

**PREVENTING WORKER EXPLOITATION:
PROTECTING INDIVIDUALS WITH DISABILITIES
AND OTHER VULNERABLE POPULATIONS**

HEARING
OF THE
**COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS**
UNITED STATES SENATE
ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

EXAMINING PREVENTING WORKER EXPLOITATION, FOCUSING ON PRO-
TECTING INDIVIDUALS WITH DISABILITIES AND OTHER VULNERABLE
POPULATIONS

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MARCH 9, 2009
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PREVENTING WORKER EXPLOITATION: PROTECTING INDIVIDUALS WITH DISABILITIES AND OTHER VULNERABLE POPULATIONS

MONDAY, MARCH 9, 2009

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 2:38 p.m., in Room SD-430, Dirksen Senate Office Building, Hon. Tom Harkin presiding.

Present: Senator Harkin.

OPENING STATEMENT OF SENATOR HARKIN

Senator HARKIN. The Senate Committee on Health, Education, Labor, and Pensions will come to order.

For too long, we have been complacent about the potential for abuse and exploitation of people with disabilities as well as other vulnerable populations in the workplace. We got a rude wake-up call last month with revelations about a shocking case of exploitation in the small town of Atalissa, IA.

We learned that Henry's Turkey Service, a firm based in Texas, has employed 21 men with intellectual disabilities at a turkey processing facility in eastern Iowa, near Atalissa. The firm has been accused of paying these workers less than the minimum wage and then taking their wages and Supplemental Security Income in exchange for room, board, and caretaking at a company bunkhouse. That bunkhouse is actually an abandoned schoolhouse with boarded-up windows and out-of-control cockroach infestation and no central heat.

The workers were reportedly provided only about \$60 a month for working in the turkey processing plant full time, or near full time. According to media reports, some of these workers may have been employed at this site in this situation for perhaps as long as 20, maybe even 30 years.

Needless to say, the abuses exposed at Atalissa shocked the conscience.

Currently, there are no fewer than 11 Federal, State, and local investigations looking into what went wrong, as there should be. All of those responsible for exploiting these employees with disabilities and violating law must be brought to justice promptly and punished to the fullest extent of that law.

In order to avoid interfering with these on-going investigations, today's hearing will not delve into the specific facts and cir-

cumstances in the Atalissa case. Instead, our hearing today will have a broader focus. I want to reexamine the Federal laws that may have inadvertently contributed to or enabled what happened in Atalissa—the 14(c) program, which allows employers to pay less than minimum wage, and the 3(m) program, which allows employers to deduct the “reasonable costs of providing food, lodging, and other services” to workers from those employees’ paychecks.

Now since the Fair Labor Standards Act was signed into law, section 14(c) has permitted employers to pay workers with disabilities less than their nondisabled coworkers, if their disability hinders their job productivity. According to a 2001 GAO report, more than 5,600 employers pay the special minimum wages to approximately 424,000 workers with disabilities.

The Atalissa case and others like it raise significant questions about how these wages are determined, how accurately these sub-minimum wages reflect the productivity of these workers, and who is actually checking to make sure that workers with disabilities are being compensated fairly and correctly.

Now equally outrageous is the fact that what little these men did earn was being taken from them. Now, again, I am only going on press accounts. They show that between \$28,000 and \$40,000 was taken every month from these 21 men out of their pay for this room and board at this place.

Now how much was the company paying for this place? Six hundred bucks a month. They are paying 600 bucks a month for the entire place, and yet they are collecting between \$28,000 and \$40,000 a month for people to live there.

Section 3(m) of the Fair Labor Standards Act prohibits employers from deducting more than the cost to the employer. Six hundred bucks a month for the whole building, not for each employee.

Again, I think this particular case shows there are too many glaring loopholes in this provision. We need to find a way to hold employers making these deductions more accountable, both through better enforcement of the law and by narrowing the circumstances under which employers can take money from any low-income worker.

As we will hear, these kinds of deductions happen to vulnerable, low-wage workers all the time and are often abused. We will have an opportunity today to hear, of course, from a representative of the Wage and Hour Division about the department’s enforcement.

Now the stated intention behind the 14(c) program is “to prevent the curtailment of employment opportunities for individuals with disabilities.” A very laudable goal.

There are many individuals with significant disabilities who are employed under this program who may not otherwise have found employment. There are also many workers with significant disabilities who are every bit as productive as the workers without disabilities, and our laws must be tightened to ensure that employers cannot use programs like 14(c) to take advantage of this.

As a longtime advocate for the rights of individuals with disabilities, I feel strongly that the Federal Government should do all it can to promote employment for persons with disabilities. Next year is the 20th anniversary of the Americans with Disabilities Act, a bill that has my name as the chief cosponsor. Twenty years later,

we still have over 60 percent of people with disabilities unemployed. It is a national disgrace.

We have to do all we can to promote employment for persons with disabilities. People with disabilities who are working have dignity and purpose. It helps them achieve economic self-sufficiency, one of the four stated goals of the Americans with Disabilities Act.

However, in our efforts to ensure that individuals with disabilities find employment and economic self-sufficiency, we obviously must draw a bright line in prohibiting and preventing employers from taking advantage of these vulnerable workers. That is what we are here to discuss today.

If people have observations on the case in Atalissa, we will listen to that. I just want to find out just what is happening nationally and what we need to do to prevent this from happening in the future.

We have two panels. Our first panel will start off with Mr. John McKeon. I hope I pronounced that correctly.

Mr. MCKEON. Close enough.

Senator HARKIN. McKeon.

Mr. MCKEON. McKeon is the Anglo way, yes, sir.

Senator HARKIN. OK. Mr. John McKeon is the deputy administrator for enforcement for the U.S. Department of Labor, Wage and Hour Division. Mr. McKeon is a 33-year veteran of the Wage and Hour Division and began his career as an entry-level compliance specialist in Providence, RI.

Since then, he has held positions of increasing responsibility, including district director and regional administrator. Currently, as deputy administrator for enforcement, he oversees the enforcement activities in the five regions, the Office of Enforcement Policy, and the Office of Interpretation and Regulatory Interpretation.

Mr. McKeon, welcome to the committee. You, along with the other panelists who will be coming up on the second panel, your statements will be made a part of the record in their entirety. If you could sum it up in several minutes, I would be most appreciative.

Mr. McKeon, welcome. Thank you. Please proceed.

**STATEMENT OF JOHN L. MCKEON, DEPUTY ADMINISTRATOR
FOR ENFORCEMENT, WAGE AND HOUR DIVISION, U.S.
DEPARTMENT OF LABOR, WASHINGTON, DC**

Mr. MCKEON. Thank you, Senator.

Thank you for the opportunity to discuss the provisions of the Fair Labor Standards Act that have applications for workers with disabilities. The FLSA, since its enactment in 1938, has contained provisions designed to prevent the curtailment of opportunities for employment of workers with disabilities by authorizing employers after receiving certification from the Department of Labor to pay wage rates less than the Federal minimum wage to employees' whose earnings and productive capacities are impaired by disability.

Like all regulatory enforcement agencies, Wage and Hour employs a variety of tools and activities to enforce the law and achieve compliance. The agency mission is to promote and achieve compliance, not just to identify violations after they occur, but to prevent

violations in the first instance, particularly where workers may be at risk, may not be aware of their rights, or are unable to assert their rights.

Section 14(c) permits the payment of special minimum wage, one that is less than the Federal minimum wage, to workers who have disabilities that impair their earning and productive capacity for the work being performed. I cannot stress strongly enough that the payment of special minimum wage is not an option solely because a worker has a disability. The disability must impair the worker's productivity for the job he or she actually performs.

Prior to paying a special minimum wage and at periodic intervals depending on the nature of the establishment, the employer must apply and receive a certificate issued by the Department of Labor. In 1994, the Wage and Hour Division centralized all processing of applications to pay special minimum wages in Chicago. Applications for certification are denied if the application is incomplete, in error, or reflects noncompliance with any of the provisions enforced by Wage and Hour.

All section 14 certificates expire. Each certificate is issued with an expiration date. Approximately 90 days before the expiration date, the certification team will forward to the employer a renewal package, pre-populating the application data. Reminder notices are forwarded to the employer 60 days before the certificate expires and again 30 days before expiration.

If the renewal application is not received prior to the expiration date, the certificate team will advise the employer by letter that the certificate has expired, and it no longer has authority to pay workers with disabilities a special minimum wage. The certificate team does follow up on approximately 250 employers that do not respond to our renewal notices each year.

It has been our experience that about 100 of the former certificate holders may be removed from the database as a result of a telephone call. Often employers are no longer in business or have merged with other certificate holders. The remaining 150 employers who do not renew receive letters inquiring as to whether it is their intention to allow the certificate to expire.

Of that number, approximately 45 contact Wage and Hour stating the certificate is no longer needed. About 60 reply and indicate they wish to renew their certificate and reapply. The remaining 45 never respond to our inquiry.

The agency's special minimum wage activities and initiatives are far too numerous to list individually. I will point out our key efforts and accomplishments over the past several years.

For each of the past several years, each Wage and Hour region has conducted a 14(c) enforcement initiative as part of the agency's strategic plan. On average, Wage and Hour conducts approximately 135 14(c) investigations per year.

The GAO made several recommendations for improving Wage and Hour's oversight of 14(c) in its 2001 report. Those recommendations have all been implemented. In addition, Wage and Hour has reinstated the regional section 14(c) team leader position, and Wage and Hour has partnered with several organizations, including NISH, to educate the regulated community about the requirements of section 14(c).

Section 3(m) of the FLSA provides the statutory definition of the term “wage.” This provision is not an exemption or an exception to the applicable minimum wage or overtime requirements. Rather, it provides the statutory parameters for making determinations of the reasonable costs to employers of furnishing the employees with board, lodging, or other facilities that may be credited toward meeting the FLSA’s monetary obligations.

All investigations conducted by Wage and Hour, whether initiated on complaint or as a directed, targeted enforcement initiative, should include an evaluation of the appropriateness of any claim by the employer for credit toward wages for furnishing board, lodging, or facilities.

Mr. Chairman, this concludes my prepared remarks. I will be happy to answer any questions you or members of the subcommittee have.

[The prepared statement of Mr. McKeon follows:]

PREPARED STATEMENT OF JOHN L. MCKEON

Thank you for the opportunity to discuss the provisions of the Fair Labor Standards Act (FLSA) that have application to workers with disabilities. I will address two specific provisions, the Special Minimum Wage program contained in section 14(c) of the FLSA and the definition of “wages” contained in section 3(m).

The FLSA, since its enactment in 1938, has contained provisions designed to prevent the curtailment of opportunities for employment of workers with disabilities by authorizing employers, after receiving certification from the Department of Labor, to pay wage rates less than the Federal minimum wage to employees whose earnings and productive capacities are impaired by a disability. Let me begin by saying that while the Wage and Hour Division (WHD) is committed to enforcement of all the laws under the WHD’s jurisdiction, the staff of the agency are particularly committed to ensuring that vulnerable populations, such as workers with disabilities and youth, are protected from exploitation. As I will highlight, our accomplishments in clarifying the requirements of section 14(c), increasing both staff and staff knowledge within this program, providing ongoing compliance assistance to all stakeholders, and conducting targeted enforcement initiatives have contributed to more compliant workplaces for workers with disabilities.

Like all regulatory enforcement agencies, WHD employs a variety of tools and activities to enforce the law and achieve compliance. The agency’s mission is to promote and achieve compliance—not just to identify violations after they occur, but to prevent the violations in the first instance, particularly when workers may be at risk, may not be aware of their rights or are unable to assert those rights. Before I address this agency’s enforcement of the special minimum wage program, I will discuss the certification process and the statutory and regulatory requirements of section 14(c).

CERTIFICATION UNDER FLSA SECTION 14(C)

The Department’s regulations administering section 14(c) are contained at 29 CFR Part 525. Section 14(c) permits the payment of a special minimum wage—one that is less than the Federal minimum wage—to workers who have disabilities that impair their earning and productive capacities for the work being performed. Most workers in this country who have disabilities are not and should not be receiving a special minimum wage because their on-the-job productivity is the same as other workers through training, workplace accommodations and their own ability and determination. I cannot stress strongly enough that payment of a special minimum wage is not an option solely because a worker has a disability. The disability must impair the worker’s productivity for the job he or she is actually performing. A WHD investigator, when conducting an investigation, routinely reviews medical documentation, production records, and supervisor notes to ensure that each worker receiving a special minimum wage under section 14(c) not only has a disability, but that disability impairs his or her production.

Prior to paying a special minimum wage, and at periodic intervals depending upon the nature of establishment, the employer must apply for and receive a certificate issued by WHD. The employer must complete and submit the *Application for Authority to Employ Workers with Disabilities at Special Minimum Wages* (Form

WH-226), and in the case of renewal applications where special minimum wages have been paid in the recent past, the employer must also complete and submit the *Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Special Minimum Wages* (WH-226A). The latter form, which must be submitted for every establishment or worksite where workers with disabilities were employed at special minimum wages during the employer's last completed fiscal quarter, requires information about each worker who received a special minimum wage, including the name, primary disability of the worker, the type of work performed, and the average earnings per hour of the worker. Both forms may be downloaded from the WHD Web page.

In 1994, the WHD centralized all processing of applications to pay special minimum wages in Chicago. The portion of the WHD National Certification Team that processes applications under section 14(c) is composed of three WHD Compliance Specialists trained in the requirements of section 14(c), the certification process, and customer service; one clerical support staff, and a supervisor. The Compliance Specialists review applications for completeness, accuracy, and compliance. If there are deficiencies or errors in the application, the Compliance Officer will contact the employer in order to correct those deficiencies or errors. An important aspect of both the section 14(c) certification and enforcement processes is the statutorily required employer representations and written assurances included on the WH-226A. These statements constitute a written acknowledgement by the employer that it not only understands the requirements of section 14(c) but will comply with those requirements. Applications for certification are denied if the applications are incomplete, in error, or reflect noncompliance with the provisions enforced by WHD.

Once the National Certification Team approves the application, a certificate authorizing the payment of special minimum wages will be issued (Form WH-228-MIS). Approximately 2,050 applications are reviewed each year. The WHD issues four different types of certificates under section 14(c):

- Community Rehabilitation Center (CRP) certificates, which are issued for a 2-year period. CRPs (formerly known as sheltered workshops and also known as work centers) are establishments that specialize in the employment of workers with disabilities and normally provide rehabilitation, life-skill, therapeutic, and recreation services for clients.
- Hospitals and residential care facilities may also employ their patients as patient workers. These Patient Worker certificates are also issued for 2-year periods.
- For-profit business establishments (such as fast food establishments, retail stores, and mail distribution centers) may also receive certificates. These certificates are issued for a 1-year period.
- School Work Experience Program (SWEP) certificates are issued to schools, allowing them to place their students with disabilities with employers in a "joint employment" situation. If all the conditions of section 14(c) are met, the employer may pay the student with a disability, that impairs his or her production for the work being performed, a special minimum wage under the SWEP certificate issued to the school.

All section 14(c) certificates expire. Each certificate is issued with an expiration date. Approximately 90 days before the expiration date, the National Certification Team will forward to the employer a renewal package pre-populated with application data. If the application is not received by the National Certification Team, reminder notices are forwarded to the employer 60 days before the certificate expiration date and again 30 days before the expiration date if necessary. If the renewal application is not received prior to the expiration date, the National Certification Team will advise the employer, by letter, that the certificate has expired and it no longer has authority to pay workers with disabilities a special minimum wage.

Some firms advise the National Certification Team that they no longer require certification. Employer reasons for non-renewal vary, but as the Department advised the Government Accountability Office when responding to its 2001 Report, those reasons include:

- The productivity of employees with disabilities may increase to the point where earnings exceed the Federal minimum wage and thus subminimum wage authority may not be needed until newer, less productive employees come to the work center.
- Employment opportunities may not be available for workers with disabilities at certain times during the 2-year certification period as contracts end and start throughout the period.
- Participation in many State and private programs—and the accompanying funding critical to the viability of the work centers—often requires a current certificate authorizing the payment of special minimum wages. In some circumstances the funding enables the work centers to raise the pay of some workers with disabilities

to the full Federal minimum wage, even though the worker's productivity would justify the payment of a subminimum wage.

The National Certification Team does follow-up on the approximately 250 employers that do not respond to our renewal notices each year. It has been our experience that about 100 of the former certificate holders may be removed from the data base as a result of records checks or phone calls. Often employers are no longer in business or have merged with other certificate holders. The remaining 150 employers who did not renew, receive letters inquiring as to whether it was their intention to allow the certificate to expire. Of that number, about 45 employers contact the WHD stating the certificate authority is no longer required or desired. About 60 employers each year reply that they wish to renew their authority and submit an application. The remaining 45 employers never respond to our letter of inquiry.

Once the employer receives a certificate, it must inform each worker with a disability who will be receiving special minimum wages, or his or her parent or guardian if appropriate, both orally and in writing, of the terms of the certificate. This may be accomplished by posting or making copies of the certificate available. In addition, employers paying special minimum wages must display, or make available to workers, the *WHD Poster Employee Rights for Workers with Disabilities Paid at Special Minimum Wage Rates* (Form WH-1284).

STATUTORY AND REGULATORY REQUIREMENTS OF SECTION 14(C)

The FLSA requires that a special minimum wage under section 14(c) be a commensurate wage rate; one that is based on the worker's individual productivity in proportion to the wage and productivity of experienced nondisabled workers performing essentially the same type, quality, and quantity of work in the vicinity in which the individual is employed (see 29 CFR § 525.525.3(i)). This requires that the employer identify and define the job that will be performed by the worker who will be receiving the special minimum wage, establish detailed standards for the job in terms of quality and quantity of production, and accurately determine the productivity of workers who do not have disabilities that impact their productivity when performing that job using an acceptable industrial work measurement process. These steps, which establish the standard for the job, must be performed for every job that will be performed by a worker paid a special minimum wage. This process must be performed again when any aspect of the job is changed—such as when the type of equipment or materials being used are changed, the number of items being handled in a production cycle is altered, or when production methods are reorganized.

The employer would then normally measure the productivity of each worker with a disability who will be employed to perform the work, in order to compare the performance of the worker with a disability in terms of quality and quantity of production, and establish a commensurate rate. For workers who will be paid on an hourly basis, the regulations require that his or her productivity be measured within the first 30 days of employment and at least every 6 months thereafter. New measurements must be conducted when an employee changes jobs. Employers are not required to conduct work measurements of workers who are paid on a piece rate basis as once the standard for the job has been accurately established, every worker's productivity, whether the worker has a disability or not, will be determined by the number of pieces he or she completed.

The employer must also determine the prevailing wage paid to experienced workers performing that job in the same vicinity as the workers with disabilities who will be paid under the authority of section 14(c). In most cases, employers will be required to annually survey a representative number of employers who employ experienced workers performing the same type of work in the area to determine the prevailing wage. Additional reviews of prevailing wages are required when State or Federal minimum wages are increased. Surveys are not necessary if the work is subject to the McNamara-O'Hara Service Contract Act (SCA), as the contract will normally provide the prevailing wage rate for each job; or when the employer's workforce is comprised mostly of experienced workers who do not have disabilities performing the same work as those paid under the terms of the section 14(c) certificate. Employers are required to submit samples of actual work measurements and prevailing wage surveys when submitting Form WH-226 to renew a section 14(c) certificate.

The FLSA and regulation also require that an employer paying special minimum wages under section 14(c) create and retain certain records in addition to those normally maintained by employers. These records include documentation of each employee's disability and how that disability impairs the employee's productive and earning capacities for the job being performed. Records detailing the work measure-

ments conducted for each job, the prevailing wage rates determined, and individual worker productivity must also be preserved.

WHD'S ENFORCEMENT AND ADMINISTRATION OF FLSA SECTION 14(C)

The agency's special minimum wage activities and initiatives are far too numerous to list individually, so I will point out our key efforts and accomplishments over the past several years.

The WHD has spent considerable resources re-invigorating its section 14(c) program since 1994. It is important to note that certified employers represent less than .07 percent of the approximately 7 million FLSA covered work places in the United States. Workers with disabilities receiving special minimum wages account for less than .04 percent of the estimated 130 million workers covered by the FLSA.

For each of the past several years, each WHD regional has conducted a section 14(c) enforcement initiative as part of the agency's strategic plan. Building on a National Compliance Baseline Survey that was conducted by WHD in 2002, the regions have targeted certificated employers with larger numbers of workers paid special minimum wages. On average, WHD has concluded approximately 135 section 14(c) investigations a year over the last 5 years, and collected \$600,000 in back wages for 3,000 workers on average each year over the 5-year period.

The Government Accountability Office (GAO) made several recommendations for improving WHD's oversight of section 14(c) in its 2001 Report *Characteristics of Workers with Disabilities and Their Employers, and Labor's Management, Which Needs to Be Improved*, GAO-01-886, dated September 4, 2001. Those recommendations, which included improving the database of certificate actions, tracking staff hours devoted to the 14(c) Program, conducting directed investigations, training staff, and posting the Field Operation Handbook, among other recommendations, have all been implemented. Many of those I have discussed in my testimony today. Several of these recommendations were developed in conjunction with WHD and were actually implemented prior to the publication of the report. The WHD not only implemented all of the GAO recommendations but took additional steps to improve the program.

WHD re-instituted the Regional Section 14 Team Leader position. Each of five regions has a senior Compliance Specialist, trained in the FLSA and section 14(c), who coordinates and oversees the enforcement and technical assistance activities of the Region. With the WHD National Office Child Labor and Special Employment Team, through monthly teleconferences, the Regional Section 14 Team Leaders form the Section 14 Working Group, an important advisory body for the program that provides both direction and oversight. The Team Leaders work with the National Certification Team to ensure the certification process is in sync with the enforcement and technical assistance aspects of the program.

In addition, WHD has created a wide assortment of compliance assistance materials to help employers attain, understand, and maintain compliance with section 14(c). All of these tools are available on the WHD Web page, and many are included with the periodic compliance mass mailings that are sent to certificate holders. For example:

- The WHD Field Operations Handbook chapter dealing with section 14 has been available to all stakeholders on the WHD Web page since at least 2003.
- The Section 14(c) *e-laws* Advisor, an electronic interactive compliance tool that allows interested parties to learn about the program and research specific areas of section 14(c) has also been operational for several years.
- WHD has developed a series of seven fact sheets that provide specific information about various compliance requirements of section 14(c). Several of these fact sheets are routinely mailed to certificate holders during the certificate renewal process.
- The section 14(c) Working Group has developed and continues to deliver specialized WHD Investigator section 14(c) training to improve both the enforcement and compliance assistance aspects of the program.
- WHD has partnered with several organizations, including NISH (formerly known as the National Institute for the Severely Handicapped), to educate the regulated community about the requirements of the section 14(c) program.

WHD regional and local district offices will continue to develop enforcement and education initiative to promote compliance with section 14(c).

DEFINITION OF "WAGE" UNDER THE FAIR LABOR STANDARDS ACT

The FLSA defines the term "wage" in section 3(m) of the Act to include "the reasonable cost . . . to the employer of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished

by such employer to [its] employees.” The implementing regulations codified at 29 CFR Part 531 interpret generally the provisions of section 3(m) of the Act. These provisions apply to special minimum wages under section 14(c) in the same manner as they apply under all other applicable FLSA minimum wage requirements.

Under section 531.3 of the regulations, “[t]he term *reasonable cost* as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished . . . to . . . employees [and] does not include a profit to the employer or to any affiliated person.” In addition, “the ‘reasonable cost’ to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation . . . arrived at under good accounting practices.” Furthermore, “[t]he cost of furnishing ‘facilities’ found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.” See 29 CFR 531.3(a), (b), (c), and (d).

The FLSA recordkeeping regulations at 29 CFR 516.27 govern the information and data that employers must keep with respect to any deductions from and additions to wages for board, lodging, or other facilities furnished to employees. Such records must include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost that is claimed by an employer. While no particular degree of itemization is prescribed, the amount of detail required must show, consistent with good accounting practices, sufficient information to enable the Wage and Hour Division to verify the nature and amounts of expenditures claimed by an employer as the reasonable cost of furnishing employees with board, lodging, or other facilities.

Section 3(m) of the FLSA provides a statutory definition of the term “wage.” This provision is not an exemption or exception to the applicable minimum wage or overtime requirements. Rather, it provides the statutory parameters for making determinations of the reasonable costs to employers of furnishing employees with board, lodging, or other facilities that may be credited towards meeting the FLSA’s monetary obligations. All investigations conducted by WHD, whether initiated by complaints or as part of a directed, targeted enforcement initiative, should include an evaluation of the appropriateness of an employer’s claim for credit against wages for furnishing board, lodging, or other facilities to employees pursuant to the requirements of section 3(m) of the FLSA.

Mister Chairman, this concludes my prepared remarks. I will be happy to answer any questions that you or the members of the subcommittee may have.

Senator HARKIN. Mr. McKeon, thank you very much.

Let me just go through some steps here just so I understand it better.

The employer has to be the moving party? I mean, if they are going to hire someone with a disability, they have to request or file a 14(c) application?

Mr. McKEON. Correct.

Senator HARKIN. And that goes to where, Chicago?

Mr. McKEON. It goes to Chicago.

Senator HARKIN. To Chicago. Now who reviews the application, and how many staff are assigned this task?

Mr. McKEON. The Chicago certification team on 14(c) has three compliance specialists who are assigned to it, plus a support staff and a supervisor.

Senator HARKIN. They have three people. Say that again, how many people?

Mr. McKEON. There are three compliance specialists who review it—these are people who are specifically trained in 14(c) and customer service—and one support staff. That is clerical work. And a supervisor.

Senator HARKIN. And one supervisor?

Mr. McKEON. One supervisor.

Senator HARKIN. One supervisor for three people?

Mr. MCKEON. Well, there are other aspects of the certification team with other people doing it, such as patient workers and student learners.

Senator HARKIN. Really, there are three people?

Mr. MCKEON. There are three people that do 14(c).

Senator HARKIN. For 5,000-some employers?

Mr. MCKEON. Yes, sir. They only apply—most 14(c) certificates are renewed every 2 years, and they are not all renewed at once. They come in—

Senator HARKIN. Oh, sure. Sure. Still, though, for 5,000 to be coming through.

Mr. MCKEON. They renew about 2,500 a year, sir.

Senator HARKIN. Three people working on that, huh?

Mr. MCKEON. About 800 a piece.

Senator HARKIN. Eight hundred each. I suppose they just come in week by week by week?

Mr. MCKEON. Correct.

Senator HARKIN. What do these three—when an application comes in or a renewal—these would be renewals?

Mr. MCKEON. Yes.

Senator HARKIN. When a renewal comes in, what would a person look for? They would just look as to when they first applied? I mean, what—

Mr. MCKEON. Well, the renewal of the application contains some additional back-up material. The initial application doesn't contain information about workers because there are no workers yet. The renewals contain information about individual workers, and it will show their productivity. It will show their disability. It will show their earning rate and how the rates are set.

Individual team members will look at how the rates are set to make sure that they are in compliance with paying the appropriate, proportionate prevailing rate.

Senator HARKIN. Let me ask you this. Are 14(c) applications ever denied?

Mr. MCKEON. Yes, sir.

Senator HARKIN. Why?

Mr. MCKEON. Well, they may be denied because the employer hasn't properly filled out the document.

Senator HARKIN. Probably just the paperwork hadn't been filled out because there is no—

Mr. MCKEON. Or they indicate that they are not paying the correct prevailing rate or they are not paying the proportionate rate.

Senator HARKIN. Well, this is the first application. They don't have anybody.

Mr. MCKEON. First application, I don't know whether any have ever been denied.

Senator HARKIN. But the renewals you say are sometimes denied?

Mr. MCKEON. Yes. The renewals sometimes result in—

Senator HARKIN. Do you have any idea how many? There are 800 a year—no, there is—

Mr. MCKEON. Twenty-five hundred.

Senator HARKIN [continuing]. Two thousand, five hundred a year coming in. Do we have any idea how many?

Mr. MCKEON. I have no idea. I can get back to you on that.

Senator HARKIN. I would like to know, just if there is any data on how many are ever denied. Mostly, that would be something that would show up on a piece of paper?

Mr. MCKEON. Yes, sir.

Senator HARKIN. 14(c) applications have to be renewed every 2 years. Is that what you said?

Mr. MCKEON. It depends on what the 14(c) is for. If it is for a CRP, it would be renewed every 2 years. If it is a private, for-profit firm, it would be renewed every year.

Senator HARKIN. I see. Again, I think in your testimony—my question has to do with, so you get paperwork in. There are only three people doing this. Is there ever any personal contact with these employers, or you just look at the paperwork?

Mr. MCKEON. No, there are—

Senator HARKIN. How many did you say a year, 250 or something like that? Didn't you say there were—

Mr. MCKEON. The certification team will be either in correspondence or by telephone talking to an employer if there are questions about the application. We investigate about 100 and—

Senator HARKIN. Oh, 250 employers you say that do not respond?

Mr. MCKEON. Right. That don't renew on time.

Senator HARKIN. I see.

Mr. MCKEON. And if they don't renew on time, there are attempts to contact them.

Senator HARKIN. Telephone?

Mr. MCKEON. Telephone, by letter. Yes.

Senator HARKIN. Are there ever any worksite visits at all?

Mr. MCKEON. Yes, sir.

Senator HARKIN. By whom?

Mr. MCKEON. By investigators in the field.

Senator HARKIN. Not by these three people?

Mr. MCKEON. I don't believe so.

Senator HARKIN. No. Who would—do you have any idea how many onsite visits are made every year to check on compliance?

Mr. MCKEON. We have averaged over about the last 5 years 135 investigations a year.

Senator HARKIN. One hundred thirty-five. That would be 135 site visits a year?

Mr. MCKEON. Correct.

Senator HARKIN. Out of 5,000.

Mr. MCKEON. That is correct, sir.

Senator HARKIN. Would these site visits, would they be the ones made if there is indication of any problems or something like that? I assume that is what would—

Mr. MCKEON. There might be. Each region and, within each region, each district office has, as part of their strategic plan, an initiative to stress enforcement in section 14(c). There are a number of directed investigations conducted. Those are cases where there is no outward indication of a violation.

Senator HARKIN. There are some of those?

Mr. MCKEON. Most of them are that—

Senator HARKIN. They are unannounced?

Mr. MCKEON. We get very few complaints in this field.

Senator HARKIN. OK. Are these 135 site visits then, are they sort of unannounced visits where inspectors show up and say, "I am with the Wage and Hour Division?"

Mr. MCKEON. They can be, but they don't have to. There may be a letter sent. I believe in most cases, a letter is sent. I can remember way back when, when I did them, we sent a letter because the records required to be reviewed aren't always kept onsite.

Senator HARKIN. Yes.

Mr. MCKEON. We would tell them what records we wanted to see.

Senator HARKIN. In your testimony, you said that the supplemental data sheet contains information about each worker—

Mr. MCKEON. Correct.

Senator HARKIN [continuing]. Who receives a special minimum wage. Over the weekend, I looked at those papers and how they fill them in. They put the name and everything down there. Do employers only file this information when they seek to renew their certificates?

Mr. MCKEON. They only submit that information when they seek to renew. However, they are required to have that on file—

Senator HARKIN. On file.

Mr. McKeon [continuing]. When we visit.

Senator HARKIN. If everything seems to be in order, they still could have a spot check, right?

Mr. MCKEON. Yes, sir.

Senator HARKIN. Do you think—

Mr. MCKEON. This is an industry where we get—as I said before, we get very, very few complaints. We—because of the vulnerability of the workers—we have, I can only say, for 33 years. For 33 years, we have had a directed program where we go out and do investigations with or without a complaint.

Senator HARKIN. Do you have any idea how many investigators we are talking about? We still don't know.

Mr. MCKEON. How many investigators?

Senator HARKIN. Yes.

Mr. MCKEON. Every journeyman-level investigator should be able to conduct a section 14(c) investigation, although I will tell you that in most offices, there are typically a handful—two, three, four—who are, we don't like to say "specialize" because we don't consider our investigators specialists in any one field, but who tend to do them.

When I was an investigator in Providence, when I was actually a trainee, the district director took me by the hand and taught me how to do section 14 investigations. I became one of the two or three people in the office who typically would do the section 14 cases.

However, if I were busy with something else and the other two or three people were busy with something else, and a section 14 came up that had to be done right now, any other senior investigator in the office would be able to do it.

Senator HARKIN. OK. These investigators are not just dedicated to 14(c)?

Mr. MCKEON. No.

Senator HARKIN. Is the Department of Labor more likely to investigate particular worksites or particular industries?

Mr. MCKEON. In 14(c)s, Senator.

Senator HARKIN. Yes.

Mr. MCKEON. I would say probably more likely to indicate worksites.

Senator HARKIN. Worksites.

Mr. MCKEON. Because a worksite may have multiple industries at it.

Senator HARKIN. Do we have any data on what percentage of investigations result in penalties to the employer?

Mr. MCKEON. I don't have that, but I could get that for you.

Senator HARKIN. I would like if you have that, that would be good.

Does DOL keep track of how many people with disabilities are employed under a 14(c) application for a particular employer?

Mr. MCKEON. I believe they would, but I would have to check on that.

Senator HARKIN. I just wonder how they track it, too. Yes. Does DOL keep track of how many people with disabilities are employed under a 14(c) application because a 14(c) application—correct me if I am wrong, Mr. McKeon—but they don't have to absolutely list everybody, do they?

Mr. MCKEON. Not on the initial application.

Senator HARKIN. No. Just, but on the renewal, they do?

Mr. MCKEON. On the renewal, they do.

Senator HARKIN. They have to list everybody.

Mr. MCKEON. Yes. Everybody that was employed in the last calendar quarter of the fiscal year.

Senator HARKIN. Last—

Mr. MCKEON. Last quarter of the fiscal year.

Senator HARKIN. Right.

Mr. MCKEON. It still may not be a complete list.

Senator HARKIN. Is any of this information routinely shared with State labor enforcement entities?

Mr. MCKEON. I don't know that, sir. I could check.

Senator HARKIN. Well, the reason—

Mr. MCKEON. I mean, I know, as an investigator, we used to get calls from the Rhode Island State Department of Labor wanting to know if a particular entity had a 14(c) certificate, and we used to, quite frankly, chuckle because they have a certificate that they have to post.

Senator HARKIN. The reason I ask that is that it is my understanding that the Iowa Workforce Development requested information about the number of 14(c) employees in the State of Iowa—not just here, but in the State—and where they were employed, and they were told they had to file a Freedom of Information Act request.

That is why I just wondered, do these routinely go back and forth to the State or not if they request it?

Mr. MCKEON. I don't know whether they are routinely shared, but I also don't know whether they are protected under privacy. So—

Senator HARKIN. Find out about that.

Mr. McKeon [continuing]. It is kind of a tough area.

Senator HARKIN. Let us shift to 3(m). 3(m) is the provision that allows them to deduct certain things, like room and board and stuff. What information about 3(m) deductions is filed with the Department of Labor? What do they have to give as information to you?

Mr. McKEON. The employer doesn't give information. They must have information when we come. When we come to do an investigation, they must be able to account for all of the costs that are incurred, that are allegedly incurred that the employer is taking credit for.

If we don't do an investigation, they don't—there is no clearing-house for 3(m) information.

Senator HARKIN. The only way you would ever find out about a 3(m)—so when they file the renewal for 14(c), they don't have to file 3(m)?

Mr. McKEON. I don't know whether they do or not, Senator.

Senator HARKIN. They don't. All they have to do—

Mr. McKEON. No, I suspect not. But, I can't tell you that for sure.

Senator HARKIN. They have just got to keep it on file. The only way DOL would ever find out about that would be through a site inspection and asking to see the records, right?

Mr. McKEON. Yes.

Senator HARKIN. Or I suppose you could ask them to send it to you, I suppose.

Mr. McKEON. We go to the site on these.

Senator HARKIN. How do you prove that someone even wants the food or housing that is being deducted from their paycheck? Maybe they don't even want it.

Mr. McKEON. I can tell you from my experience, Senator, that under 14(c), the use of 3(m) is very, very rare. I don't remember running into it as an investigator ever. I ran into 3(m) a lot as an investigator, but not on a 14(c) case.

Senator HARKIN. Say that again. I misunderstood. You ran into 3(m) deductions.

Mr. McKEON. In the normal course of my work, I ran into 3(m) fairly regularly.

Senator HARKIN. Yes.

Mr. McKEON. I don't ever remember running into 3(m) in a 14(c) situation.

Senator HARKIN. You could have a 3(m) deduction but not have a 14(c) exemption? I don't understand how you do that.

Mr. McKEON. Well, no. In a non-14(c) investigation, I am investigating a restaurant, for example.

Senator HARKIN. Yes.

Mr. McKEON. I would find on the record that they were deducting for meals, as an example. That would be fairly normal. We see that regularly. 14(c), I would say in my 15 years as an investigator and 7 years as a district director, I never saw one where 3(m) was applied. That doesn't mean—

Senator HARKIN. I am told that 3(m) is basically used for migrant workers a lot?

Mr. MCKEON. 3(m) may be used for migrant workers, but it is used in many industries. Under 14(c), this is the first instance in my career that I have heard of it. That doesn't mean anything. I mean, I am just—my vision is fairly narrow.

Senator HARKIN. I just wonder, is there criteria, and if there is, what would that criteria be for determining if housing or food or other deductions are primarily for the benefit of the worker? How do you determine that?

Mr. MCKEON. We have to look at all of the facts in the situation. Now, in the case, as your staff mentioned, migrant workers, if that is the housing that the migrant workers want to live in and the employer or farm labor contractor is deducting or taking credit for that and it meets the safety and health standards, then it can be taken. But, they have to prove the value. What is the reasonable cost?

Senator HARKIN. Mr. McKeon, I said I wasn't going to get specifically into Atalissa. Are you aware of this Atalissa case?

Mr. MCKEON. I am aware of it, but I am also not really prepared to talk about it, sir.

Senator HARKIN. Well, just hypothetically, I am just saying how could it be that for going on 30 years, they had this situation like this bunkhouse here, the old abandoned school where these people lived, and no one from DOL or whatever checked to see if 3(m) was being appropriately used?

I mean, how could that just go on year after year after year? Wouldn't something pop up some place? Wouldn't there be an inspection? How could that go on? How could something like that exist for so many years?

Mr. MCKEON. I would tell you, Senator, that I suspect there are a lot of 14(c) employers that have never seen a Wage and Hour investigator. It is a resource issue.

Senator HARKIN. Well, you have got investigators. I still don't know how many investigators there are out there.

Mr. MCKEON. There are somewhere between 730 and 750 currently.

Senator HARKIN. Seven hundred fifty?

Mr. MCKEON. Yes.

Senator HARKIN. For the entire United States?

Mr. MCKEON. Correct. When I started—

Senator HARKIN. They do more than just—these are—

Mr. MCKEON. They do. They do the full range and scope.

Senator HARKIN. Yes.

Mr. MCKEON. When I started, there were 1,500. That was 1975.

Senator HARKIN. Whoa. Tell me that again.

Mr. MCKEON. When I started in Wage and Hour, 1975, there were 1,500 investigators.

Senator HARKIN. Fifteen?

Mr. MCKEON. Fifteen—one, five.

Senator HARKIN. What?

Mr. MCKEON. One, five.

Senator HARKIN. One thousand five hundred investigators in Wage and Hour?

Mr. MCKEON. Correct. Yes, sir.

Senator HARKIN. In 19, what, 50?

Mr. MCKEON. 1975. Come on. I am not that old.

[Laughter.]

Senator HARKIN. No, no, no, no.

Mr. MCKEON. Just because it says "Mister," it is not my father.

Senator HARKIN. 19——

Mr. MCKEON. '75.

Senator HARKIN. 1975.

Mr. MCKEON. That was about our peak.

Senator HARKIN. How many are there now?

Mr. MCKEON. There are around 740, something under 750.

Senator HARKIN. Half as many?

Mr. MCKEON. Yes, sir.

Senator HARKIN. There are not half as many employers out there?

Mr. MCKEON. I would think not. There are about 7 million employers.

Senator HARKIN. Seven hundred fifty. Well, yes, I see that. My, my, I did not know that. Because I have just often wondered how that could go on for so many years, and nobody would ever check on something like this. Although there were reports in the newspapers, and there are things popping up all the time that some people were kind of warned about it.

Again, I don't know. I am still trying to get to the bottom. Is this just one isolated little case in the United States? I am going to ask the panel that. Are there more that we don't know about out there like this? I don't know.

Mr. MCKEON. I don't either, sir.

Senator HARKIN. I was surprised, Mr. McKeon, to find out that there is a contract agency in Texas, this Henry's Turkey Service, they hired these men. They applied for the 14(c). They put them on a bus, and they drive them up to Iowa. They put them in this bunkhouse, and they go to work at this turkey plant. And the turkey plant doesn't pay them. They pay Henry's Turkey Service in Texas.

Henry's Turkey Service deducts all the 3(m) and all that kind of stuff. They pay the 600 bucks a month, and I think, if I am not mistaken, they give the men some spending money.

Mr. MCKEON. That is what the press accounts indicate.

Senator HARKIN. That is what I heard. It wasn't until, I think, a sister of one of the men that was there found out that after all these years, he had nothing to show for it. I am still wondering is this commonplace? Have you ever seen this kind of arrangement anywhere?

Mr. MCKEON. The number of 14(c) for-profit employers is very small.

Senator HARKIN. Yes.

Mr. MCKEON. I mean, I don't know what that number is, but it is a very small number, I am told. Most are nonprofit organizations.

Senator HARKIN. Yes. Yes, I am going to try——

Mr. MCKEON. I will be honest with you. This is the first situation like this I have ever heard of, and it is disconcerting.

Senator HARKIN. Well, it is pretty bad, and I am still trying to get to the bottom of just what we need to do with 14(c) and 3(m)

and tightening up on those and just making sure that, first of all, under 14(c) there has to be determination of your productivity.

Mr. MCKEON. Correct.

Senator HARKIN. I am not certain how much of that is being done, how much you are being paid.

Mr. MCKEON. Every investigation, and that is a big part of—the 14(c) investigation takes considerably longer, about twice as long, as a normal FLSA investigation because that is one of the criteria that we have the investigators look at, which is the individual. The individual may be disabled, but not disabled for their work.

Senator HARKIN. That is right.

Mr. MCKEON. That is something that we have to be very careful that we don't just take a look and say, "Oh, that person is disabled so I will move on." "Is that individual disabled for the work that they are doing?"

Senator HARKIN. Mr. McKeon, thank you very much.

Mr. MCKEON. You are welcome.

Senator HARKIN. You get me some of that information I asked about, I would sure appreciate it very much.

Mr. MCKEON. Yes, sir. I will get that.

Senator HARKIN. Thank you, Mr. McKeon.

Mr. MCKEON. Thank you, sir.

Senator HARKIN. Next we will turn to our second panel. Our second panel is Mr. Curt Decker, affiliated with the National Disability Rights Network since its inception in 1982. As executive director of the Nation's largest nongovernmental enforcer of disability rights, Mr. Decker oversees activities related to training and technical assistance and legislative advocacy.

Then we have Ms. Bobo. Kim Bobo founded the Interfaith Worker Justice in 1996 and has since provided leadership and vision for building the organization and the movement for worker justice.

Joyce Bender is the CEO and founder of Bender Consulting Services, Inc., a firm that provides competitive employment opportunities for people with disabilities who are trained in the information technology, engineering, finance, accounting, human resources, and general business areas. She has successfully employed and placed more than 400 persons with significant disabilities in competitive employment.

James Leonard was an attorney for the U.S. Department of Labor from 1973 to 1995, where he handled trial, appellate, regulatory, and opinion work under the Fair Labor Standards Act and also supervised trial litigation under various other laws as well. He now does volunteer legal work for Farm Worker Justice and the Child Labor Coalition and is on the advisory board of the National Wage and Hour Clearinghouse.

Well, thank you all very much for being here and for your testimonies. Like I said, they will be made a part of the record in their entirety. If you could just sum it up in several minutes, I would certainly appreciate it so we could get into a question and answer period.

First, we will start with Mr. Curtis Decker, of course, a longtime friend of this committee and done a lot of work on disability rights for a long time. Welcome, Mr. Decker, and please proceed.

**STATEMENT OF CURTIS DECKER, EXECUTIVE DIRECTOR,
NATIONAL DISABILITY RIGHTS NETWORK, WASHINGTON, DC**

Mr. DECKER. Good afternoon, Senator, and thank you for holding this important and timely hearing.

The National Disability Rights Network is a voluntary membership organization of the federally mandated Protection and Advocacy and Client Assistance Programs that were created by Congress in 1970 to protect the rights of children, adults with disabilities, and their families.

We have an agency in every State, U.S. territory, and the District of Columbia, and we offer a legal voice to individuals with disabilities and aim to uncover and eliminate maltreatment and ensure compliance with the laws designed to protect the rights of individuals with disabilities.

The concept that individuals with disabilities should be earning less than other workers is an out-moded concept, with its origins in the creation of the Fair Labor Standards Act of the 1930s, a time when veterans and people with physical disabilities were seeking factory jobs in the manufacturing industry. But our world has changed significantly since the 1930s, along with our expectations of people with disabilities.

Services and supports for individuals with a disability that were only a dream in the 1930s are now a reality. The creation of assistive technology devices, advances in supportive employment services, experience in the use of behavioral supports, and the concept of reasonable accommodation were not even considered in the 1930s or for many decades later.

Subsequent amendments to the 14(c) provisions in 1966 and in 1986 failed to take into consideration these advancements. It is inappropriate to single out and stigmatize workers with disabilities in an era of demonstrated progress and thinking about disabilities through passage of such landmark legislation, thanks to your leadership, of the Americans with Disabilities Act, the Assistive Technology Act, the Ticket to Work and Work Incentives Improvement Act, and strengthening of Section 504 of the Rehabilitation Act.

People with disabilities can and should be integrated into the workplace. Employers such as Hyatt Hotels and Walgreens continually prove that individuals with a disability can meet the productivity and quality standards required of these businesses and, thus, earn the minimum wage or prevailing wage for that position.

From a public policy perspective, if we ask the question whether if Congress and the disability community today would create a program like 14(c) if it didn't exist, I think the answer would be a resounding no.

That said, we do have to be cognizant of the consequences an immediate abolishment of 14(c) would have on current employees and employers, as well as individuals with significant disabilities. We must work together in the short term to improve section 14(c) provisions, while Congress, the Department of Labor, disability service providers, disability advocates, and other employment experts evaluate the efficacy of the section 14(c) provision program.

Now NDRN is working in conjunction with our affiliates in Iowa, Texas, Missouri, Illinois, and South Carolina regarding the recent discovery of the frightful work and living conditions for employees

at Henry's Turkey Service in Atalissa. Prior to this event, we have also worked with programs in Hawaii, Kansas, Louisiana, Nebraska, North Dakota, Oregon, and Washington State on past wage and hour violations. Some of them sounding very similar to the situation that was uncovered in Atalissa.

The weaknesses of the 14(c) program and the lack of oversight enabled Henry's Turkey Service to exploit the labor of individuals with disabilities in order to increase the profit of the business. This is outrageous and cannot be continued.

Updating Federal employment legislation and regulations for individuals with disabilities is long overdue. Now you heard this is not a new issue. Both the GAO and the IG conducted investigations of how the Wage and Hour Division oversees the wage certificates and offered very specific recommendations. While we would acknowledge that the Wage and Hour Division has made some progress, there is still much more to be done.

We believe the following recommendations ought to be taken into consideration—that guidelines for employee evaluations must be more explicit and standardized; there needs to be a system of transparency as current data is not accessible, as you stated; we also have to use a FOIA request in order to get basic information. This is very cumbersome, time consuming, and not very timely.

The critical information on the 14(c) program needs to be on the Department of Labor's Web site and presented with clarity in such a detail that red flags can be detailed. Current regulations require that employers maintain records. Assuring better accessibility would not present an additional burden.

Clearly, enforcement of the 14(c) program needs to improve. However, only just increasing enforcement of these provisions by the Department of Labor is not enough. There has to be independent oversight that could be provided by programs such as mine, both the Protection and Advocacy system and the Client Assistance Program.

Another concern that has been mentioned of the employees with disabilities is the deduction from cash wages to cover room and board provided by the employer. While this is allowed under the Fair Labor Standards Act, exposing those violations is critical to make sure that people are not subject to exploitation.

This would reduce the disincentive of these exploitative room and board charges and would allow us to have a better handle on what is going on in some of these places that are so obviously out of the way and in very rural areas.

And last, we would also like to see the role of the Office of Disability Employment Policy, ODEP, made more clear on its role in working with the Wage and Hour Division. Right now, ODEP is not authorized. It ought to be authorized with some very clear mandates on how they can contribute to this process.

We also believe that there are not enough sufficient penalties to go after the bad actors. While there is the ability to get back wages, there ought to be increased penalties to make sure that private employers, in particular, do not use this program and abuse people with disabilities.

Last, I would say that this is a pretty complex problem, and it is not just looking at the wage and hour issue. We need to look at

the role of Social Security. Obviously, one of the issues here was the fact that the Atalissa people were also the representative payee. This has happened in many situations where it has all been combined into one group. As a result, it is very hard to get a handle on what is going on.

We would like the review of this issue to include the full range of issues from both the Department of Labor and Social Security and the range of supports and services that people with disabilities need.

Thank you again for holding this hearing. I will be glad to answer any questions.

[The prepared statement of Mr. Decker follows:]

PREPARED STATEMENT OF CURTIS DECKER

I would like to thank Senator Harkin and the other Senators here today for holding this important and timely hearing.

NDRN is a nonprofit membership organization for the federally mandated Client Assistance Program (CAP) and Protection and Advocacy (P&A) systems, created by Congress in the 1970's to protect the rights of children and adults with disabilities and their families. With a presence in every State and U.S. territory, and the District of Columbia, the CAP and P&A systems offer an advocacy and legal voice to individuals with disabilities, and aims to uncover and eliminate maltreatment and ensure compliance with laws designed to protect the rights of individuals with disabilities.

The concept that individuals with disabilities should be earning less than other workers is an out-moded concept with its origins in the creation of the Fair Labor Standards Act of the 1930's, a time when veterans and other people with physical disabilities were seeking factory jobs in the manufacturing industry. But our world has changed significantly since the 1930's. Services and supports for individuals with a disability that were only a dream in the 1930's are now a reality. The creation of assistive technology devices, advances in supported employment services, experience in the use of behavioral supports, and the concept of reasonable accommodation were not considered in the 1930's. Subsequent amendments to the § 14(c) provision in 1966 and 1986 failed to take into consideration these advancements.

It is inappropriate to single out and stigmatize workers with disabilities, especially in an era of demonstrated progression in thinking about disability through passage of such legislation as the Assistive Technology Act, the Americans with Disabilities Act, the Ticket to Work and Work Incentives Improvement Act, and the strengthening of Section 504 of the Rehabilitation Act. Employers such as Hyatt Hotels and Walgreens continually prove that individuals with a disability can meet the productivity and quality standards required of these businesses, and thus earn the minimum-wage or prevailing wage for their position.

From a public policy perspective, we should ask the question: if the § 14(c) waiver did not exist, is it something Congress and the disability community would devise today? I believe the answer to that question is "no." That said, we must be cognizant of the consequences an immediate abolishment of section § 14(c) would have on current employees and employers, as well as individuals with significant disabilities. We must work together in the short term to improve the § 14(c) provision while Congress, the Department of Labor, disability service providers, disability advocates such as the P&A/CAP network, and others evaluate the efficacy of the § 14(c) provision.

NDRN has been working in conjunction with our affiliates, the Client Assistance Program and Protection and Advocacy systems in Iowa, Texas, Illinois, Indiana, Georgia, Missouri, South Carolina, and Wisconsin regarding the recent discovery of frightful work and living conditions for employees at Henry's Turkey Farm in Atalissa, IA. We have also worked closely with Client Assistance Program and Protection and Advocacy systems such as Hawaii, Kansas, Louisiana, Nebraska, North Dakota, Oregon, and Washington in the past on wage and hour violations.

While the exact facts surrounding the Atalissa incident are still unclear, it's impossible to ignore the systemic flaws that have been uncovered. In Atalissa, the weaknesses of § 14(c) and a lack of oversight enabled Henry's Turkey Service to exploit the labor of individuals with disabilities in order to increase the profit of the business. This is outrageous.

Henry's Turkey Service is certainly the catalyst for this hearing, but updating employment regulations for individuals with disabilities is long-overdue. This is not a new issue. A Government Accountability Office report in 2001 highlighted many shortcomings in the §14(c) waiver provision. The same year, the Department of Labor Inspector General also conducted a review of how the Wage and Hour Division issues and oversees the wage certificates allowed under §14(c) and offered specific recommendations. Since then, some progress has been made to improve oversight of the certificates.

Among other improvements, the Department of Labor has worked to eliminate redundancies in their §14(c) records and better verify accuracy. The Wage and Hour Division is now tracking the number of staff hours their investigators devote to the special minimum wage provision and use this information to better manage employers who possess the §14(c) wage certificate. Additionally, employers are now provided with written guidance for §14(c) requirements and other technical assistance.

While the Department of Labor took positive steps to improve §14(c), Henry's Turkey Service lingers as an ugly reminder that more is still required. Inadequate oversight and compliance at worksites covered by a §14(c) certificate still continues. To address this, NDRN offers the following recommendations:

- The guidelines for employee evaluations must be more explicit and standardized.

- A system of transparency must be enacted. Current data is not easily accessible, and making a FOIA request is a lengthy process and requested information cannot be received in a useful time frame or fashion.

- Critical information about the §14(c) program should be on the Department of Labor's Web site, and presented with clarity and in such detail that red flags can be detected. For example, for worksites operating with a §14(c) certificate the percentage of employers operating under the certificate, the productivity level of these individuals, and the dates for which the certificate renewed must be easily accessible. Current regulations require the employer to maintain these records so assuring better accessibility would not represent an additional burden. Information about employers which held a §14(c) certificate that has been revoked, not renewed, or expired should also be made easily available.

- Clearly enforcement of the §14(c) program needs to improve. However, just increasing enforcement of these provisions by the Department of Labor is not enough. Independent oversight of the program provided by the Client Assistance Program and Protection and Advocacy network is warranted. Specifically, CAPs and P&As should be allowed access to §14(c) sites to ensure individuals with disabilities are being treated fairly, without having to maneuver difficult hurdles.

- Another concern for employees with disabilities is the deduction from cash wages to cover room and board provided by an employer. Though allowed under the FLSA, to expose violations for individuals with disabilities who could be subject to exploitation, intent to make deductions should be noted on §14(c) applications. Deductions for room and board should not be handled by the same entity. This would disincentivise exploitative room and board charges which re-claim most of or all wages paid to employees, a practice that should have expired alongside sharecropping and indentured servitude.

- The role of the Office of Disability Employment Policy (ODEP) is currently vague. The role of ODEP should be clarified through statute and include a mandate to work with the Wage and Hour Division to oversee enforcement of §14(c) wage certificates. ODEP's experience working on disability and employment issues could be better utilized to assure the proper implementation and enforcement of Federal employment laws under Department of Labor's jurisdiction which impact individuals with disabilities, such as §14(c). In fact, ODEP has already funded an analysis of the §14(c) wage certificates in terms of Community Rehabilitation Providers, a training assistance center on sub-minimum wage, and expansion of the role of the office to assist with enforcement is a logical means to address the shortfall in oversight by DOL.

- Lastly, for employers to take their responsibilities more seriously, stiffer penalties must be enacted. Though Department of Labor statute allows for revocation of a §14(c) certificate as far back as the date of issuance or date of a violation, there is no clear provision to obtain liquidated damages for violations of section §14(c).

The section §14(c) waiver program is just one piece of the puzzle of employment for individuals with disabilities. In order to reach a comprehensive solution, we need to ultimately examine a number of issues including access to supports and services, disincentives to work within the Social Security program, and archaic attitudes by some service providers.

Thank you again for holding this hearing. I look forward to working with you and your colleagues in the House and Senate to address this issue.

Senator HARKIN. Curt, thank you very much.

Now we go to Joyce Bender. Ms. Bender, welcome. Please proceed.

**STATEMENT OF JOYCE BENDER, PRESIDENT AND CEO,
BENDER CONSULTING SERVICES, INC., PITTSBURGH, PA**

Ms. BENDER. Thank you very much, Senator Harkin.

I want to begin by telling you not only how honored I am to be here, but this is so outrageous, this discussion today, that it seems as if you are always there, always there helping us helping people with disabilities to not be taken advantage of. I want to start by thanking you for that.

Senator HARKIN. Well, you can't imagine how embarrassing isn't the right word, embarrassment. Just how badly I feel that this has taken place in my own State.

Ms. BENDER. I do believe that—

Senator HARKIN. Under my own nose. Didn't even know about it.

Ms. BENDER. But you are doing something about it. You always do something about it.

Senator HARKIN. We are going to do something about it. I just don't know exactly what. That is why we have got you here.

[Laughter.]

Ms. BENDER. I know you will, though. I can count on you.

As you mentioned, I am Joyce Bender. I am the founder and CEO of Bender Consulting Services, which is a company that focuses on competitive employment for Americans with significant disabilities. In addition, I am a woman with epilepsy and a hearing loss. I am also very excited to tell you, Senator Harkin, that I will be the chairman of the board of the National Epilepsy Foundation this May, a great honor to me.

A great honor to me because my life changed 24 years ago. What I did for a living is employment. My specialty is employment and disability. That is what I have done my whole life. I was in executive search at my company in Pittsburgh, PA, where I am headquartered. In the midst of my career, there was a misdiagnosis of my fainting spells.

One evening, I went to the movie theater with my husband. At intermission, I went to get a Diet Coke, and I had a tonic seizure and hit the floor so hard I fractured my skull, broke all the bones in my inner ear. That is why I have the hearing loss. I was rushed to the hospital in a coma.

Thank God, against all odds, I had lifesaving brain surgery. That is when I heard the news. "You have epilepsy." What I did 2½ months later, when I got back to work, I said to myself, "You know, I am placing all these people with all these skills. Now why the heck can't people with disabilities do these jobs?"

I knew very well that they can do these jobs. That is when I founded Bender Consulting Services. I also want to point out to you, Senator Harkin, that I noticed one other thing—that they were paid at a lower rate than other people when they did find employment.

Due to this experience, I founded Bender in 1995. We are now located in 18 States and 2 provinces of Canada. We are a for-profit company. We pay competitive wages, which include, I am proud to say, family benefits coverage.

I want to tell you the main reason we have been successful. It really has nothing to do with me. It has to do with my employees. These are people with significant disabilities that go to work every day on time, early, and compete at such a high level. That is the reason we have been successful.

We have partnered with people such as Highmark, Bayer Corporation, CSC, WellPoint, the MGM Mirage, and Federal agencies such as the NSA, the FAA, and the Naval Supply Systems Command. These are just a few of the companies I have partnered with that seem to realize that talent is really the only discriminator.

I want to tell you, Senator Harkin, I just came back this Saturday from a job fair at the CityCenter in Las Vegas, where they interviewed 50 people with significant disabilities for competitive wages, equal to everyone else.

Before I close, I am going to give you just two examples. One is Jamie. This is a young man that I hired, who now works for Highmark, who has cerebral palsy. He has a very significant disability. Therefore, you cannot understand him when he speaks. Jamie uses augmentative communication. He types with a stick in his mouth.

Jamie, when I met him, had on his resume—this is what it said. It said, “I will take a very low salary because of my disability.” Of course, I told him to take that off of his resume. And you know, I hired Jamie, and he works at Highmark. Since then, he has been promoted several times and is paid a very high salary.

Justin, a person with Down Syndrome, an intellectual disability. When I met him, he was told he should just work as a lawn service person. He works in their mail service operation, and he is paid a very competitive salary.

I would just close by telling you that when I founded Bender, I did not want our motto to be “jobs mean freedom.” I wanted it to be “competitive jobs mean freedom,” because without equal pay, without that great treasure of employment, you are never free in this country.

On behalf of all those Americans with disabilities, thank you again for always being there, Senator Harkin.

[The prepared statement of Ms. Bender follows:]

PREPARED STATEMENT OF JOYCE BENDER

Esteemed members of Congress, I would like to thank you for not only giving me the opportunity to speak today, but also for your care and concern for quality of life and equality of opportunity for all Americans with disabilities.

My name is Joyce Bender; I am the CEO and founder of Bender Consulting Services, a company that focuses on competitive employment for Americans with disabilities. I am a person who is living with epilepsy and a hearing loss and am the chair-elect of the national Epilepsy Foundation’s board of directors.

Twenty four years ago, in the midst of my career in executive search, I had an almost fatal accident. One evening, my husband and I went to see Amadeus, and at the intermission, I had a seizure at the concession stand, fractured my skull and broke all of the bones in my right ear—all of this happened, due to a misdiagnosis of epilepsy. After having brain surgery and spending 2 months in rehabilitation, I started thinking about what happens with people with disabilities. For the next 10 years of my life, in addition to getting back to work in executive search, I also did

volunteer work, trying to find competitive employment for Americans with significant disabilities. I learned that people with the most significant disabilities, including those with intellectual disabilities couldn't get good jobs. I also didn't understand why many had sub-minimum wage jobs.

Due to this experience, I decided to focus on this effort and founded Bender Consulting in 1995, a for-profit company that aligns talented people with disabilities with great career opportunities in information technology, finance/accounting, human resources and other general business areas. Today, Bender Consulting operates in 18 States, and in 2 provinces in Canada, through Bender of Canada. We have hired over 400 people with significant disabilities and have paid them competitive wages, including family benefits coverage. The primary reason for Bender Consulting's success is due to the outstanding performance and efforts of my employees, people with significant disabilities, who go to work every day, early, with a great attitude.

Many employers believe that people with disabilities are inferior and not able to do the job at the same level as their non-disabled counterpart. We know that is not true. I work in partnership with great corporations such as Highmark, Inc., Bayer Corporation, CSC, WellPoint, MGM MIRAGE and Federal agencies including the NSA, the FAA, and the Naval Supply Systems Command. These are companies and government agencies that look at talent as the only discriminator, and provide competitive jobs with competitive wages. In reference to MGM MIRAGE, I just returned from Las Vegas. On Saturday, 52 people with disabilities were interviewed by CityCenter managers through our Bender partnership.

Although I have many examples of success, I would like to share with you the career success stories of Jamie and Justin, both of whom were aligned with freedom through competitive employment because of my partnership with Highmark, Inc.

Jamie is a young man who has cerebral palsy that is so significant that he uses a wheelchair, keeps his arms behind his back, due to the spasticity, types with a stick in his mouth and is very difficult to understand so he uses augmentative communication. When I met Jamie at a job fair, his resume indicated that he had a master's degree in rehabilitation science and technology and would accept \$12,000 a year due to his significant disability. Through the Bender/Highmark partnership, Jamie landed a job as a computer programmer. Within 2 months on the job, his manager called me to tell me that Jamie was "out-programming" his non-disabled colleagues. Jamie is seen frequently on evenings and weekends attending sporting events, concerts and cultural activities. He has worked at Highmark for over 7 years, has recently been promoted, and is paid competitively.

Justin, another individual who Highmark hired through our partnership is a young man who has an intellectual disability, Down Syndrome. Justin works for Highmark in the mail service operations area. He has a full-time job and is competitively compensated with a great benefits package. More important, Justin has become one of the top employees, among those who have disabilities and not, and is used to train new employees that Highmark hires in his area. Every time he sees me, he reminds me that having a competitive salary and a career has changed his life. When Justin was first referred to me by a person in social services, I was told he could only be successful in a lawn mowing or maintenance job. I often think how different his life would be today, if he had been referred to another company who took the advice of that social services person, who lowered the bar for Justin. He may not be living the way he is living today—purchasing goods and services, paying taxes and making a difference for Highmark.

When I chose the corporate motto for Bender Consulting, I did not choose "jobs mean freedom," I chose "competitive jobs mean freedom." Without competitive employment and pay, people with disabilities will never, ever be free in this country.

Thank you for the opportunity to speak today.

Senator HARKIN. Well, thank you very much, Ms. Bender, for being here and thanks for your testimony and all the great work that you have done. I appreciate it very much. We will have more to talk to you about on this situation here.

Now we turn to James Leonard, former U.S. Department of Labor attorney. Mr. Leonard, welcome, and please proceed.

**STATEMENT OF JAMES B. LEONARD, FORMER ATTORNEY,
U.S. DEPARTMENT OF LABOR, ARLINGTON, VA**

Mr. LEONARD. Thank you, Senator, and thank you for inviting me to testify.

I would like to talk to you a little bit today about the U.S. Department of Labor's enforcement of section 14(c) and section 3(m) and make suggestions about how its procedures as well as perhaps regulations and the text of the statute itself could be amended.

In addition, I would like to tell you about some of the problems that the Department of Labor is facing more generally in enforcing this law because of severe staff shortages. Finally, I will try to make some suggestions about how it could operate even in the face of these staff shortages.

Now Mr. McKeon talked about the application procedure, where an employer who wants to hire handicapped workers has to file an application with the Department of Labor. Here is what I see is one big problem with that process. The application does not have to have any information which shows how the employer computed the productivity of the handicapped workers in comparison with nonhandicapped workers who are doing essentially the same work.

The only time the employer has to submit that information is when it is up for a renewal of its 14(c) certificate. Now Mr. McKeon mentioned that in the case of competitive employment, such as Henry's Turkey Service, the period of that certificate is only a year. It has to be renewed every year. For other forms of employment, such as sheltered workshops or patients who are working in an old folk's home, say, or some care facility, applications for those 14(c) certificates only have to be renewed every 2 years.

The result of that is the Department of Labor knows that these employers are hiring and have on the payroll handicapped workers, but it has no information from them for 1 year or 2 years that shows the detailed information that is really necessary in order for the Department of Labor to try to figure out whether the wages that are being paid to handicapped workers really reflect the degree of their disability.

I think that the application procedure has to be changed so that the Labor Department gets this information up front. It may not be able to make much use of it because it doesn't talk to the individual people who compiled the data. At least it would have more information than it has now.

Because the employer is required to have this information on hand in the event there is an investigation, it wouldn't force the employer to do any additional work to send it to the Labor Department. It would only be the cost of photocopying and postage. That seems to me to be a small expense to protect handicapped workers.

You asked earlier of Mr. McKeon why it is that no one knew about this horrible situation, which seems incredible. I have some suggestions. The problem with these employers is the workers typically, because of their handicaps, are not necessarily as likely as other workers to understand when they are being exploited, when their wages are improper. Therefore, the Department of Labor tends to target likely violators.

How do they pick their targets? This is a very difficult problem, and every investigative agency has it. Here is what I think the Labor Department ought to do and that all agencies ought to do. They ought to make more use of the eyes and ears of people in the community who would be likely to know about this.

It seems highly unlikely to me that people in the town or near the plant didn't know something about this. If the Labor Department had partnerships or some other kind of cooperative arrangement with worker advocacy organizations and similar organizations, this would be a way in which the Labor Department could learn about these violations.

We all know about community policing, where police forces encourage citizens and community groups to alert the police to possible violations of the law. This is the same thing that I am talking about in the case of handicapped workers.

Now in the case of food and lodging and other facilities, you were asking Mr. McKeon if there is some way that the Labor Department can find out about what is going on in advance? Also you asked about whether or not we could really say that these things were primarily for the benefits of the employees?

As he said, the program does not require the employer to notify the Labor Department that it is taking advantage of this. Here is a suggestion that I would make. If the employees had to be told exactly how the cost of food, the cost of lodging, or the cost of other facilities is being computed to be added to their cash wage so that they are raised up to the required wage, the employees would be in a better position to know whether they are being cheated.

If you know that the schoolhouse you are living in cost \$600 a month to rent and you see what is being deducted from your wage, you know immediately that there is a problem. This is, in effect, using the employees themselves as community policers because it would require the employees to be told exactly how the employer computes their additions to their cash wage in the form of meals and lodging.

I would like to say a few quick things about enforcement. I know I am over my time. The Department of Labor is in serious straits because the staff, both of the Wage and Hour Division and of the lawyers who are supposed to enforce this law, along with many other laws, has been reduced drastically.

Mr. McKeon talked about the 50 percent reduction since he joined the Labor Department. In the Solicitor's Office, the legal arm of the Labor Department, the situation is even worse. Here is a quick statistic. In 1992, the Solicitor's Office had 786 employees. That includes not only lawyers. It includes paralegals and support staff.

By 2001, it was down to 709 employees. In January 2007, the last statistics I have seen, it had only 590 employees. Yet during this time, it has been given other laws to enforce, and the workforce has increased as well.

In the case of the Wage and Hour Division, based on my calculations, each full-time investigator in the Wage and Hour Division is responsible for protecting 245,000 workers. Impossible.

That is why if the staff is not increased, the job of both these organizations—the Wage and Hour Division and the Solicitor's Office—is to try to figure how to leverage the power they have got, and I can discuss this in more detail and give more time to my colleague Kim Bobo.

Thank you.

[The prepared statement of Mr. Leonard follows:]

PREPARED STATEMENT OF JAMES B. LEONARD

Good afternoon. My name is Jim Leonard. I was an attorney for the U.S. Department of Labor for 22 years until I retired a while ago, and I am now on the advisory board of the National Wage and Hour Clearinghouse and also do volunteer legal work for two not-for-profit advocacy organizations—Farmworker Justice and the Child Labor Coalition. Thank you for inviting me to testify today on the important subject of how the Fair Labor Standards Act can be better used to prevent the exploitation of employees with disabilities and other vulnerable workers. This exploitation can include, among other problems, paying workers not in cash, but instead with in-kind payments that are not in accord with the restrictions of the Fair Labor Standards Act.

The Fair Labor Standards Act (“FLSA”) contains minimum wage and overtime pay requirements for covered workers. The Federal minimum wage is now \$6.55 per hour, and is scheduled to go up to \$7.25 per hour on July 24, 2009. The term “wage” means not only cash, but is also defined to include “the reasonable cost, as determined by the Secretary of Labor, of furnishing [any] employee with board, lodging, or other facilities, if [these] facilities are customarily furnished by [the] employer to his employees. . . .”¹ There are certain restrictions on how an employer can count the cost of lodging, meals, and other so-called facilities towards his wage obligation, which I will explain later.

HANDICAPPED WORKERS (FLSA SECTION 14(C))

The FLSA also contains various exemptions that excuse an employer, in specified circumstances, from following some of its requirements. One of these exemptions relates to handicapped workers. Specifically, the law says that workers whose “earning or productive capacity is impaired by age, physical or mental deficiency, or injury, can be paid less than the minimum wage, so long as the wage paid is “related to the individual’s productivity” and is “commensurate” with the wages paid to non-handicapped workers in the vicinity who do “essentially the same type, quality, and quantity of work.”² An employer cannot employ any handicapped workers at less than the minimum wage unless the employer first receives a special certificate from the U.S. Department of Labor (“DOL”) authorizing such sub-minimum wage rates. The employer, in order to receive such a special certificate, has to provide written assurances to DOL that, among other things, he will maintain records that document the employees’ disability; their productivity; any times studies or other work measurements; and prevailing wage surveys that were used to set the handicapped workers’ wages. In addition, the employer must assure that he will “review” the wages of workers paid on an hourly basis at least once every 6 months, and will “adjust” the wages of all employees at least once a year to reflect changes in the prevailing wage rate paid to non-handicapped workers in the vicinity doing essentially the same work.

DOL’s regulations require that any employer of handicapped workers who has a special FLSA section 14(c) certificate must maintain, and have available for inspection, records that support the assurances that the employer made in the application for the certificate.³ These records must show critical information, namely, verification of the worker’s disability; evidence of the productivity of each worker, gathered on a continuing basis or at periodic intervals; the prevailing wages paid to non-handicapped workers in industry in the vicinity for essentially the same type of work; and the production standards and supporting documentation for non-handicapped workers for each job performed by the employer’s handicapped workers.

If the policy goal of DOL’s Wage and Hour Division, which enforces the FLSA, is to protect handicapped workers from exploitation, then there are two serious problems with Wage-Hour’s regulatory approach.

The first problem is that when an employer first applies for a section 14(c) certificate, he does not have to send to DOL any information showing the employer’s evaluation of the worker’s productivity; this information does not have to be sent in until the employer applies to renew the certificate. The application form—Form WH-226—specifically says this in Items 10 and 11. Any certificate that is issued lasts for 1 year if the work is in competitive industry (such as a turkey processing plant), and for 2 years in other employments, such as sheltered workshops and residential care facilities. The application form and the regulations ought to be changed to require the employer to send in all this information not only with any application to renew the FLSA section 14(c) certificate, but also when any wage changes are

¹ FLSA section 3(m), 29 U.S.C. 203(m).

² FLSA section 14(c)(1), 29 U.S.C. 214(c)(1).

³ The special recordkeeping regulation for handicapped workers is in 29 CFR 525.16.

made, including at the time of hiring handicapped workers after the first certificate is issued to an employer. DOL then would have in its possession information that would indicate problems, irregularities, or violations that warrant checking further into the matter.

The second problem relates to those situations in which an employer has handicapped workers but does not have an FLSA section 14(c) certificate. In such cases, DOL does not have adequate procedures in place to protect those handicapped workers from abuse. There are several abuses that could occur.

- One abuse is that the employer may just be paying less than the minimum wage to handicapped workers and hoping that DOL will not find out. This is a clear violation of the law because no employer can pay handicapped workers less than the minimum wage without a section 14(c) certificate. The only way that DOL can learn about such violations is if it receives a complaint from an employee, a business competitor, or some other source, or if DOL, even in the absence of a complaint, decides to target the employer for an investigation. In order to do a better job of finding employers who are violating the law, DOL needs to make more use of the “eyes and ears” of individuals and organizations who are most likely to have knowledge of workplace practices affecting handicapped workers. DOL has in recent years had various so-called “partnerships” with employers and employer organizations, but very few if any partnerships with worker advocacy organizations that have ties to local communities. Just as some cities work closely with community groups to bring criminal activity to their attention, DOL must expand its outreach in this manner. If DOL had had such partnerships in place, the many organizations that knew what was happening to Henry’s Turkey Service workers at the West Liberty Foods plant and about the shoddy lodging facilities in Atalissa, IA, would have been much more likely to bring the facts to DOL’s attention.

- Another abuse is that the employer may have a section 14(c) certificate and not seek to renew it but still pay his handicapped workers less than the minimum wage. This, too, is a clear violation of the law. I’m not sure what DOL now does when an employer does not renew a section 14(c) certificate, but DOL should follow up with the employer, by phone, letter, or even by sending an investigator to look into the matter.

- Another possibility for abuse occurs when the prevailing wage for the particular job may be high enough that even when the lower productivity of the handicapped worker is taken into account, the handicapped worker’s commensurate wage would be above the minimum wage. Here, the employer does not need an FLSA section 14(c) certificate. Nevertheless, there may be handicap discrimination problems under the Americans with Disabilities Act, and this kind of situation is one in which there could also be FLSA violations as well. Here, too, if DOL had partnerships with worker advocacy organizations, it could rely on these “eyes and ears” to alert it to possible violations of the law.

BOARD, LODGING, AND “OTHER FACILITIES” WAGE CREDIT (FLSA SECTION 3(M))

Under section 3(m) of the FLSA all workers, including handicapped workers, can be paid not just in cash, but also in “board, lodging, or other facilities” that are provided primarily for the benefit or convenience of the employee. One example of the “other facilities” that have been deemed to be primarily for the benefit or convenience of the employee are the cost of transportation provided by the employer to employees from home to work before the workday begins and back home again at the end of the workday, provided that the employee is not doing compensable work (such as driving the vehicle).⁴ If any facility is furnished to an employee in violation of Federal or State or local law, it cannot count towards the employer’s FLSA wage obligations.⁵

It is important to note, in light of the Atalissa, IA, situation involving Henry’s Turkey Service and West Liberty Foods that prompted this hearing, that these FLSA limitations apply only to deductions from cash wages. The FLSA does not restrict, for example, deductions from Social Security disability payments. I do not know if the Social Security Act or its regulations have any restrictions in this regard, but the FLSA does not.

DOL needs to think of ways of strengthening section 3(m) by regulatory action, and Congress should also look to see whether legislative action is also needed. The key to section 3(m)’s protections is that the employer cannot deduct from cash wages any “board, lodging, or other facilities” that are primarily for the benefit or convenience of the *employer*; and even with the “board, lodging, or other facilities” are pri-

⁴ 29 CFR 531.32(a).

⁵ 29 CFR 531.31.

marily for the benefit or convenience of the *employee*, the employer cannot deduct more than the “reasonable cost.” Most unfortunately, DOL has recently taken steps to weaken these two requirements. I will mention these steps briefly, and can elaborate, if you wish more detail, during any question and answer period.

First, DOL, contrary to the rulings of every court that has faced the issue, has taken the position that the costs that an employer expends to recruit workers to come to work for him are primarily for the benefit of the employee, and hence can be deducted from wages even if those deductions reduce the employee’s wage below the minimum wage. For years DOL took no position on this issue, stating that it was reviewing the matter. Then out of a clear blue sky, DOL, in the preamble of a final regulation issued on December 18, 2008, stated that these recruitment expenses were primarily for the benefit of the employees. There was no proposed regulatory change to this effect in the proposed regulations, nor did the final regulations contain a regulatory change that adopted the position. Instead, the preamble of the final regulation, for the first time, announced DOL’s position.

Second, DOL has proposed a regulatory change that would permit an employer to deduct from an employee’s cash wages an amount that is greater than the cost to the employer of the meals that the employer furnishes to an employee.⁶ This proposed regulation, fortunately, has not been issued in final form, and is apparently on hold.

MORE AGGRESSIVE DOL ENFORCEMENT OF THE FLSA

The best way for DOL to prevent worker exploitation across the board is for DOL to be more aggressive in the remedies it seeks under the FLSA when it finds that an employer has violated the law. The FLSA permits DOL to recover back wages that are due going back 2 years or, if the employer’s violations are willful, going back 3 years. DOL, though, typically seeks back wages going back only 2 years, even when the violations are willful. The FLSA also authorizes DOL to recover—in addition to back wages—an equal, additional amount as liquidated damages. DOL rarely if ever seeks liquidated damages unless it files a lawsuit against an employer that has been investigated. DOL files lawsuits in only about 1 percent of the total number of FLSA cases that DOL investigates.⁷ DOL investigators in effect reward employers who violate the law because the employers are not even asked to pay interest on the money they have withheld from employees, so it is cheaper for an employer to pay back wages after an investigation than to pay the wages when they are due. There is even some indication that DOL investigators may point out to employers who owe back wages that the employers would be better off paying only back wages, since they might have to pay an equal, additional amount as liquidate damages if the case goes to court.

DOL can also impose civil money penalties, of up to \$1,000 for each violation, against any person who repeatedly or willfully violates the minimum wage or overtime pay provisions of the FLSA. Moreover, if DOL files a lawsuit, it can seek an injunction barring the employer from committing further violations. If an employer violates an injunction that the court issues, the employer can be held in contempt of court and be forced to pay the costs that DOL incurs in proving that the employer has violated the injunction, and also be required to take such other corrective measures as the court, in its sound discretion, considers appropriate.

Another remedy that is available, though rarely sought by DOL, is a so-called hot goods injunction. This is an emergency order, issued by a court, that bars shipment in the channels of interstate commerce of any goods that have been produced by employees who have been paid in violation of the FLSA’s minimum wage or overtime pay (or child labor) provisions. *Any* person—not just the employer of the underpaid employees—can be sued in a hot goods case, and can be barred from shipping such “tainted” goods in his possession. In the Atalissa, IA, situation, the companies that could have been sued in a hot goods case would include not only Henry’s Turkey Service, but also West Liberty Foods and any food brokers or wholesalers who had possession of the turkeys, if any of the turkeys were in the flow of commerce that would eventually go out of Iowa into another State.

Why is DOL not being more aggressive in enforcing the FLSA? As I see it, there are two basic reasons.

⁶See Notice of Proposed Rulemaking by the Department of Labor, 73 Fed. Reg. 43654, 43660 (July 28, 2008).

⁷In fiscal year 2007, the latest year for which data are publicly available, DOL filed only 151 FLSA lawsuits, whereas DOL conducted more than 11,000 FLSA investigations. (The exact number of FLSA investigations may have been considerably higher than this, but this information is not available on DOL’s Web site.)

First, the number of Wage and Hour Division investigators and DOL lawyers has declined markedly in recent decades, even though the number of employees in the workforce, and the various laws that DOL has to enforce, have increased significantly. Here are some statistics. From fiscal year 1975 to fiscal year 2004, the number of Wage-Hour investigators declined from 921 to 788, a reduction of 14 percent.⁸ These investigators enforce not only the FLSA, but also many other laws, including the Family and Medical Leave Act (FMLA), the Migrant and Seasonal Agricultural Worker Protection Act (AWPA or MSPA), the Service Contract Act, the Davis-Bacon Act, and other laws. Moreover, the investigators do not spend all of their time investigating employers for possible violations of the law; they also engage in “compliance assistance” (e.g., giving lectures to employer groups to educate them about the law’s requirements), take part in training, and perform other tasks). In 2004, the actual amount of hours spent in investigative activity was 1,000,739.⁹ This is the equivalent of 544 full-time investigators to enforce the FLSA and the various other laws.¹⁰ The laws that these investigators enforce protect over 135 million workers in more than 7.3 million establishments.¹¹ Accordingly, each full-time investigator is responsible for protecting 245,000 workers.

DOL’s legal staff—known as the Solicitor’s Office—has also been cut drastically, especially since 2001. In 1992, the Solicitor’s Office had 786 employees,¹² but by 2001, it was down to 709 employees, and in January 2007, it had only 590 employees.¹³ These employees enforce not only the FLSA but also many other laws such as the Occupational Safety and Health (“OSHA”), the Mine Safety and Health Act (“MSHA”), the Employee Retirement Income Security Act (“ERISA”) and many others. As a result of these many responsibilities the Solicitor’s Office lacks the ability to litigate many FLSA cases—and cases under other laws as well—aggressively. The contrast in a 20-year period, from fiscal year 1987 to fiscal year 2007, is striking. In 1987 DOL’s legal staff filed 705 FLSA lawsuits, whereas in 2007 it filed only 151, a decline of 79 percent.¹⁴ The FLSA authorizes lawsuits not only by DOL, but also by aggrieved employees represented by private attorneys. In 1987 there were 773 private FLSA lawsuits, and in 2007 there were 7,159 private FLSA lawsuits, an 826 percent increase.¹⁵ This means that in 1987, DOL filed 48 percent of all FLSA lawsuits, but only 2 percent in fiscal year 2007.

The second main reason that DOL has not been aggressively enforcing the FLSA is that it needs to rethink, from top to bottom, its enforcement strategies, in light of its greatly reduced staff. There are too many issues it has to address under this heading to discuss today, but here are just a couple key ones that would benefit all workers (including handicapped workers).

In the case of the Solicitor’s Office, since it is filing only 2 percent of FLSA lawsuits, it needs to focus more on lawsuits of a type that the private bar tends not to handle.

In the case of DOL’s Wage and Hour Division, there are three steps it could take right away. One is to propose amendments to various regulations that would strengthen the existing law. Many FLSA regulations are far out of date and do not reflect key court decisions that have strengthened the FLSA. A second step is to publicize much more widely and graphically the results of investigations in which

⁸Brennan Center for Justice, Economic Policy Brief, No. 3, September 2005, available on-line at www.brennancenter.org/dynamic/subpages/download_file_8423.pdf. The 788 investigators in fiscal year 2004 were only part of Wage-Hour’s total staff, which numbered 1,442 employees; the other staff included supervisors, analysts, technicians, and administrative employees. (*Department of Labor FY 2009 Performance Budget*, www.dol.gov/dol/budget/2009/PDF/CBJ-2009-V2-03.pdf, pp. ESA-35 and ESA-36.)

⁹DOL response to Freedom of Information Act (FOIA) request.

¹⁰A full-time employee works 40 hours per week for 52 weeks, or 2,080 hours per year. It would take 481 such full-time investigators to spend 1,000,739 hours in investigative activity. Since even full-time employees take vacations and holidays, and are sometimes ill, it is more realistic to expect a full-time investigator to be absent from work roughly 6 weeks per year, and thus on the job for 46 weeks, or 1,840 hours per year. It would take 544 such investigators to accumulate a total of 1,000,739 investigative hours.

¹¹*Department of Labor FY 2009 Performance Budget*, www.dol.gov/dol/budget/2009/PDF/CBJ-2009-V2-03.pdf, p. ESA-35.

¹²U.S. Department of Labor Budget Submission to Congress for Fiscal Year 1993.

¹³“Legal Services,” in volume 3 of the U.S. Department of Labor’s *FY 2008 Detailed Budget Documentation*, pp. DM-28 to DM 28, available at www.dol.gov/dol/budget/2008/PDF/CRJ-V3-02.pdf. Although the Solicitor’s office had 590 employees in January 2007, it had funding to pay for only 551 employees. *Id.* at DM-28.

¹⁴Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, 1987 Annual Report, Table C-2 (Washington, DC, 1987); Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, 2007 Annual Report, Table C-2 (Washington, DC, 2007).

¹⁵See previous footnote.

employers pay back wages found due. The third step that Wage-Hour could take, mentioned above, is to work more closely with worker advocacy organizations, as well as with lawyers in private practice who represent employees in FLSA cases. This would leverage the power that DOL, in order to better protect vulnerable workers whose wages in many situations, it is not an exaggeration to say, have been stolen by their employers.

Senator HARKIN. Thank you very much, Mr. Leonard, for the testimony, the advice, and the suggestions.

Now we will turn to Ms. Kim Bobo from Interfaith Worker Justice. Ms. Bobo, please proceed.

**STATEMENT OF KIM BOBO, EXECUTIVE DIRECTOR,
INTERFAITH WORKER JUSTICE, CHICAGO, IL**

Ms. BOBO. Senator Harkin, thank you for inviting me today.

Others have focused on the 14(c) subminimum wage provisions. I want to focus particularly on illegal paycheck deductions, which are a common problem for all vulnerable workers, not just disabled workers, and robs untold millions from workers each and every year.

Interfaith Worker Justice runs a network of 21 worker centers around the country. We see illegal paycheck deductions on a regular basis.

Several Polish cleaning women came to visit the IWJ-affiliated Arise Chicago worker center. They were being deducted collectively about \$2,400 a month for an apartment that costs about \$800 a month.

Workers in Houston, their employer deducted \$1,900 from four workers' paycheck, claiming he had paid a notary to petition for the workers' citizenship.

The now-famous Saigon Grill delivery workers in New York City, who were paid less than \$2 an hour, also had fines of \$20 deducted if they entered information in the computer too slowly or slammed the door too loudly.

Cincinnati Interfaith Worker Justice center told me the other day about an employer who deducted \$2,000 from four workers for a room that at most he paid \$750 for and then was deducting for \$7 a day for transportation, whether or not they worked those days.

So, paychecks have illegal deductions taken on a regular basis. It is a huge problem in the country right now. Interfaith Worker Justice has six recommendations that we think would help all workers, including disabled workers.

First recommendation. Require under FLSA that all employers provide a statement explaining workers' wages, benefits, and deductions to each worker along with each paycheck. This would enable workers to ask questions about things that seem odd and to compare hours worked with hours paid.

Now most ethical employers already provide such a pay stub, but for those who want to hide and steal wages, this does not happen. We need a pay stub explanation similar to the requirements under the Migrant Seasonal Protection Act.

Second recommendation. Require under FLSA that workers agree ahead of time in writing to any fees that will be deducted from their paycheck that are for the workers' benefit. All workers who

are paid subminimum wages and have legal guardians must have the guardian's approval ahead of time as well.

If food and lodging are being provided for the workers' benefit, then the workers or their guardian should have the ability to say no to that benefit if they have to pay for it. This provision, if we did this, would be similar to a provision that the Texas Payday Law has, which our folks in Texas tell us actually works quite well.

Third recommendation. Outlaw any housing deductions unless the employer has petitioned to the Department of Labor to provide housing and testifies that the housing is provided at reasonable cost and meets all relevant housing codes. This housing deduction is a place of enormous problems. Vulnerable workers are exploited in slave-like conditions across the Nation.

Fourth recommendation. Penalize employers who take illegal deductions by making them pay triple damages for illegal deductions. If you knew that there was going to be a significant penalty if you stole somebody's wages, you might think twice before you did it.

Fifth recommendation. We need to support the President's budget request that would provide more resources for Wage and Hour investigators. I join my colleagues in saying that the Wage and Hour Division simply does not have enough staff to do the job.

When I am out there talking to investigators, they describe their work as "triage." We are doing triage with workers' wages. Good laws without adequate enforcement render the laws meaningless.

And finally, we need to target investigations of industries that are widely believed to be making illegal paycheck deductions. Interfaith Worker Justice-affiliated worker centers would recommend investigating those large buffet restaurants, which often house workers in dormitories and take illegal deductions; some cleaning companies who prey on new immigrants, again housing them and taking excessive deductions; construction firms who house employees in the buildings in which they are working; and companies that recruit workers to clean up after disasters, such as Hurricanes Katrina, Ike, and the Iowa floods.

These are six recommendations that we think would make a difference. I am grateful to the committee for its work to investigate what went wrong for these workers. More importantly is figuring out how do we stop and deter illegal paycheck deductions for all workers in the future.

[The prepared statement of Ms. Bobo follows:]

PREPARED STATEMENT OF KIM BOBO

PAYCHECK DEDUCTIONS: ANOTHER FORM OF WAGE THEFT

Senators, thank you for inviting me today. My name is Kim Bobo. I am the Executive Director of Interfaith Worker Justice, a national organization that works through a network of interfaith groups and workers centers to improve wages, benefits and working conditions for low-wage workers. I am also the author of *Wage Theft in America: Why Millions of Working Americans are not Getting Paid and What We Can Do about It* (New Press, 2008).

Others are focusing on the sub-minimum wage provision, which is controversial even within the disability rights community. I will focus on illegal paycheck deductions, which are one of the many forms of wage theft that rob billions of dollars from millions of workers each year. The problem of illegal paycheck deductions is illustrated so clearly in the case of Henry's Turkey Service.

Twenty-one men lived in a bunkhouse with boarded up windows, roaches throughout and a non-functioning heater that Henry leased for a grand total of \$600 per

month from the city of Atalissa. He then turned around and charged the workers their full Federal disability checks and lots more, resulting in them earning \$60.30 per month. Most of the workers had worked for this company for 20 years. According to newspaper articles, Henry's Turkey Service deducted \$487 monthly for each worker's room and board and \$572 for each worker's "kind care."¹ In fact "kind care" seems missing here.

The men, most of them in their 50s and 60s were awakened at 2:30 a.m. At 4:30 a.m. they boarded vans to the turkey plant where they donned gear and then took spots on the line cleaning turkeys. The men were paid a sub-minimum wage, about half what others were paid, theoretically because of how their disability caused them to be less productive than others.²

Several government agencies had investigated Henry's Turkey Service over the years. A 1974 memo from Iowa social worker Ed George said that once a man became an employee of Henry's Turkey Service, "he for all practical purposes loses most basic human rights."³ A 2001 DOL Inspector General report criticized a 1999 Wage and Hour compliance action of this same turkey plant's deductions from disabled workers' paychecks. Not only did the company charge more than the "reasonable cost" for meals, lodging and services, but it deducted from the workers' paychecks for "property improvement, building supplies and the owner's salary expenses unrelated to the operation of the group home."⁴

This case is so wrong on so many levels—shipping mentally disabled folks from Texas to Iowa to work in a turkey plant, housing folks in unsafe and filthy conditions, stealing wages through blatantly illegal deductions, and government inspections that failed to protect these workers and punish systemic wage theft.

Others are focusing on the sub-minimum wage provision, which is controversial even within the disability rights community. I want to focus on illegal paycheck deductions. Unfortunately, employers routinely take illegal deductions from many workers' paychecks.

Several Polish cleaning women came to visit the IWJ-affiliated Arise Chicago workers center. As a condition of their employment, they were required to live in a dormitory floor housing eight women. Two women shared a small room and bathroom down the hall. Each woman was charged \$300 per month. Clearly, the employer made money off these workers.⁵

Then there are the workers in Houston whose employer deducted \$1900 from four workers' paychecks, claiming he had paid a notary to petition for the workers' citizenship.⁶

The now famous Saigon Grill delivery workers in New York City, whose employer paid them less than \$2 per hour, also deducted \$20 in fines for being slow on entering information into the computer or slamming the door too loudly.

The Cincinnati Interfaith Workers Center assisted workers employed by Diverse Able. The first deduction from paychecks was \$400 for flights from Puerto Rico. Next was the advance on the first paycheck, plus interest, of course. The workers were initially charged up to \$135 per week for four or five of them to stay in a two-bedroom apartment until the workers center intervened and the rent dropped to \$65 per week (probably still higher than the true cost of the housing). Workers were charged \$7 per day for transportation even if they didn't work each day.⁷

My all-time personal "favorite," is the employer in Chicago who handed out a list of fines for worker misdeeds that included:

- Being late for work: \$100.
- Being absent without giving at least 48 hours notification: \$250 and up.
- Forgetting to lock the trucks: \$100 from all crew members.
- Smoking on job site or in company vehicles: \$150 and up.
- Possession of alcohol on site—first offense: \$500; second: \$1,000; and third: \$1,500.

¹ Clark Kauffman, *State Closes Bunkhouse That Housed Mentally Retarded Workers*, Des Moines Register, February 8, 2009.

² Ibid.

³ Amy Lorentzen, *Iowa Had Known of Plant's Use of Mentally Disabled*, The Associated Press, February 25, 2009.

⁴ Office of Inspector General, U.S. Department of Labor, *The Wage and Hour Division's Administration of Special Minimum Wages for Workers with Disabilities*, Audit Report No. 05-01-002-04-420, March 19, 2001.

⁵ Notes from interview with Anna Karewicz, polish worker rights advocate, Chicago Arise Workers Center.

⁶ Kim Bobo, *Wage Theft in America* (New York: The New Press), 2008, page 31.

⁷ Notes from interview with Don Sherman, Director, Cincinnati Interfaith Workers Center.

- Quitting without giving 2 weeks notice will forfeit the worker's previous weeks' work, unless the worker had been there more than 6 months, in which case the worker must give a month notice or lose paychecks.

This employer sums up the policy: "If you think that your presence (spirit) at the job site is enough to get paid you are wrong. Before you are paid you must reveal the quality and quantity of your work and your loyalty to the company. In the future this is what your pay will be based upon."⁸ And there you have it!

Illegal employer deductions are common for all workers, not just for those covered by the sub-minimum wage. Interfaith Worker Justice offers six recommendations that would help all workers.

1. Require under FLSA that all employers provide a statement explaining workers' wages, benefits, and deductions to each worker along with each paycheck. This would enable workers to ask questions about things that seem odd and to compare hours worked with hours paid. Because most employers provide such a pay-stub already, this requirement will focus on improving transparency and accuracy among those employers who are most likely to cheat workers and will have little impact on most employers. This pay-stub explanation would be similar to the requirements for giving information to migrant workers under the Migrant Seasonal Protection Act.

2. Require under FLSA that workers agree ahead of time in writing to any fees that will be deducted from their paycheck that are for the workers' benefit. All workers who are paid sub-minimum wages and have legal guardians must have the guardians' approval ahead of time. If food or lodging are being provided "for the workers' benefit," then the workers or their guardians should have the ability to say "no" to that benefit if they have to pay for it. This provision would be similar to that required by the Texas Payday Law, which says "The employer may not make deductions unless ordered to do so by a court of competent jurisdiction (as in court-ordered child support payments); authorized to do so by State or Federal law (as in IRS withholding); or authorized in writing by the employee, and then only for a lawful purpose."⁹

According to Cristina Tzintzun of the Workers Defense Project, and Austin-based workers center, this law is enormously helpful in challenging illegal deductions.¹⁰ Iowa has a similar law, but without adequate public enforcement or advocacy by a nonprofit agency, the law was meaningless.

3. Outlaw any housing deductions unless the employer has petitioned to the Department of Labor to provide housing and testifies that the housing is provided at "reasonable cost" and meets all relevant housing codes. Filing such a housing deduction petition should automatically trigger an unscheduled wage and hour inspection. Many of the worst employers, those who effectively keep workers in slave-like conditions, "provide" housing for their employees.

4. Pay workers triple damages for illegal deductions. If a worker agreed to have lunch provided and deducted from his/her paycheck and the actual employer cost of that lunch was \$2 but the employer deducted \$4, the employer would be required to pay the worker \$6 for each lunch (\$2 overcharge times 3) for which he/she was overcharged. This kind of meaningful penalty would help make sure employers calculate costs fairly and accurately.

5. Support the President's budget request that would provide more resources for Wage and Hour investigators. One reason Henry's Turkey Service wasn't closed down was because the Wage and Hour investigators who visited this plant in 1999 did not have time to do a follow-up unscheduled visit. My experience with Wage and Hour investigators is that they have way too many cases to deal with, so follow-up seldom occurs. The word the investigators use is "triage." They are performing triage with workers' wages. Good laws without adequate enforcement render the laws meaningless. More investigators will reduce the possibility that such situations as Henry's go undetected.

6. Target investigations of industries that are widely believed to be making illegal paycheck deductions. IWJ-affiliated workers centers would recommend investigations of large buffet restaurants, which often house workers in dormitories and take illegal deductions, some cleaning companies who prey on new immigrants, again housing them and taking excessive deductions, construction firms who house employees in the buildings in which they are working, and companies that recruit workers to clean-up after disasters such as Hurricanes Katrina and Ike

⁸Policy obtained from Anna Karewicz, polish worker rights advocate, Arise Chicago Workers Center.

⁹Description of the Texas Payday Law, which can be found at <http://www.twc.state.tx.us/ui/lablaw/pdlsum.html>.

¹⁰Interview with Cristina Tzintzun on March 3, 2009.

and the Iowa floods. The same firms that make illegal deductions from paychecks are usually not paying minimum wage or overtime. Wage and Hour investigators probably have a good idea which industries should be investigated as well, but, as I stressed above, there must be enough investigators to do the job.

I am grateful to the committee for its work to investigate what went wrong for these workers, but more important is figuring out how we stop and deter illegal paycheck deductions for all workers in the future.

Senator HARKIN. Well, thank you very much. We have got some great suggestions there. Follow up on some of those and discuss them here.

Thank you all very much. One of the things that I was amazed to see is that I think it was in 1938 when FLSA was passed, there was a 75 percent floor, 75 percent of minimum wage that had to be paid to subminimum wage people under 14(c). Then that was reduced to 50 percent at some point. I can't remember where and when. And then, in 1986, that was even taken away.

I have got my staff looking into why. I was actually here in 1986. I can't remember this actually happening. It seemed to have been broadly supported because the people that were listed on that particular provision were people that I know of being sensitive to this and supportive of people with disabilities. I am trying to figure out what that was all about.

Just broadly speaking, do you think there ought to be—do we need to reinstate a wage floor or not? As I said, it was 75 percent. Then it went to 50, and now there is no wage floor. I don't know why. Can any of you enlighten me as to why this was done? No? Do we need a wage floor?

Curt.

Mr. DECKER. My guess is that as we began to bring more and more people with severe disabilities out into the community from large institutions and attempted to bring them—to give them some kind of day activity, it was thought that making 20 cents an hour was OK because it meant that they then had some kind of activity during the day.

I think that might have been a well-intentioned and well-thought of idea that has sort of gone awry. I would certainly think that re-establishing a floor is not a bad idea because we are trying to get, really, people into competitive employment now through a variety of supports and to disincentivize, to change the dynamic from assuming people can't do very much to assuming they can do the job and only in a few rare situations let them be paid less.

Senator HARKIN. Well, as you pointed out—of course, I wasn't here in 1938, but in those subsequent years—

Mr. DECKER. Neither was I.

Senator HARKIN [continuing]. People were looked upon, people with disabilities were all just sort of lumped together, everybody was in that lump. As you point out now, with supportive services, new technologies, people with significant disabilities can actually do a lot of work that they otherwise could not have been able to do.

Perhaps we need to more narrowly define what people with disabilities are eligible for this. Now Ms. Bender, you have done great work, but correct me if I am wrong. There are some people with significant disabilities that just simply cannot make it in competitive work?

Ms. BENDER. There are some people that—we have hired people with intellectual disabilities, such as Down Syndrome—

Senator HARKIN. Right.

Ms. BENDER [continuing]. That we also were able to hire, and I am sure there are some that would not be able to work for us.

Senator HARKIN. Because there is a spectrum of Down Syndrome.

Ms. BENDER. There is a spectrum. The majority of people—what Curt is talking about, things have changed. With assistive technology today, it has equaled the playing field. And although there are some, I am very fearful of what these two have talked about with people like this group taking advantage of that. That is why I am so happy that you are doing this.

Senator HARKIN. Well, OK.

Ms. BENDER. For example, we have people who are blind, deaf, wheelchair, cerebral palsy, epilepsy, psychiatric disabilities, intellectual disabilities.

Senator HARKIN. Again, do we need to more narrowly define, for example? If you can't answer, think about it and get back to me on it. I ask all of you, do we need to more narrowly define who might be eligible for a 14(c) subminimum wage? Just more narrowly define it some way in terms of capabilities, what kind of supportive services they might need, and how much that might cost?

I don't know. I am just thinking that we can't lump everybody under that one big umbrella any longer.

Ms. BENDER. Yes, I agree it should be re-evaluated. Don't you think so?

Mr. DECKER. Well, I also think that this idea that the private employer has sort of a self-assessment, they do the productivity determination. I would like to see that standardized, but also a party to outside review so that the incentive for an employer to say, "Oh, yes, this person can only work at 40 percent or 30 percent," I think is very grave, given the sort of profit motive.

Senator HARKIN. See, that is another thing I wanted to get into. It is up to the employer to determine how much the productivity of that person is. Well, are there more objective individuals or concerns that could help decide what their productivity is, rather than just the employer?

I mean, there would obviously be a bias for the employer to get it down. That is just a normal inclination. Maybe we need DOL or someone to come in and do an assessment of the productivity of an individual.

Mr. DECKER. Or as I said, I think the partnering with local disability providers who have some expertise in this area.

Senator HARKIN. Well, how about your own P&A people?

Mr. DECKER. Well, as you heard in my testimony, I am a big believer in spreading, getting as many people as possible in contact with these workers. I think that is how you uncover these kinds of situations.

When you have that closed, little society where they are the representative payee, they are providing the room and board, they are also providing the evaluation—I believe in this situation they actually didn't have 14(c) certificates in these last years. That closed environment I think really lends itself to abuse.

The more people involved in terms of evaluation or productivity and recognizing a large number of representative payees in one place, a large number of 14(c) certificates with low productivity evaluations, all that information I think would give us the opportunity to identify these kinds of situations before they go on for many, many years.

Ms. BOBO. This is another place where if the information were widely available on the Web about what firms have applied for the 14(c) and what is the criteria that has been used, it would make it easier for community partners to be advocates on this. If they said, "Oh, look, there are all these folks, and they are getting these deductions," and they are paying 50 cents in terms of—50 percent on the wage. Then people could say, "Hey, that doesn't make any sense."

Right now, it is next to impossible to get any of this information. I think if it were made more publicly available, it would be easier to have these community partnerships.

Senator HARKIN. Now again, as Mr. McKeon said, the vast majority of 14(c) applications are from nonprofits.

Ms. BOBO. That is right.

Senator HARKIN. Community-based, probably something we used to call sheltered type workshops, that kind of work setting, right?

Ms. BOBO. Right.

Senator HARKIN. Well, again, they may be—correct me if I am wrong, they may be nonprofit, but they do make money.

Mr. LEONARD. Oh, yes, they do. In addition, sometimes they have contracts where they are supplying things to for-profit firms.

Senator HARKIN. That is very true.

Mr. LEONARD. And so, there is a certain incentive for them to reduce their costs because of what they are trying to sell to others. I don't mean to suggest that they are nefarious employers, but merely because they are not for profit and really because they are running a sheltered workshop does not mean that they wouldn't try to cut corners in a way that would harm workers.

Mr. DECKER. In addition—

Mr. LEONARD. Getting back to your original point, I think the question about what to do with 14(c) in the overall context requires several questions. The first one would be can anyone figure out what would happen if all handicapped workers had to be paid at least the minimum wage? How would that affect employment?

If it would be a very negative effect on employment, is there some lesser level, like a 75 percent or a 50 percent floor that could not be breached and if lower than that would not have an adverse effect on employment? I don't know whether economists or any other such study this issue, but it seems to me that is the first question to look at.

If it turns out that without some fluctuating wage, the way you now have in section 14(c), there would be a lot of people who want work who wouldn't be able to get jobs. Then the question is how can you better enforce section 14(c)?

I think you mentioned the key point, which is who is it that decides the productivity of these handicapped workers, and should it just be the employer? Would it be possible to have someone else involved in the equation? Those are the basic policy issues, it seems

to me, that need to be addressed and the facts that need to be gathered.

Senator HARKIN. Well, we have the protection advocacy people out there. We have the university-affiliated programs out there, the DD councils. There are a lot of entities out there that—I don't know if they—of course, they are not flush with money and personnel either, but should be at least notified. As you said, put on the Web that they have that notification.

Now that seems to me sort of a bare minimum, Ms. Bobo, of what we ought to be doing. I think beyond that would be to actively engage these entities into looking into these instances to see if people are not being paid.

Now it just occurred to me listening to you that under 14(c) it is the employer, it is the employer who gets the 14(c) exemption, right? It is the employer.

Mr. LEONARD. That is correct. The employer is excused from paying the Federal minimum wage if he has a 14(c) certificate that authorizes a lower wage.

Senator HARKIN. Should we certify that an individual is eligible for 14(c)? We don't have that requirement. Maybe we should have some determination of an individual, whether that individual should be certified for 14(c)?

Mr. LEONARD. Well, the way the system now works, the employer is the one who handles it because he is the one who is responsible for paying wages. As Mr. McKeon said, the employer has to give information about individual employees when he reapplies to get a new certificate.

Mr. DECKER. I was also concerned, Senator, when Mr. McKeon said that after a while, they don't reapply, their names drop off the database. Again, this seems like it was a situation where they had 14(c) certificates in the early 2000, 2001, and they never reapplied but continued to pay less than the minimum wage.

We need to know who had certificates and who may now have just not bothered to reapply but are—still think that they have the right to charge—to provide subminimum wage. It is important to know, I think, to look back as well at those folks who have that, assuming they are still in business.

Senator HARKIN. Yes, well, that also gets into this whole area of penalties that you were talking about.

Ms. BOBO. That is right.

Senator HARKIN. Like triple damages type of thing. Because as I have looked into this Atalissa case, first of all, you have got to figure out what laws were broken, and that is still a question.

Then what are the penalties? Well, from what I have been able to determine, not much. Not much. This has been going on 20 or 30 years.

Mr. LEONARD. May I speak to that issue for a moment, Senator?

Senator HARKIN. Yes, sir. Yes, sir.

Mr. LEONARD. The penalties under the Fair Labor Standards Act call for the payment of back wages owed.

Senator HARKIN. Back wages.

Mr. LEONARD. There is a statute of limitations, and that is for 2 years. So you can seek back wages going back 2 years, but if the employer commits willful violations, you can go back 3 years.

In addition, the statute authorizes an equal additional amount on top of the back wages in the form of so-called liquidated damages. The purpose of that is to pay for other expenses the employees may have because they didn't get the proper wage. It is just a way of a rough estimate of what the damages would be without the employee having to prove them exactly.

When the Department of Labor does an investigation, it seeks only 2 years of back wages. Even when the violations are willful, it typically does not seek 3 years of back wages. In addition, the investigator does not ask for liquidated damages. So the employer, in the typical case, is allowed to pay back wages for 2 years, not even with interest on top.

If the violations went back 2 years, the employer, in effect, has had the beneficial use of those back wages for 2 years. I hate to put it this way, but there is almost a financial incentive to take a chance that you won't be caught because if you are caught, you will have to pay back wages, which in mildly inflationary times are actually a little less than the actual value of the wages had they been paid on time.

This is one of the problems, and my view is that one of the reasons the Wage and Hour Division does this is that the Solicitor's Office is so short-staffed that it is not in a position to file many lawsuits. If the employer refuses to pay the third year of back wages, if the employer refuses to pay liquidated damages, then the only way that can be collected is to take the employer to court.

In 2007, the last year for which I have data from the Administrative Office of the U.S. Courts, the Department of Labor filed 151 Fair Labor Standards Act cases. That is three a week. Twenty years ago, the Labor Department filed over 700 cases.

The private bar, because employees are able to bring their own lawsuits—it is not just the Department of Labor that can sue. The private bar 20 years ago brought about half of all the Fair Labor Standards Act cases in the country. In 2007, the private bar brought 98 percent of all Fair Labor Standards Act cases.

The Department of Labor is a very small actor in the courts in enforcing the Fair Labor Standards Act. The Department of Labor's Wage and Hour Division, according to its statistics—and remember, they enforce more than the Fair Labor Standards Act. They enforce other laws. They have something like what they call 30,000 enforcement actions a year.

I don't know how many of those are Fair Labor Standards Act. I don't know how many of those are full-dress investigations or simple phone calls or simple conciliations. Whatever the number, when you compare 30,000 or even 20,000 or even 10,000 to 151 lawsuits, that is a miniscule set of teeth to put into a law when you are facing an employer who refuses to pay.

The bottom line, I think, is one of the reasons the Wage and Hour Division does not insist on a third year of back wages when the violations are willful and does not insist on liquidated damages, even though they are awardable on every case in court, is that they think the case might wind up in the Solicitor's Office, and the Solicitor's Office can't handle it.

This is a very serious problem in enforcement.

Ms. BOBO. I want to affirm what he is saying on this. Our worker centers say they talk to investigators all the time who say, "Look, this is the best deal we can get." We are going to settle on 50 cents on the dollar in terms of getting back wages with no penalties because the Solicitor's Office can't follow through and can't take them to court.

It is a huge problem in terms of enforcement right now. We not only need more investigators, but we need more attorneys to take some of these cases when employers won't pay up with what they owe workers.

Senator HARKIN. I was going to kind of ask this question. Well, so what? If the number of DOL cases, solicitor's cases have gone down, if the private bar is taking 98 percent of them, what is wrong with that? Let the private bar take them. I think what you are saying is a lot of these are, what, just bargained away, and they accept some kind of a settlement?

Ms. BOBO. Yes, I mean, I was literally on the phone the other day with one of our worker centers in Cincinnati who was saying he was so frustrated because he had worked with a group of 30 workers, and they had—he had worked with a Wage and Hour investigator, and he really liked the investigator.

Then, when it got to the Solicitor's Office, they were just trying to settle it as quickly as possible. What it appeared to him from looking at the workers' paycheck was they ended up getting half of what they were owed.

Senator HARKIN. But if it goes to the private bar, a private attorney wants the highest settlement possible. That is how they make their money.

Ms. BOBO. That is right.

Senator HARKIN. Contingent in these cases. Again, I ask the question, what is wrong with having the private bar pick up—

Ms. BOBO. That is good if there are a lot of workers or if there is a lot of money involved. If you are just owed a couple hundred dollars in terms of overtime, what attorney is going to take it? We have got to have a very strong Department of Labor that folks worry about, right?

I mean, you know, we worry about the IRS. No one worries about the Department of Labor, right? I mean, we need to be fearful of them coming in because they are going to find something, and if they do, they are going to penalize you. They are going to fine you, right? Let us make this some meaningful consequences here.

Ms. BENDER. Senator Harkin, I just want to say that, you know, you were talking earlier. Remember when you mentioned next year is the 20th anniversary of the Americans with Disabilities Act? Yet we still have this huge unemployment. How many people have I met throughout the past years who could work in competitive employment, but were told to work in these situations with this 14(c)?

I believe that if you take a lead on this in some way, this will be one aspect—this will be one way we will change that. Because there is a stigma that, "Oh, they can't do it. Oh, they can't perform. Oh, we have got to put them in this sheltered workshop. They can't do it."

I believe if you take a lead on this, this would just be one thing that will help us change that because that is the problem. It is this,

the big picture, the attitudinal barrier, the myth, the thinking that all of these people are inferior when they are not. Sadly, as has been mentioned by my two colleagues here, sometimes people are not doing the right thing.

Senator HARKIN. OK. So, we want to get out of this idea that everyone is lumped together. We need individual assessments of personal abilities in terms of different job sectors and jobs that they could do.

Again, the more I think about it, that is not so much different than what we normally do in employment practices. People are assessed for their abilities to do certain jobs.

Ms. BENDER. Right. As you just said, the new rule should be you are assessed for one thing only. Do you have the skills to do this job? That is it.

If the person is able to do the job, if they have the skills to do the job—

Senator HARKIN. Right.

Ms. BENDER [continuing]. They are no different than anyone else. And sadly, by the way, the deaf community has been caught up in this.

Senator HARKIN. Of course, now there are other problems there, too, having been in this work for so many years. A person may be assessed to have the ability to do a job.

Ms. BENDER. Yes.

Senator HARKIN. Maybe that person doesn't have the transportation to get to and from that job.

Ms. BENDER. That is right, yes.

Senator HARKIN. Maybe that person has—

Ms. BENDER. Epilepsy, that is a big problem. Transportation can be a problem.

Senator HARKIN. Of course. Or it could be, of course, under ADA we did mandate that employers had to make reasonable accommodations. We got the reasonable accommodations basically covered.

Not only do you have to look at a person for their ability to do the job, but what other factors are there involved that might preclude that person from actually doing that job?

Ms. BENDER. Well, see, I don't think they have listened to you. That is their problem. They haven't listened because with the ADA, you provide the accommodations for the person. I mean, really, I have placed people with all different types of significant disabilities, and here is the thing. They go on the interview, and they look at one thing. Can you do the job?

Again, just as you said, there could be an individual unable to do this job. The majority of people that I have met, including people who are deaf or blind, have sometimes been scooped up into that big world you are talking about. I still believe that when you do what you are doing here, it is going to have an impact on this.

Senator HARKIN. Well, like I said, that is what we are going to do. We are going to change this law some way.

Ms. BENDER. I know you will.

Senator HARKIN. I am trying to get the best information. You have great suggestions. Ms. Bobo, Mr. Leonard had some suggestions on how to change it, on how to change this law also.

I am just thinking again out loud that we have to get more of the entities that are out there. I mentioned the DD councils, university-affiliated programs, the Protection and Advocacy services. Who am I missing?

Mr. DECKER. Well, the vocational rehabilitation system—

Senator HARKIN. Oh, rehab, of course.

Mr. DECKER [continuing]. Certainly, I think should be a major actor in this whole evaluation process. They are the experts in getting people ready for employment.

Senator HARKIN. Exactly. We need everybody involved. Then we need to have it transparent, put out there so people know. Families and guardians of some individuals also need to be told about this. They need to have access to that information.

We need to strengthen the enforcement activities of DOL. They obviously need more people, right, Mr. Leonard? And also on the solicitor's side. I think we also need to strengthen the penalty system so that people do know that if they get caught, they are going to get severely fined.

What is lingering in the back of my mind, though, is the idea that most of these people work for these nonprofits, community programs. They do things—as you pointed out, they make things. They may be collating, putting things together that go on to a profit-making business.

How do we get at that under 14(c) and enforce that? Because it is not just—this just happens to be a private person, private—

Mr. DECKER. No, and Senator, I have to say we have certainly seen some abuses in those situations as well.

There is the issue of changing people's job so that they may have gotten proficient in one job and were starting to earn a higher wage, closer to the minimum wage. Then because of the need to meet the contract deadline or the deliverable, they move them over to another job, lower the evaluations. There is a constant shifting of the evaluation.

We have seen the nonprofits charge for transportation, charge for room and board. I think the structure that you are talking about could apply to the nonprofits as well as the profit-making businesses.

Senator HARKIN. OK. All right.

Mr. DECKER. And should.

Senator HARKIN. OK. I just want to make sure of that. OK. There is one other thing.

You mentioned all these different things. Office of Disability Policy, what role should they play in that, Curt?

Mr. DECKER. Well, I think, as I said in my testimony, I would like to see that agency authorized with some very specific direction and mandates. One would be to utilize some of their resources, build on what they have already done. They have created a technical assistance center on wage and hour. It is now ended.

They, I think, have an important role to work in conjunction with Wage and Hour and act as kind of the disability experts at the department. I think that was your original concept of that agency back in 2000, and I don't believe that it has come up to its full potential.

Senator HARKIN. Maybe this might spur it on.

Mr. DECKER. I agree.

Senator HARKIN. We have a new administration that might be more adaptable to that, too.

Just only one last thing. I don't mean to prolong this any more than necessary. One other thing, Ms. Bobo, that I want to get into, and that is this idea that there is a lot of other deductions taken out of people's wages that are happening and not just people with disabilities.

Ms. BOBO. That is right.

Senator HARKIN. A whole broad range of people out there, and you mentioned some in your testimony. Some of them were egregious examples of that.

Again, I am just trying to think, how do we stop something like this? How do we make it more reasonable?

Ms. BOBO. I think there are some examples out there. The Texas Payday Law, where you have to sign in writing ahead of time for deductions that are going to come out of your paycheck. If they are going to be for your benefit, you have to agree that you want them taken out of your paycheck. We need some sort of requirement like that for all workers.

I also believe this, the housing stuff is such a problem for not just disabled workers, but other vulnerable workers, that that should automatically have to be filed—some sort of appeal for the housing deduction to the Department of Labor—or should automatically trigger an investigation. Anyway, the housing deduction is one that makes—that workers are particularly vulnerable on.

That is one. Again, just requiring that every employer provide information about the deductions that are taken out of your paycheck. That would be useful.

Because you and I have that in our paychecks, but workers who are paid in cash don't have that. Workers who are vulnerable often don't have that, and that would be useful and, frankly, would get stuff a little more in the light so that workers and their advocates could be better advocates on these issues.

Senator HARKIN. Why do they go to you rather than go to the Government? You said a lot of these, they come to you for help. Why would they—

Ms. BOBO. Well, particularly for immigrants who don't have proper documentation, they often can't get into the Government buildings. Folks, even if they have documents, a lot of folks are a little nervous about Government agencies, and our worker centers are usually based in churches and community organizations. So, we are very available.

Again, we don't want to do this job without the Department of Labor. We want to work in partnership with the Department of Labor. Again, from our point of view, they really need more resources to be able to do the job well.

Mr. DECKER. Senator, I think one model that could be looked at is when we passed the Ticket to Work program, we created the benefits planning groups, the WIPAs, and also funding for the Protection and Advocacy agency, where people who are thinking of going back to work are able to get counseling on how it is going to affect their benefits, what the deductions would be.

I think that is something that we could build on to make sure that workers who might be in the subminimum wage category had some advisor, had some advice to make sure they understood their protections and what they should be looking for and asking for.

Because this is a very serious issue, especially with the economy, I think there is the incentive for employers to say, "Well, if you take less, we will keep your job." I think this is even more urgent than it has been.

Mr. LEONARD. Senator Harkin.

Senator HARKIN. Yes.

Mr. LEONARD. One thing I wanted to mention is that the Department of Labor takes the position with regard to patient workers, those who are living in an assisted living facility but also doing work there, that room and board that they get cannot count toward the employer's wage obligation.

There is a different rule there for 3(m) than there is everywhere else. I don't know why that is the case. That is something that is worth asking the Department of Labor about.

Ms. BOBO. That is interesting.

Senator HARKIN. Is that a law or what, regulations?

Mr. LEONARD. I believe it is in the regulations. Yes, it is in the regulations, and it says with regard to patient workers only, the employer cannot take any so-called section 3(m) credits. He has to pay those workers entirely in cash.

As I said, I don't know why that is the rule, and I only found it over the weekend. It struck me as unusual as to why they don't have that for other handicapped workers.

Senator HARKIN. My staff, Michelle, thinks that this might go back to that 1986 law, but we don't know.

Mr. LEONARD. I just don't know. I just don't know. It is worth exploring because it might suggest something that could be done for other handicapped workers as well.

Senator HARKIN. Absolutely.

Mr. LEONARD. The other thing I wanted to mention is with regard to these section 3(m) credits. The Labor Department takes the position, and it has generally been upheld by the courts, that the employee has to accept this voluntarily. In other words, the employee can insist on being paid entirely in cash, but if the employee decides, yes, I want to take meals at this restaurant or, yes, I want to live in your housing, then the employee can do that.

I think that is a very good protective device. The Department of Labor proposed regulations under the last administration, which now appear to be on hold, which would change the rule with regard to meals and would allow an employer to tell employees if I am supplying you with meals, you have to accept the cost of that as part of your wage. You cannot get a full wage in cash.

I think that is flat-out wrong. It is based on a couple of court decisions that I think were completely wrongly decided, and many of the commenters on this proposed regulation, which hasn't taken effect and probably won't, opposed it vigorously.

If there were a clear protection in that sense that any time the employer wants to pay partly with these noncash items that the employee would have the opportunity to say, "No, I don't want that. I want cash."

That is in the law now. But again, when you are talking about handicapped workers and even other vulnerable and exploited workers, they might not understand the law. It is hard enough for us to understand what I just said, even for me. So, the question is how can we protect these workers against exploitation they may be unaware of even though they are given all this detail?

I think in the case of handicapped workers, as I think some people at this table have mentioned, if their parents or guardians or other people who are looking after them had to be informed as well, that is a way to assure that even though the handicapped worker doesn't understand what is going on, there would be somebody who has the interest of that worker at the top of their priorities to examine the matter.

Senator HARKIN. I love my staff. I just found out that I sent a letter opposing that last fall. Well, I wasn't the only one. There were a lot of people, a lot of Senators and Congressmen—Senator Kennedy, Senator Murray, Senator Harkin, Senator Reed, Senator Obama.

Ms. BOBO. Heard of him.

Senator HARKIN. I have heard of him.

[Laughter.]

Senator Brown, Senator Sanders, Senator Clinton, Senator Mikulski, Senator Dodd, Congresswoman Woolsey, and Congressman George Miller all sent a letter opposing this that we were just talking about. They are on hold right now.

Mr. LEONARD. That is right.

Senator HARKIN. Yes, they are on hold. Maybe we will get some better outcomes from that.

Again, you all know what we are wrestling with here. I would just ask all four of you that as we move ahead, if you will make yourself accessible to me or my staff in trying to figure out exactly how we do this and what we put together.

It is my intent to have some legislation soon in draft form that would not only get at the Atalissa problem but cover the nonprofits that are out there and get at what you pointed out that these 3(m) deductions—the rule that we were just talking about here.

Ms. BOBO. That is right.

Senator HARKIN. Also looking at how we better—I don't know. Do we need to put a floor under this, or do we just need to say they have to be paid the minimum wage? You know? Period. That is it.

And then do individual assessments for people as to what their abilities are and what jobs they can do. Again, we need to do a better job of enforcing the part of the ADA that requires reasonable accommodations for people. These are all the things I am thinking of that we have got to put into this legislation. The fines and penalties, make those more stringent, too.

Maybe Atalissa was kind of a wake-up call to us that we have really got to look at not just that aspect, but a broader aspect of what is happening with worker exploitation. That is why I entitled this hearing—if I am not mistaken, I entitled it “Preventing Worker Exploitation: Protecting Individuals With Disabilities and Other Vulnerable Populations.”

Poor people, people that don't speak English very well, recent immigrants to this country that come here. I think we just have to take a much broader look than just this one incident.

Ms. Bender, thank you for all you are doing. You can also be a very great source of information to us and help on how we can structure things for competitive employment.

Ms. BENDER. I will. I will. I thank you because I am going to tell you, that minimum wage—if you are able to do that, minimum wage. Minimum, this is it. You know what? There you are, once again, Senator Harkin, saying equality for all, justice for all.

I will provide you with that information. Once again, on behalf of everyone with disabilities, I thank you.

Senator HARKIN. I thank all of you. Any last things I should be thinking about before we adjourn the hearing?

I just thank you all for your recommendations. I appreciate them very much, and we will be in contact with you as we move ahead on this.

Thank you very much. With that, the committee will stand adjourned.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR MURRAY

Thank you, Mr. Chairman, for calling this important hearing. Thanks to the witnesses for being here today to discuss how individuals with disabilities are being treated in the workplace.

I share Senator Harkin's concern about reports of deplorable conditions and mistreatment of some workers with disabilities in his home State of Iowa. I applaud the speed with which Senator Harkin has addressed these reports, and I agree that we must dig deeper to examine whether the laws on the books are adequate to ensure workers with disabilities are treated fairly and with respect.

The opportunity to work in a safe and healthy environment and to be treated equitably in the workplace is a basic human right. Unscrupulous employers who take advantage of workers with disabilities should be held accountable to the fullest extent of the law. Where the law fails to protect workers, it needs to be changed. Where government agencies fail to enforce the law, they should be held accountable.

It is Congress' responsibility to be a voice for those who may not always be able to speak for themselves in abusive situations. That is the reason this hearing is so important.

I look forward to the testimony of our witnesses and working together on this important issue. And I want to thank everyone again for coming to share their expertise.

PREPARED STATEMENT OF NISH

Mr. Chairman, Ranking Member, and members of the committee, thank you for the opportunity to submit this statement for the record of the hearing on March 9, 2009, regarding Preventing Worker Exploitation: Protecting Individuals With Disabilities and Other Vulnerable Populations.

The Committee for Purchase From People Who Are Blind or Severely Disabled (Committee for Purchase) is the independent Federal agency that administers the AbilityOne Program, which is the largest single source of employment for people with significant disabilities. The AbilityOne Program's mission is to provide employment opportunities in the manufacture and delivery of products and services to the Federal Government for people who are blind or have significant disabilities.

Established in 1974, NISH is one of two Central Nonprofit Agencies designated by the Committee for Purchase. Headquartered in Vienna, VA, NISH supports a network of 560 producing Nonprofit Agencies (NPAs) and the Federal customers that rely on the quality goods and services supplied by these NPAs. NISH provides the technical assistance and professional training to these social entrepreneurs needed for successful contract management. In fiscal year 2008, NISH-affiliated AbilityOne agencies secured 38,775 jobs for people with significant disabilities within the AbilityOne Program. During this same period, AbilityOne-producing NPAs reported more than 129,000 jobs for people with significant disabilities.

As a nonprofit dedicated to promoting a dignified place in the workplace for people with significant disabilities, we were most disturbed to learn of the conditions at Henry's Turkey Service and Hill Country Farms, and are appreciative of the oversight the committee has brought to this matter. We applaud the Chairman's commitment to protecting the rights and dignity of all working Americans, including those with significant disabilities.

The committee's hearing explored the role of FLSA 14(c) and 3(m) programs by highlighting their failure to protect 21 men with significant disabilities working at Henry's Turkey House in Iowa. The conditions reported at Henry's Turkey House would appear to have occurred as a result of serious and numerous violations of Federal and State law and regulation that were not corrected due to lapses in oversight. A situation of this kind should never be allowed to happen again. While we understand the committee's concerns over the use of Federal commensurate wage provisions in this instance, the fundamental and broader benefit of FLSA 14(c) can-

not be ignored. FLSA 14(c) remains needed as one of the tools available to employers who wish to create employment opportunities for people with significant disabilities with the greatest barriers to productivity.

This hearing on March 9, 2009 brought out several statements and a few key questions on which NISH is offering comments. In the Chairman's opening statement of the hearing he said, in part:

Now the stated intention behind the 14(c) program is "to prevent the curtailment—to prevent the curtailment of employment opportunities for individuals with disabilities." A very laudable goal. There are many individuals with significant disabilities who are employed under this program who may not otherwise have found employment. There are also many workers with significant disabilities who are every bit as productive as the workers without disabilities, and our laws must be tightened to ensure that employers cannot use programs like 14(c) to take advantage of this.

So we have to do all we can to promote employment for persons with disabilities. People with disabilities working have dignity and purpose. It helps them achieve economic self-sufficiency, one of the four stated goals of the Americans with Disabilities Act. However, in our efforts to ensure that individuals with disabilities find employment and economic self-sufficiency, we obviously must draw a bright line in prohibiting and preventing employers from taking advantage of these vulnerable workers.

NISH agrees fully with these statements. The 560 NPAs employing people with significant disabilities under the AbilityOne Program share these beliefs as well. They put these beliefs to work everyday as evidenced by the average wage of \$10.57 per hour earned in 2008 by people with significant disabilities in the AbilityOne Program.

The key questions raised in the hearing deserves to be answered. In addition to the answers provided by the witnesses, NISH offers the following information.

Question 1. How are Special minimum wages determined; how accurately do Special minimum wages reflect the productivity of workers; and who is checking to ensure that workers with disabilities are being compensated fairly and correctly?

Answer 1. Special minimum wages are commensurate wages which are based on the productivity of a worker with a disability, in proportion to the wage and productivity of workers who are not disabled for the same type, quality, and quantity of work in the same or similar geographic location. NISH, in cooperation with the DOL Wage and Hour Division, conducts training and technical assistance site reviews of all NPAs employing people with significant disabilities under the AbilityOne Program. This enhanced assistance acts to ensure this vulnerable group of workers are fully protected as well as offering the opportunities to maximize their earnings.

Question 2. In 1938 when FLSA was passed, there was a 75 percent floor. Then that was reduced to 50 percent at some point. Then, in 1986, that was even taken away. Do we need to reinstate a wage floor or not?

Answer 2. From the earliest days of the Wagner-O'Day Act, the AbilityOne Program has sought to emphasize the *capabilities* of persons who were blind or had significant disabilities. The AbilityOne Program emphasizes what individuals *can* do. The program has always strived to be inclusive and to recognize that participants with lower productivity levels have something of value to offer. Under the commensurate wage system, even employees with extremely low levels of productivity are offered a seat at the workbench and are given an opportunity to improve their skills and their productivity to earn higher levels of compensation.

Question 3. Perhaps we need to more narrowly define what people with disabilities are eligible for this. There are some people with significant disabilities that just simply cannot make it in competitive work? Should we certify that an individual is eligible for 14(c)?

Answer 3. We already define who is eligible for the Program. There is in fact a certification process for employers that use 14(c). What we need to ensure is that existing Federal, State and local laws are fully implemented.

Question 4. Does DOL keep track of how many people with disabilities are employed under a 14(c) application for a particular employer?

Answer 4. As you heard in John McKeon's testimony, the U.S. Department of Labor's Wage and Hour Division needs to improve its enforcement and oversight of the program. NISH has a partnership with the U.S. Department of Labor, Wage and Hour Division (WHD). Representatives from the WHD provide training to

AbilityOne Program Community Rehabilitation Program (CRPs) on the Fair Labor Standards Act and payment of special minimum wages to workers with disabilities under section 14(c).

Furthermore, the AbilityOne Program has its own regulatory requirements. The AbilityOne Program requires CRPs to submit quarterly employment reports (QER). The QER collects the number of direct labor hours performed by people without substantial disabilities, by products and services; hours include vacation, holiday or paid sick leave; and other information as required by the committee.

In addition, participating CRPs are also required to submit an annual certification, the cumulative total of all data submitted throughout the fiscal year on the Quarterly Employment Report. In addition, the AbilityOne Program requires NPAs to maintain compliance with all Federal laws and regulations pertaining to them as employers, employers of people with disabilities, and as Federal contractors. There are systems in place to monitor compliance and to deliver consequences for noncompliance.

Question 5. What would happen if all workers with disabilities were paid the minimum wage? How would that affect employment? If it would have a negative effect on employment, is there some level, like a 75 percent or a 50 percent floor that could not be breached that would not have an adverse effect on employment of people with severe disabilities?

Answer 5. To pay all people with significant disabilities working on AbilityOne projects full minimum or competitive wages would have severe consequences for people with significant disabilities working in the AbilityOne Program. In order to remain price competitive, the population of people with significant disabilities who are less than 85 percent productive will be supplanted by people with disabilities who have a higher productivity rate. This would eliminate the employment of people with the most significant disabilities—the people that the AbilityOne Program was initially established to serve. In order to continue the employment of the people with the most significant disabilities, the cost of AbilityOne contracts would increase substantially as full minimum or competitive wages are paid to the population of people with significant disabilities that are less than 85 percent productive.

Question 6. Should there be individual assessments for people as to what their abilities are and what jobs they can do?

Answer 6. Individual assessments are absolutely critical to determine individual abilities along with requirements for individual supports and services. They should be mandated along with a dedicated funding stream to ensure full and accurate compliance.

Question 7. If employers are to hire someone with a disability, they have to request or file a 14(c) application. Should the employee have the right to request or file a 14(c) application?

Answer 7. Under the principle of self determination there is every reason to allow a potential employee to file a 14(c) application. It is necessary that the term “self determination” be clearly defined to avoid disputes.

RECOMMENDATIONS

We ask that the subcommittee move cautiously before initiating any legislative action that might eliminate or restrict access to the provisions of section 14(c). The impact to **the thousands of hard working Americans with significant disabilities along with people without disabilities who support them in the AbilityOne Program** would be profound and long-lasting. The hardest hit would be employees with developmental disabilities and intellectual disabilities. These are the employees who would have little chance at securing employment in the competitive environment; the employees who would most likely have no job opportunities if not for the AbilityOne Program. Considerable discussion and a review of the commensurate wage system by all involved parties should be undertaken in advance of any proposals to amend the provisions of FLSA section 14(c).

NISH proposes the following immediate action steps:

- Direct the Department of Labor (DOL) Wage and Hour Division Administrator to ensure sufficient resources are allocated to increase training, technical assistance, and oversight activities of Fair Labor Standards Act Section 14(c) certificate holding employers to ensure that the law is closely monitored and adhered to strictly.
- Direct the Rehabilitation Services Administration, the National Institute on Disability and Rehabilitation Research, and the Office of Disability Employment Policy to provide funding, training, technical assistance, and other supports to certificate holding for-profit and not-for-profit employers which will increase produc-

tivity levels of people with significant disabilities work incentives and employment support programs.

- Require the Rehabilitation Services Administration and the Office of Disability Employment Policy to cooperatively conduct pilot projects which would prove the effectiveness of customized employment in large-scale employer applications, rather than the small scale studies conducted.

- Require the Wage and Hour Administrator to survey certificate holding for-profit and not-for-profit employers to determine an accurate count of people with significant disabilities who meet the criteria specified in the regulation as having significant disabilities for the work being performed.

- Congress should reinstate the Advisory Committee on Special Minimum Wages. Members should be appointed by the Secretary of Labor to advise and make recommendations to the Secretary and the Wage and Hour Division Administrator concerning the administration and enforcement of regulations and the need for amendments thereof and serve other functions as needed by the Secretary or the Administrator.

Thank you for considering our point of view. Please feel free to contact Tony Young, Senior Public Policy Strategist, on *tyoung@nish.org* or at 571-226-4567 for additional information.

[Whereupon, at 4:20 p.m., the hearing was adjourned.]

