

Testimony of Julie Rabinowitz, Director of Communications and Operations

Maine Department of Labor

In Opposition

LD 1240, “An Act To Phase Out the Payment of Subminimum Wages to Workers with Disabilities”

Before The Joint Standing Committee On

Labor, Commerce, Research & Economic Development

Sponsored by: Senator Roger Katz

Date of Hearing: Thursday, May 14, 2015

Senator Volk, Representative Herbig, and members of the Joint Standing Committee on Labor, Commerce, Research and Economic Development, my name is Julie Rabinowitz and I am the Director of Communication and Operations at the Maine Department of Labor. I am here to testify in opposition to LD 1240, “An Act To Phase Out the Payment of Subminimum Wages to Workers with Disabilities.”

The Department supports almost all elements of this bill because we believe that as proposed, this permitting process for subminimum wage individuals would bring the subminimum wage program into compliance with Maine’s Employment First law and connect these individuals with the state’s vocational rehabilitation program on an ongoing basis with the goal of gaining integrated, community based, competitive employment. We are opposed solely because, for those few individuals in the future for whom a determination is made by Vocational Rehabilitation, to which the client and/or guardian must agree, that the client is “not able to benefit from Vocational Rehabilitation services” at this time, that individual should have the option to obtain such employment as is permitted in this bill under the grandfather clause.

We note that:

- People with disabilities, especially intellectual disabilities, have high rates of unemployment and are under-represented in the work force.
- The number of agencies certified for this type of employment has fallen in half because maintaining certification is costly and time consuming. (Note, however, changes in mandated minimum wages at the state or federal level could make paying sub-minimum wages more cost-effective for the employing agency and encourage new agencies to apply for certification).
- The federal government, through the new Workforce Innovation and Opportunity Act that will be phased in over the next year, will prevent an otherwise-qualifying individual from being placed in a sub-minimum wage job until all possibilities via vocational rehabilitation have been exhausted, to ensure that competitive employment is the preferred and prioritized

type of employment. Maine must comply with this provision, and this is consistent with our Employment First law.

- Vocational rehabilitation services must be offered to each individual; however, subminimum wage jobs should remain available only as the jobs of last resort when attempts for sustained competitive employment have been exhausted and the determination of “not able to benefit” has been made and agreed to by the client; to clarify, such a determination also requires that vocational rehabilitation check in with that client every six months as a condition of that waiver, ensuring a continued effort to engage that person in competitive employment.

Under these conditions, the department anticipates that the few, remaining, certified employing agencies in Maine may provide an employment opportunity to the estimated no-more than 30 percent of the current individuals cited on the certifications for whom it is anticipated competitive employment could not be sustained.

People with disabilities, to include people with intellectual or developmental disabilities, have lower labor-force participation rates and higher rates of unemployment than people without disabilities. Maine has a higher share of individuals with a disability than the nation, about 16 percent compared to 12 percent, respectively. According to the Center for Workforce Research and Information, “On average, one in three adults with a disability is employed. The likelihood of working varies widely by type of disabling condition. Persons with sensory difficulties are more likely to be employed than those with other disabilities,” to include cognitive disabilities. In 2014, the unemployment rate of people with a disability in Maine was more than 17 percent. Nationally, research supported by the Special Olympics indicates that the unemployment rate for individuals with an intellectual disability was more than twice as high as that of the general population in 2014. The Department supports all efforts to employ people in competitive employment wherever possible.

This bill would mandate changes under two of the department’s bureaus. The Bureau of Labor Standards (BLS) has oversight, consultation, and regulatory authority over the laws governing the payment of sub-minimum wages to individuals with disabilities. The department’s Bureau of Rehabilitation Services (BRS) provides vocational rehabilitation (voc rehab) to individuals with a qualifying disability to prepare them for competitive employment.

Under both federal and state law, employers may apply for special wage certificates through the Department. Maine statute follows federal law, employers with state certificates may pay special minimum wages that are less than the State minimum wage (\$7.50). Pursuant to an approved certificate, the employer can hire individuals with disabilities whose productive capacity is impaired by a physical or mental disability. The payments of sub-minimum wages are based on an evaluation of the individual’s performance and are authorized to prevent curtailment of opportunities for employment for workers with disabilities, in other words, this program has existed to provide those individuals who would not be successful in gaining competitive employment the opportunity to participate in the workforce, earn a paycheck, and be part of a community of colleagues. In Maine, all subminimum wage employment **must** take place in a facility where people with and without disabilities work side-by-side.

There are eight agencies in Maine who hold both federal and state certificates authorizing them to pay sub-minimum wages to individuals deemed to have disability whose productive capacity is impaired. These eight agencies employ approximately 296 individuals represented on the certificates; however, not all the individuals are paid less than \$7.50 an hour, some are paid as high as \$10.11 an hour. Two years ago, there were 13 agencies authorized to pay sub-minimum wages, today, only eight are authorized, and one will be voluntarily ceasing the use of their certificate in June 2015 (nationally, there are approximately 2,744 companies with federal certificates).

The majority of individuals represented on the certificates have an Intellectual Disability or a Developmental Disability (ID/DD) and receive either Section 21 or Section 29 MaineCare waiver services¹. No other waiver (brain injury, other related conditions) or employment-funded services (such as Mental Health-SAHMS) allow individuals to be paid sub-minimum wages and access funding for on-the-job support.

Every six months the employing agency is required to conduct a new time study to ensure that the individual is paid correctly based on the individual's skill set. If changes to the rate of pay are needed, the employing agency **must increase the wage of the individual**. Decreasing the wage is only allowed if the performance of the individual indicates a decrease in productivity during the time study. In the last three years, BLS has not investigated any allegations as to the payment of sub-minimum wages in the state.

The Department agrees that every individual who can obtain competitive employment at the minimum wage or higher should do so, and our efforts support Employment First. While LD 1240 provides an exemption for those individuals who wish to remain in their current employment situation, this bill, as written, would not allow others to enter such employment. There is no specific degree of disability that automatically prohibits someone from being employed, but regulations, policy and procedures do define how functional limitations—as they relate to competitive community-based employment—are evaluated and employment planning occurs. By mandating that all workers who would have otherwise qualified for these grandfathered positions be paid the minimum wage, we have concerns that the workers with the least productivity will lose this chance to be employed. Many will simply have their hours cut—going from a job where they spent 20 hours a week and that offered their parent or guardian time to work themselves or take care of other duties, to working a few hours a week or not at all. Not all workers will want to continue in their subminimum wage jobs, and we certainly do not want people working in jobs or for wages they believe do not adequately recognize or value their contribution; they should be free to access vocational rehabilitation to gain competitive employment at higher wages. *However, those who prefer to work but cannot sustain competitive employment, even with the understanding that their wage will reflect their productivity and that it might be less than the state minimum wage, should have the right to choose that job—just as this bill currently grants the people it would grandfather under the permit system.*

¹ The remaining individuals have other disabling conditions but are not accessing MaineCare Waiver services for support on the job. Support of sub-minimum wages for ID/DD individuals are currently allowed under Section 21 and Section 29 MaineCare rules under Work Supports-Group Employment based on Technical Assistance guidance from the Centers for Medicare and Medicaid Services (CMS). It is not allowed under Work Supports-Individual Employment based on Technical Assistance guidance from CMS.

Voc rehab is federally mandated to give priority to those with more significant disabilities. At this time, there is no wait list for Maine voc rehab services; however, the influx of these 296 individuals could change the priority of individuals applying for vocational services. We do not anticipate this generating a waitlist at this time; if funding cuts to the vocational rehabilitation program were to occur, a waitlist for services could be reinstated.

The department believes that sub-minimum wages may make sense for those **few** individuals who cannot sustain competitive employment, but this must be done in conjunction with the provision of vocational rehabilitation services. This bill, as written, concedes that a small group of people should be grandfathered under subminimum wages, but denies that possibility of employment to anyone who is not currently employed at the subminimum wage.

We respectfully ask the committee to vote Ought Not To Pass. Thank you for your consideration of this testimony. Staff from the bureaus available to attend the work session.