



JAN 29 2015

Christopher Rueggeberg  
New Hampshire Council on Developmental Disabilities  
The Walker Building  
21 South Fruit Street, Suite 22  
Concord, New Hampshire 03301-2451

Dear Mr. Rueggeberg:

This letter is in final response to the inquiry of the New Hampshire Council on Developmental Disabilities ("Council") regarding section 14(c) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 214(c)(1). In your letter, you explained that the Council seeks to inform a study committee established by the State of New Hampshire to consider state legislation to end the payment of subminimum wages to persons with disabilities. The Council posed three questions regarding section 14(c):

- (1) Will the Department continue to issue section 14(c) waivers to New Hampshire employers under the Fair Labor Standards Act if the State of New Hampshire passes legislation that prohibits employers from paying subminimum wages to persons with disabilities?
- (2) Does section 14(c) of the Fair Labor Standards Act prevent or limit a state in any way from prohibiting the use of subminimum wages through state legislation?
- (3) Would a section 14(c) certificate issued by the Department under the Fair Labor Standards Act exempt the New Hampshire employer from a higher state minimum wage requirement, or from a state minimum wage law that does not provide an exception for payment of subminimum wages to workers with disabilities?

A partial response, dated August 19, 2014, addressed the Council's second and third questions. This letter responds to question one. For your convenience, the previously provided responses to questions two and three are also included below.

Response to Question 1: Yes. The Wage and Hour Division ("WHD") will continue to issue section 14(c) certificates to employers in New Hampshire as well as other states that pass legislation prohibiting employers from paying subminimum wages to persons with disabilities.

WHD anticipates that there will likely be a decrease in section 14(c) applications from any state that passes legislation which ends the payment of subminimum wages to persons with disabilities. However, even in a state that requires the payment of the state minimum wage to those employed by a 14(c) certificate holder, there may be circumstances in which the certificate holder may pay a commensurate wage rate under the certificate. For example, often the

prevailing wage rate under a Service Contract Act ("SCA"), 41 U.S.C. §§ 6701-6707, or the Walsh-Healy Public Contracts Act ("PCA"), 41 U.S.C. §§ 6501-6511 contract is higher than the Federal or state minimum wage, and the payment of workers with disabilities on these contracts at a rate less than the prevailing wage may not be a violation of a state law prohibiting employers from paying wages below that state's minimum wage.

In addition, on February 12, 2014, President Obama signed Executive Order 13658, "Establishing a Minimum Wage for Contractors," to raise the hourly minimum wage to \$10.10 beginning January 1, 2015 for workers performing on or in connection with Federal construction and service contracts. Executive Order 13658 applies to new contracts and replacements for expiring contracts with the Federal Government that result from solicitations issued on or after January 1, 2015 or to contracts that are awarded outside the solicitation process on or after January 1, 2015. The Executive Order specifically provides that workers whose wages are calculated pursuant to section 14(c) certificates are generally entitled to receive no less than the Executive Order minimum wage of \$10.10 per hour for all time spent performing on or in connection with contracts covered by the Order. If a worker is entitled to a wage rate higher than the Executive Order minimum wage pursuant to another Federal, state, or local law (e.g., the SCA), the worker must be paid the higher wage rate. The Executive Order minimum wage is a wage "floor" and it does not excuse noncompliance with any applicable higher wage obligations under other Federal, state, or local laws.

WHD will alert certificate-holders that the issuance of a certificate under the provisions of section 14(c) of the FLSA does not excuse noncompliance with any state law establishing higher minimum wage standards. WHD recommends that employers contact their appropriate state authority for guidance on the requirements of state law. Employers must pay employees in accordance with both Federal and state laws. For example, a worker who is employed under a section 14(c) certificate to perform work on an SCA-covered contract that was entered into on January 15, 2015 would be entitled to receive the highest of the section 14(c) commensurate wage, the Executive Order minimum wage, or the state minimum wage.

Response to Question 2: No. Both the FLSA and the section 14(c) regulations specifically allow a state law to establish a higher minimum wage rate than the rate set by the FLSA. Section 18(a) of the FLSA provides that "[n]o provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter . . . ." 29 U.S.C. § 218(a). See also *In re Farmers Ins. Exch.*, 481 F.3d 1119, 1134 (9th Cir.2007) ("[T]he purpose behind the FLSA is to establish a national floor under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA.") (citation and internal quotation marks omitted).

Similarly, the regulations interpreting section 14(c) provide that "[n]o provision of these regulations, or of any special minimum wage certificate issued thereunder, shall excuse noncompliance with any other Federal or State law or municipal ordinance establishing higher standards." 29 C.F.R. § 525.20. It is the Department's view, therefore, that the FLSA and the section 14(c) regulations do not prevent a state from legislating to prohibit the payment of subminimum wages to workers with disabilities.

Response to Question 3: No. This question is related to the second question, because it also asks whether the FLSA would preempt a higher minimum wage requirement under state law. As stated above, the FLSA does not excuse an employer from compliance with an applicable higher minimum wage required under state law. 29 U.S.C. § 218(a); 29 C.F.R. § 525.20. In other words, section 14(c) establishes a subminimum wage floor, but state law may raise that floor, including by not exempting certain employees from the state's minimum wage requirement. If an employer has been issued a section 14(c) certificate authorizing payment of a commensurate wage rate below the Federal minimum wage to a worker with a disability, the employer must nevertheless comply with any state law requiring the payment of a higher state minimum wage rate to that worker.

We trust this is responsive to your inquiry.

Sincerely,

A handwritten signature in cursive script, appearing to read "David Weil".

Dr. David Weil, Administrator  
Wage and Hour Division  
U.S. Department of Labor