

New Restrictions on Subminimum Wage Under WIOA: Requirements and Opportunities for State IDD Agencies

Introduction and Background

Under Section 14(c) of the federal Fair Labor Standards Act, businesses are permitted to pay individuals with disabilities less than the minimum wage, basing their pay on individual productivity rates. Currently, there are approximately 225,000 individuals earning subminimum wage (source: [US Department of Labor, Wage and Hour Division](#)), almost all of whom are employed by community service providers.

The passage of the Workforce Innovation and Opportunity Act (WIOA) in July 2014 placed new limits on the payment of subminimum wages, under Section 511, which went into effect on July 22, 2016. State vocational rehabilitation (VR) agencies have the primary responsibility for implementation of Section 511, in conjunction with education agencies and service providers.

While there is no legally mandated role for state intellectual and developmental disability (IDD) agencies under Section 511, the impact on individuals receiving employment services through the IDD system could be significant. Section 511 also has the potential to be used as part of overall efforts by state IDD agencies to expand individual integrated employment in the community.

This brief provides details on Section 511 implementation, and then discusses potential roles for state IDD agencies.

Note: This brief is based on the latest available information as of April 2017, including:

- a) [Section 511 of WIOA](#)
- b) [Final regulations for implementation of Section 511 of WIOA by VR effective September 2016](#)
- c) [July 2016 directives on Section 511 from the US Department of Labor Wage and Hour Division](#)
- d) [November 2016 Information from the Rehabilitation Services Administration](#)

The Purpose of Section 511

The goal of WIOA Section 511 is to limit the use of subminimum wage, to ensure that individuals with disabilities, especially students and youth with disabilities, have meaningful experiences that support their potential to be successful in competitive integrated employment. While Section 511 must be followed in order to pay an individual subminimum wage, given the intended purpose of limiting the use of subminimum wage, it should not be viewed simply as a requirement to be complied with. Instead, it should be regarded as a mechanism to divert individuals from entering subminimum wage employment, and to transition people from subminimum wage employment to competitive integrated employment.

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Section 511 Requirements for Those Currently Earning Subminimum Wage

What is the process for adults who are currently in subminimum wage employment?

Each of the following steps are required at 6 months and 12 months after an individual begins employment at subminimum wage, and annually thereafter.

STEP 1: Provision of career counseling to the individual by the state VR agency, and information and referral from VR to federal and state programs and other resources that support the individual to explore and attain competitive integrated employment. The career counseling and referrals must be provided by VR in a manner that:

- a) Is understandable to the individual.
- b) Facilitates informed choice and independent decision-making regarding employment.
- c) Does not encourage or directly result in subminimum wage employment.

STEP 2: The individual must be informed by the entity that is paying the individual subminimum wage of local self-advocacy, self-determination, and peer mentoring training opportunities. These services may not be provided by any entity that holds a 14(c) certificate (the [Special Wage Certificate](#) from the US Department of Labor (DOL) that permits an organization to pay subminimum wage).

How are “peer mentoring,” “self-advocacy,” and “self-determination” defined?

Although not defined in the WIOA law or regulations, the preamble to the WIOA final regulations includes the following definitions:

- “Peer mentoring” involves individuals with disabilities providing guidance, counseling, and advice to other people with disabilities based upon their own experiences and training and the experiences of others they know.
- “Self-advocacy” involves developing the skills, knowledge, and confidence to stand up for oneself, and using appropriate means to obtain one’s goals.
- “Self-determination” means having the abilities, attitudes, skills, and opportunities to play an active and prominent role in living and planning one’s life and future.

Can an individual earning subminimum wage refuse to participate in the Section 511 process?

Through informed choice, an individual earning subminimum wage can refuse to participate in the Section 511 process outlined above. However, if the individual refuses to participate in the Section 511 process, they cannot continue to be paid subminimum wage, as the business that employs them (which is typically a community rehabilitation provider) would be in violation of the Section 511 requirements and liable for back wages. (The business may continue to employ the individual at minimum wage or higher.) This refusal must be documented by VR per the specific regulations in WIOA. This refusal cannot be documented by the business that employs the individual at subminimum wage.

Section 511 Requirements for Youth considering Subminimum Wage employment

What is the process for youth seeking subminimum wage employment?

For youth with disabilities who are 24 and younger, prior to placement in subminimum wage employment, all three of the following steps are required:

STEP 1: Completion of VR pre-employment transition services (as defined under WIOA), or transition services as defined by the Individuals with Disabilities Education Act (IDEA).

STEP 2: Application for VR services, resulting in either:

- a. Determination of ineligibility for VR services, or
- b. Being determined eligible for services, but unable to achieve the goal of competitive integrated employment in the Individualized Plan for Employment (IPE) after a reasonable period of time, resulting in an unsuccessful case closure.

STEP 3: Within 30 days after determination of ineligibility or unsuccessful case closure, VR must provide career counseling, and information and referral to federal and state programs and other resources that offer employment supports to help the individual explore and attain competitive integrated employment. The career counseling and referrals must be provided by VR in a manner that facilitates informed choice and independent decision-making by the youth, and does not encourage or directly lead to subminimum wage employment.

What is “reasonable period of time” for provision of VR services prior to an unsuccessful case closure?

Per WIOA regulations, “reasonable period of time” must be consistent with the disability-related and vocational needs of the individual, as well as the anticipated length of time required to complete the services identified in the IPE. For an individual with a goal of supported employment, a reasonable period of time is up to 24 months,

unless there is agreement to extend the services longer.

Can a youth refuse to participate in the Section 511 process?

A youth or their parent/guardian (as appropriate) can refuse to participate in the Section 511 process, or can opt out of the VR process entirely. However, if the individual does so, per the preamble of the final regulations¹, they may not be paid under a 14(c) subminimum wage certificate, and must be paid at least minimum wage. The WIOA regulations contain specific procedures for educational agencies and VR for documenting youth refusal to participate.

How does Section 511 restrict use of subminimum wage while youth are in school?

Under Section 511, state and local educational agencies cannot contract or have any other type of arrangement with a business/service provider to pay a youth subminimum wage. However, educational agencies may still contract with a holder of a 14(c) certificate to provide other services, such as assisting a student to find an after-school or summer job in competitive integrated employment.

Summary of Section 511 Requirements		
Individual	Steps required	Timeline requirements
Youth (24 & under) considering employment at subminimum wage	Provision of VR pre-employment transition services, or IDEA transition services. Referral to VR, and either determined ineligible or case unsuccessfully closed. Provision of career counseling by VR, and referral to employment-related supports.	To be provided prior to youth entering subminimum wage employment.
Individual currently earning subminimum wage	Provision of career counseling by VR, and referral to employment-related supports. Provision of information by 14(c) providers of availability of self-advocacy, self-determination, and peer mentoring training.	To be provided at 6 months after beginning subminimum wage employment, 12 months, and annually thereafter while employed at subminimum wage.

General Requirements for Section 511

What is considered “informed choice”?

WIOA does not define “informed choice.” However, via general guidance on informed choice under Title II of the Americans with Disabilities Act and the Olmstead Decision, and specific [guidance on publicly funded employment services issued in October 2016](#), the US Department of Justice notes that individuals may be initially hesitant to consider employment in integrated settings. This is usually a result of being segregated in sheltered workshops, being told they cannot work in integrated settings, being tracked away from competitive integrated employment, being steered to segregated settings directly from school, being absent from the competitive labor market for long periods of time, or being given scant information about supported employment services, integrated employment settings, or how individuals with disabilities can work in jobs in the community.

Therefore, public entities, including state IDD systems, must take steps to ensure that individuals can make an informed choice about working in

¹ Federal Register, Vol. 81, No. 161, Friday, August 19, 2016, p. 55717

integrated settings. These steps include:

- Providing information about the benefits of working in integrated employment.
- Facilitating visits or other experiences in integrated employment settings (e.g., job tours, job shadows, informational interviews, job tryouts/situational assessments, discovery).
- Offering opportunities to meet with other individuals with disabilities who are working in competitive integrated employment, with their families, and with service providers who support individuals in integrated employment.
- Providing access to benefits counseling to explain the impact of income on benefits, and how benefits can be managed to maximize income from employment.
- Making reasonable efforts to identify and address concerns or objections raised by the individual, parent/guardian, or other relevant decision-maker (such as a case manager), regarding employment in the community.

Does VR need to undertake the Section 511 processes for every youth considering subminimum wage, and every individual currently earning subminimum wage?

Per WIOA, VR is only responsible for the Section 511 processes for youth “who are known” to be seeking subminimum wage employment, and individuals “who are known” to be currently employed at subminimum wage. However, the WIOA regulations are clear that Section 511 is not limited only to individuals who have applied for or received VR services or who were served by another program administered by the state VR agency.

Individuals may become known to VR through any method: through the VR process, self-identification/self-referral, referral by a 14(c) certificate holder, or referral by another entity (which could include a state IDD agency). Once an individual is known to VR, VR must undertake the Section 511 processes outline above.

What are the requirements of holders of 14(c) certificates under Section 511?

Per the [July 2016 Field Assistance Bulletin](#) from the Wage and Hour Division (WHD) of US DOL, entities that hold 14(c) certificates cannot pay an individual subminimum wage unless all requirements under Section 511 are met. Holders of 14(c) certificates must verify that all Section 511 requirements have been met, and review and keep on file copies of any relevant documentation provided to the individual by VR. In the event of an investigation by WHD, failure to comply with the requirements of Section 511 may result in payment of back wages.

What are the requirements for career counseling and information and referral services beyond those listed above?

The Rehabilitation Services Administration (RSA), the federal agency that has oversight of state VR programs, has the following [additional requirements for the career counseling and information and referral services](#) under Section 511:

- They are to be provided by professionals that have a broad understanding of the labor market and career development, knowledge about individuals with disabilities and their employment needs and challenges, and specific knowledge about resources and programs that can help to support individuals with disabilities in exploring career choices and finding suitable placements.
- They may be offered in various settings, including in groups and individually; may combine video or digital communication; and where permitted, may be provided at the worksite or at a mutually convenient location.

Can VR contract for services to implement Section 511?

VR does not have to directly provide the required services under Section 511 and can contract for those services – but contracts for these services cannot be with holders of 14(c) certificates.

What is the deadline for compliance with Section 511?

- For individuals who were earning subminimum

wage as of July 22, 2016, all requirements for Section 511 must be completed by July 22, 2017.

- For individuals hired in subminimum wage employment on or after July 22, 2016, the initial process must be completed within six months of hire, with ongoing compliance with all required timeframes (12 months and annually thereafter).
- As of July 22, 2016, youth with disabilities must complete all 3 required steps prior to entering subminimum wage employment.

What are the documentation requirements under Section 511?

Section 511 contains extensive documentation requirements for both VR and educational agencies, with deadlines for each type of documentation. The directives from WHD also contain documentation requirements. The chart below summarizes these requirements. Holders of 14(c) certificates must make copies of all relevant documentation, and make them available to the state VR agency or the US DOL upon request.

What is the impact of state wage and hour laws on Section 511?

While all states must comply with the federal wage and hour laws, many states have their own wage and hour laws with additional requirements (such as a higher state minimum wage, or a state prohibition on subminimum wage). Per a [November 2016 administrator's interpretation](#) from WHD, entities paying subminimum wages under a section 14(c) certificate must pay these wages in accordance with both federal and state laws. Issuance of a 14(c) certificate does not excuse noncompliance with any state law, including laws establishing higher minimum wage requirements.

This issuance also states that in a state that prohibits subminimum wage, there may be circumstances in which a section 14(c) certificate holder may pay commensurate wage rates to workers with disabilities and remain in compliance with state law. For example, a section 14(c) certificate may have a lawful use in a state that prohibits subminimum wage if the certificate holder has a contract with the Federal Government that is covered by the Service Contract

Act (the federal law that establishes minimum wage rates for federal contracts for services).

Who is responsible for implementation of Section 511?

There are two agencies responsible for implementation of Section 511: the public VR system (under the jurisdiction of RSA), and the US Department of Labor Wage and Hour Division (WHD). The division of these responsibilities is as follows:

- VR is responsible for undertaking and documenting the various 511 processes for youth who are known to VR to be seeking subminimum wage employment, and for individuals currently earning subminimum wage who are known to VR.
- WHD has oversight of the 14(c) wage certificate program, and is responsible for ensuring that service providers comply with all requirements for payment of subminimum wage, including Section 511.

Having two different agencies involved can create confusion. The following guidelines can assist in this regard:

- VR must comply with the requirements for Section 511 in the WIOA regulations.
- Service providers must comply with the directives from WHD concerning Section 511, including the [July 27, 2016 letter to 14\(c\) certificate holders](#).
- VR does not have jurisdiction over 14(c) certificate holders in terms of implementation of Section 511 (even if the 14(c) holder is a VR vendor). While VR may provide guidance to service providers in terms of Section 511 procedures, any questions regarding Section 511 compliance should be directed to WHD, not to VR.
- As stated by WHD, failure of 14(c) holders to comply with Section 511 could result in payment of back wages. If a 14(c) holder fails to properly comply with Section 511 because of incorrect information received from VR or any other agency (for example, being told that individuals only need to go through the 511 process if they

have expressed verbal interest in competitive integrated employment), the 14(c) holder could still be penalized by WHD. The fact that the 14(c) holder was provided incorrect information by VR or another agency does not exempt the business/service provider from responsibility for compliance.

Potential Roles and Opportunities for State IDD Agencies

There are no legal requirements or formal role in WIOA for state IDD agencies under Section 511. However, many individuals earning subminimum wage receive employment and day services from state IDD agencies, and work for service providers with 14(c) certificates that are also contractors with state IDD agencies (the state itself may also be a 14(c) certificate holder). As such, state IDD agencies have a vested interest in Section 511.

The preamble to the WIOA regulations encourages state VR agencies to develop a cooperative relationship with state IDD agencies to implement Section 511. State IDD agencies should also consider how Section 511 could be used to support agency efforts to expand the number of individuals employed in the community. The following are suggested strategies:

- Work cooperatively with public VR system in identifying individuals for the Section 511 process.
- Use the required referral to VR for career counseling as a catalyst for accessing VR services for individuals, resulting in career exploration, and consideration of individual integrated employment.
- Work with service providers to implement the requirements of Section 511, and ensure that your provider requirements are in compliance with Section 511.
- Be clear in any directives regarding Section 511 about the respective roles of VR and WHD in Section 511 implementation. Be explicit that providers should consult with WHD regarding any compliance issues, and that lack of compliance could result in payment of back wages. In addition, be clear that your IDD agency does not have any official role in Section 511 compliance.
- Use Section 511 as a way of expanding service provider focus on employment, via development of cooperative relationships between providers and public VR. This includes access to the services required by Section 511 (career

Section 511 Documentation Requirements		
For Individuals Currently Earning Subminimum Wage	Entity Responsible	Deadline
Documentation of career counseling and information services	VR agency	Provided to individual within 45 calendar days after completion (90 days under extenuating circumstances)
Documentation of refusal to participate in Section 511 processes	VR agency	Provided to the individual within 10 calendar days of refusal
Documentation of provision of information on local self-advocacy, self-determination, and peer mentoring training opportunities	14(c) provider (employer)	To be documented in conjunction with the referral to VR for career counseling and information services.
Documentation of completion of transition services under IDEA	Local educational agency	Transmitted to VR within 30 calendar days after completion of services (60 days under extenuating circumstances)
Documentation of all three required 511 activities for youth prior to entering subminimum wage employment	VR agency	Provided to youth within 45 calendar days of completion (90 days under extenuating circumstances)
Documentation of youth's refusal to participate in IDEA transition services	Local educational agency	Transmitted to VR within 5 calendar days after refusal
Documentation of youth's refusal to participate in 511 process	VR agency	Provided to youth within 10 calendar days of refusal

counseling; referring individuals to self-advocacy, self-determination, and peer mentoring training opportunities; etc.), as well as other VR services.

- Work with VR to ensure that the annual reviews for those currently earning subminimum wage and other components of Section 511 are done with integrity towards the goal of expanding competitive integrated employment, and not to meet a compliance requirement to continue to pay subminimum wage.
- Link the required annual review process under Section 511 with a review of employment status under the Individual Service Plan (ISP) for consistency in terms of messaging and strategies, and ensuring cross-agency use of resources.
- Work with VR on a consistent definition of “informed choice” and mechanisms for ensuring informed choice via various career exploration processes.
- Be clear with service providers regarding the requirements of informed choice.
- As noted, WIOA requires that individuals earning subminimum wage be informed by the 14(c) provider of self-advocacy, self-determination, and peer mentoring training opportunities. IDD systems should ensure the “informing” process maximizes access to these opportunities. In addition, IDD systems should assist in identifying and developing quality self-advocacy, self-determination, and peer mentoring training opportunities that assist in advancing employment, expanding awareness of their availability, and broadening their use beyond Section 511.
- Include language in your state’s VR-IDD interagency agreement that specifically addresses Section 511, and the areas listed above.
- If compliance with wage and hour regulations is part of IDD system quality assurance, compliance with Section 511 should be added to this process.

Where do I get more information?

In working with VR agencies and service providers, IDD systems should become familiar with the various source documents regarding Section 511, and be somewhat cautious in assuming what they are being told verbally is correct. There is a reference list at the end of this publication with links to source documents on Section 511. Given the complicated nature of Section 511 in terms of legal and regulatory issues, it is important to consult with the primary entities responsible for oversight and implementation. These include the following:

US Department of Education, Office of Special Education and Rehabilitation Services, Rehabilitation Services Administration (RSA)

RSA is the federal agency that has oversight of the state VR program, including VR responsibilities regarding Section 511 implementation. The US Department of Education issued the final regulations for implementation of Section 511.

Phone: 202-245-7488

RSA WIOA Information:

<https://www2.ed.gov/about/offices/list/osers/rsa/wioa-reauthorization.html>

RSA State liaisons: <https://rsa.ed.gov/people.cfm>

US Department of Labor, Wage and Hour Division (WHD)

WHD is the federal agency that has oversight of subminimum wage, and is responsible for ensuring compliance with Section 511 by entities that hold 14(c) certificates.

WHD Subminimum Wage Information:

www.dol.gov/whd/workerswithdisabilities/

Phone: 1-866-4USWAGE (1-866-487-9243); TTY: 1-877-889-5627

Additional contact information, including list of regional offices:

www.dol.gov/whd/contact_us.htm

References

- Section 511 Legislation: Workforce Innovation and Opportunity Act Legislation, H.R. 803 – Sec. 511: Limitations on Use of Subminimum Wage. <http://www.wintac.org/topic-areas/pre-employment-transition-services/law-reg-and-policy/section-511-limitations-use-sub#lgeneral>
- Section 511 Regulations: Federal Register, Vol. 81, No. 161 – August 19, 2016 – Part IV, Department of Education, 34 CFR, Part 397 – Limitations on Use of Subminimum Wage. <https://www.federalregister.gov/documents/2016/08/19/2016-15980/state-vocational-rehabilitation-services-program-state-supported-employment-services-program>
- US Department of Education, Office of Special Education and Rehabilitation Services, Rehabilitation Services Administration – Overview and Discussion of Federal Regulations on Section 511 and Limitations on Use of Subminimum Wage, CSAVR Conference, November 2016. <http://www2.ed.gov/about/offices/list/osers/rsa/publications/csavr-2016-section-511-subminimum-wage.pdf>
- US Department of Justice Civil Rights Division - Statement on informed choice - Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.: What factors are relevant in determining whether an individual does not oppose an integrated setting? https://www.ada.gov/olmstead/q&a_olmstead.htm
- US Department of Justice Civil Rights Division - Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C. to State and Local Governments' Employment Service Systems for Individuals with Disabilities. https://www.ada.gov/olmstead/olmstead_guidance_employment.htm
- US Department of Labor Wage & Hour Division – General information on subminimum wage and list of holders of 14(c) certificates. <https://www.dol.gov/Whd/specialemployment/index.htm>
- US Department of Labor Wage & Hour Division - Fact Sheet #39: The Employment of Workers with Disabilities at Subminimum Wage. <https://www.dol.gov/whd/regs/compliance/whdfs39.htm>
- US Department of Labor Wage & Hour Division - Fact Sheet #39H: The Workforce Innovation and Opportunity Act and Limitations on Payment of Subminimum Wages under Section 14(c) of the Fair Labor Standards Act. <https://www.dol.gov/whd/regs/compliance/whdfs39h.pdf>
- US Department of Labor Wage & Hour Division - Field Assistance Bulletin No. 2016-2 - WHD Enforcement of WIOA Limitations on Payment of Subminimum Wages under FLSA Section 14(c), July 27, 2016. https://www.dol.gov/whd/FieldBulletins/fab2016_2.htm
- US Department of Labor Wage and Hour Division - Letter to 14(c) Certificate Holders on Section 511, July 27, 2016. https://www.dol.gov/whd/specialemployment/14cLetter_July2016.pdf
- US Department of Labor Wage and Hour Division - Administrator's Interpretation No. 2016-2 - Effect of state laws prohibiting the payment of subminimum wages to workers with disabilities on the enforcement of section 14(c) of the Fair Labor Standards Act, November 17, 2016. https://www.dol.gov/whd/opinion/AdminIntrprtn/FLSA/2016/FLSAAI2016_2.htm



**State Employment
Leadership Network**



NASDDDS

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The SELN is a joint program of the Institute for Community Inclusion at UMass Boston and the National Association of State Directors of Developmental Disabilities Services.

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