSA authorizes the Secretary of Labor ("the Secretary"), "to the extent necessary to prevent curtailment of opportunities for employment," to grant certificates to employers authorizing them to pay workers with disabilities at a rate below the federal minimum wage.⁴

No portion of Section 14(c), however, *requires* employers to pay employees with disabilities at rates lower than the federal minimum wage, nor does it require federal agencies to contract with employers who operate under such certificates. As a result, federal agencies retain the option not to enter into contracts in which the services are to be performed by people with disabilities earning below the minimum wage.

Moreover, the FLSA explicitly states that its provisions, including Section 14(c), were not intended to override any other federal, state, or municipal law establishing a higher minimum wage rate.⁵ As discussed in further detail below, the McNamara-O'Hara Service Contract Act and Walsh-Healey Public Contracts Act authorize a higher minimum wage rate for contract workers with disabilities than that permitted in Section 14(c).

The McNamara-O'Hara Service Contract Act and Walsh-Healey Public Contracts Act

The McNamara-O'Hara Service Contract Act (SCA)⁶ and the Walsh-Healey Public Contracts Act (PCA)⁷ require agencies to include, in each federal contract, a provision setting forth a minimum wage to be paid to employees of the contractor involved in the fulfillment of the contract (hereinafter referred to as the "contractor minimum wage"), which may be higher than the nationwide minimum wage set forth in the

³ 29 U.S.C. § 206.

⁴ *Id.* § 214(c).

⁵ *Id.* § 218(a).

⁶ 41 U.S.C. § 351(a)(1). The SCA applies to employees of federal contractors and subcontractors performing services on contracts in excess of \$2,500.

⁷ *Id.* § 35(a). The PCA applies to employees of federal contractors and subcontractors performing services on most contracts in excess of \$10,000.

FLSA. The SCA and PCA delegate authority for setting this contractor minimum wage to the Department of Labor.

The statutory language of the PCA and SCA lacks any explicit exception for employees with disabilities. The PCA requires contracts in excess of \$10,000 must include an agreement that “*all persons* employed by the contractor” to work on the contract be paid “not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages” for individuals performing similar work in the locality where the contract is to be performed.⁸ Similarly, the SCA requires that contracts in excess of \$2,500 contain a “provision specifying the minimum monetary wages to be paid” to employees, and that the wage will be “determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality . . .”⁹ The SCA also states that “[i]n no case” shall the wages set by the Secretary of Labor be lower than the standard federal minimum wage.¹⁰

Both the SCA and the PCA, however, authorize the Department of Labor to allow “reasonable variation, tolerances, and exemptions” to contractors’ minimum wage obligations to the extent that those exceptions are “necessary and proper” either (1) in the public interest; or (2) to “prevent injustice and undue hardship” (in the context of the PCA)¹¹ or to “avoid the serious impairment of government business” (in the context of the SCA).¹² Relying on this authority, the Department of Labor has issued regulations allowing federal contractors to pay workers with disabilities at rates below their usual minimum wage obligations, to the extent that doing so would satisfy the requirements of Section 14(c) of the FLSA.¹³

Because neither statute explicitly requires an exception to the contractor minimum wage for workers with disabilities, the Department of Labor retains the discretion to eliminate this exception based on a finding that such exceptions are not “necessary and proper” as a means to serve the public interest, prevent injustice and undue hardship, or avoid serious impairment of government business. A wealth of recent evidence indicates that sub-minimum wage employment of persons with disabilities is harmful to people with disabilities.¹⁴ Indeed, the usual justification offered for sub-minimum wage employment – increasing opportunities for individuals who may otherwise not be able to access employment – is particularly inapposite in the context of federal contractors, in light of other laws and programs designed to increase federal contractors’ employment of people with disabilities.¹⁵

Moreover, because the implementing regulations of the PCA and SCA do not *require* payment of contract workers with disabilities at sub-minimum wages, the President may issue an executive order eliminating

⁸ *Id.* (emphasis added).

⁹ *Id.* § 351(a)(1).

¹⁰ *Id.* (emphasis added); 41 U.S.C. § 351(b) (“No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay *any of his employees* engaged in performing work on such contracts less than the minimum wage specified under section 206(a)(1) of title 29.” (emphasis added)).

¹¹ 41 U.S.C. § 40.

¹² *Id.* § 353(b).

¹³ 29 C.F.R. § 4.6(o) (SCA); 41 C.F.R. § 50-202.3 (PCA).

¹⁴ See generally NATIONAL DISABILITY RIGHTS NETWORK, SEGREGATED AND EXPLOITED: A CALL TO ACTION! (2010).

¹⁵ See, e.g., 41 C.F.R. § 60-741 (2013) (recent Department of Labor regulations requiring federal contractors to affirmatively recruit, hire, train and promote qualified people with disabilities). The President has also announced initiatives to improve employment of people with disabilities in the federal government itself. See, e.g., Increasing Federal Employment of Individuals with Disabilities, Exec. Order No. 13548, 75 Fed. Reg. 45,039 (July 26, 2010).

this practice without the need to amend the Department's regulations implementing the PCA and SCA. Just as agencies retained the discretion to require contractors and subcontractors to pay wages higher than the contractor minimum wage, agencies retain the discretion to include contract provisions prohibiting payment of sub-minimum wages to contract workers with disabilities. The President may exercise his authority over the activities of agencies to require them to include such a provision in all contracts.

The Javits-Wagner-O'Day Act

The Javits-Wagner-O'Day Act requires that federal agencies purchase certain supplies and services from certified nonprofit agencies that employ individuals who are blind or have other significant disabilities.¹⁶ In practice, many individuals employed by these agencies are paid at rates below the contractor minimum wage. Nevertheless, no portion of the Javits-Wagner-O'Day Act requires payment of people with disabilities at sub-minimum wages. As a result, agencies retain the authority to negotiate contracts with certified nonprofit agencies that require payment of workers at wages equal to or greater than the contractor minimum wage.

Conclusion

Notwithstanding statutes that authorize payment of sub-minimum wages to individuals with disabilities, no law requires federal agencies to enter into contracts with employers who pay people with disabilities at sub-minimum wages. As a result, to the extent that the President is authorized to direct agencies to require a \$10.10 minimum wage provision in all federal contracts, the President is also authorized to direct agencies to ensure that this provision also applies to individuals with disabilities.

¹⁶ 41 U.S.C. §§ 8501-8506.