NFIB

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January 6, 2025

Hon. Julie A. Su, Acting Secretary of Labor
c/o Mr. Daniel Navarette, Director, WHD/DRLI
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, N.W.

Dear Acting Secretary Su:

RE: Department of Labor Notice of Proposed Rulemaking titled "Employment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act," RIN 1235-AA14, 89 *Fed. Reg.* 96466 (December 4, 2024)

The National Federation of Independent Business (NFIB)[1] submits these comments in response to the Department of Labor notice of proposed rulemaking titled "Employment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act [FLSA]" and published in the *Federal Register* of December 4, 2024. Section 14(c)(1) of the FLSA directs the Secretary of Labor, "to the extent necessary to prevent curtailment of opportunities for employment," to issue special certificates to employers for employment at less than the minimum wage of individuals whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury.[2] Part 525 of title 29 of the Code of Federal Regulations implements section 14(c)(1).

The proposed rule would (1) determine that "subminimum wages are no longer necessary to prevent the curtailment of opportunities for employment for individuals with disabilities,"[3] and (2) would nevertheless allow issuance of certificates for a three-year phase-out period. The proposed rule is flatly contrary to law. The Department should withdraw the proposed rule and continue to issue special certificates in accordance with the existing Part 525 rules.

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[1] NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty States hear the voice of small business as they formulate public policies.

[2] 29 U.S.C. 214(c)(1).

[3] Proposed 29 CFR 525.1, 89 *Fed. Reg.* 96510, col. 3. See also proposed 29 CFR 525.9(a), 89 Fed. Reg.96511, col. 1 ("(a) As of [EFFECTIVE DATE OF FINAL RULE], the Secretary has determined that certificates allowing for the payment of subminimum wage rates for workers with disabilities are no longer necessary to prevent the curtailment of opportunities for employment.").

In 1947, the U.S. Supreme Court described section 14 of the FLSA as follows:

> The language of this section and its legislative history reveal its purpose. Many persons suffer from such physical handicaps, and many others have so little experience in particular vocations that they are unable to get and hold jobs at standard wages. Consequently, to impose a minimum wage as to them might deprive them of all opportunity to secure work, thereby defeating one of the Act's purposes, which was to increase opportunities for gainful employment. On the other hand, to have written a blanket exemption of all of them from the Act's provisions might have left open a way for wholesale evasions. Flexibility of wage rates for them was therefore provided under the safeguard of administrative permits.[4]

The laudable objective of section 14 remains to prevent curtailment of opportunities for employment for individuals with specified disabilities or the specified individuals who lack experience.

Under section 14(c)(1) the Secretary of Labor may issue a special certificate that allows an employer to pay individuals with disabilities less than a minimum wage "to the extent necessary to prevent curtailment of opportunities for employment[.]" The key legal defect of the proposed rule is that it has the Secretary of Labor making a blanket, omniscient determination for all places, all times, and all circumstances that "*the Secretary has determined that subminimum wages are no longer necessary to prevent the curtailment of opportunities for employment for individuals with disabilities.*"[5]

The proposed universal determination that the statutory "extent necessary" is zero ("no longer necessary") has the following legal flaws:

> -- First, the proposed determination is not true, and therefore its making is arbitrary, capricious, and contrary to law. The Department of Labor said "it is widely acknowledged that individuals with disabilities continue to face challenges in obtaining equal opportunity and treatment[.]"[6] The Department also said that, "[a]s of May 1, 2024, the Department's data shows [sic] there were 801 employers with either an issued certificate or a pending certificate application" and that "[e]mployers with an issued certificate reported paying approximately 40,579 workers at subminimum wages in their previously completed fiscal quarter."[7] Thus, by the Department's own admissions, the "extent necessary" is, in fact, not zero, for, if it were zero, none of those certificates could be in force. Employment opportunities may be much better for many individuals with disabilities than they were in the past, but not for all such individuals (as the Department's admissions make clear), and

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[4] *Walling v. Portland Terminal Co.*, 330 U.S. 148, 151 (1947) (footnote omitted),

[5] Proposed 29 CFR 525.1, 89 *Fed. Reg.* 96510, col. 3. See also proposed 29 CFR 525.9(a), 89 *Fed. Reg.* 96511, col. 1 ("(a) As of [EFFECTIVE DATE OF FINAL RULE], the Secretary has determined that certificates allowing for the payment of subminimum wage rates for workers with disabilities are no longer necessary to prevent the curtailment of opportunities for employment.").

[6] 89 *Fed. Reg.* at 96467, col. 1.

[7] 89 *Fed. Reg.* at 96473, col. 1.

the 40,579 workers with disabilities the Department cites still merit the protection that Congress gave them in enacting section 14(c)(1).

-- Secondly, the proposed determination unlawfully renders section 14(c)(1) a nullity. Under section 14(c)(1), the Secretary cannot issue a special certificate except to "the extent necessary to prevent curtailment of opportunities for employment." By making the (unjustified) determination that "the extent necessary" is zero, and thereby ending issuance of special certificates, the Department purports to exercise either power to repeal a statute or power to ignore a statute rather than to faithfully execute it, either of which violates the Constitution. The text of the statute says "*to the extent* necessary," which is not the same as "*if* necessary;" the phrase "to the extent necessary" denotes a congressional determination that, to an extent, the special certificates are necessary. Moreover, the crucial verb phrase in section 14(c)(1) is that the Department "shall . . . provide" for employment under certificates of individuals with specified disabilities if the statutory requirements are met; the provision does not give the Department discretion to decide that the Department will no longer give to the last few tens of thousands of individuals with disabilities the protection that the law grants to them.

-- Thirdly, the proposed rule is internally inconsistent. Once the Secretary of Labor determines as a factual matter that the "extent necessary" is always and everywhere zero, a condition precedent to the issuance or continuance in force of any special certificates at all disappears. The Secretary thereafter would have no power to issue or continue any further special certificates, and therefore the proposed post-determination three-year phase-out of special certificates for employers who already had certificates would be unlawful.

No agency has any powers beyond those granted to it by Congress by law.[8] And no law grants the Secretary of Labor authority to make in the proposed rule the blanket determination that "the Secretary has determined that subminimum wages are no longer necessary to prevent the curtailment of opportunities for employment for individuals with disabilities."[9]

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[8] *NFIB v. Department of Labor, OSHA*, 595 U.S. 109, 117 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided."); *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 374 (1986) ("First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.").

[9] Proposed 29 CFR 525.1, 89 *Fed. Reg.* 96510, col. 3. ("In view of the legal and policy developments that have expanded access to employment opportunities for individuals with disabilities since Congress first included the provision for subminimum wages in 1938 and since the Department last substantively updated its regulations in 1989, the Secretary has determined that subminimum wages are no longer necessary to prevent the curtailment of opportunities for employment for individuals with disabilities, see § 525.9. In light of this determination, the Secretary will cease issuing new certificates immediately as of [EFFECTIVE DATE OF FINAL RULE] and certificates will be available only to renewing applicants for a limited phaseout period ending [DATE 3 YEARS AFTER THE EFFECTIVE DATE OF FINAL RULE]. See § 525.13.")

The Department and various advocacy organizations may have concluded that section 14(c) is no longer a good idea for any people with disabilities,[10] but, even if that were true, the Department must continue to faithfully execute section 14(c) as long as it remains the law of the land. The Department's attempt with the proposed rule to render section 14(c) a nullity is unlawful. NFIB recommends and requests that the Department withdraw the proposed rule and instead continue administering section 14(c) under its current regulations.

Sincerely,

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Approved for filing:

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[10] 89 *Fed. Reg.* at 96474, col. 3 to 96476, col. 2.