

*The Productivity Fallacy:
Why people are worth more than just how fast their
hands move*

A White Paper by Michael Callahan

When Congress passed the sub-minimum wage components of the Fair Labor Standards Act (FLSA) of 1938 [Section 14 (c)], it is clear the intention was to assure that workers who were not able to meet employer productivity standards, because of the impact of disability on work performance, would not be excluded from earning a wage. Unfortunately, the consequences of this well-intended legislation have been far more negative than positive in the 71 years since its passage. From its onset, the provision was based on an outmoded concept that the FLSA sought to replace – reliance on an absolute connection between pay and productivity. In the years prior to the FLSA, employers were free to connect pay and productivity in a way that too often placed productivity targets far outside the reach of even the most ardent efforts by workers. Theoretically, one could make a decent wage if one’s production was high enough, but workers wore themselves out trying to meet impossibly high standards. Congress sought to remedy this through the FLSA by establishing a minimum wage for most workers. Of course employers could still set production standards and even offer incentives for increased productivity but, at the end of the day, employees could expect to receive at least the minimum wage for their hours worked.

But what happens when disability affects productivity? Congress chose to use a strategy common in the Industrial Revolution to address this issue – to pay workers only what they produced. On one hand, Section 14 (c) might have resulted in the integration of hundreds of thousands of workers with disabilities making less than minimum wage working alongside workers earning full minimum or commensurate wage. This outcome would be less than acceptable, but at least those workers would be integrated in typical workplaces. But instead of the impact being individually focused, the sub-minimum wage provisions of FLSA have resulted in the development and growth of a “separate but equal” industry of alternative employers whose business it is to employ individuals with disabilities and to use Section 14 (c) as the centerpiece of their business model. Today 95% of all sub-minimum wage certificates are held by human service organizations. By their own admission, the only way these organizations can remain viable is to link pay with worker productivity. Both sides agree that there are individuals who, as a result of the significance of their disability, will not meet productivity standards regardless of training, matching or assistive technology. But how can those individuals ever expect to earn at

least the minimum wage and to work in regular community workplaces if the only indicator of contribution is the speed of their productivity?

At least one answer to this dilemma is to confront the presumption that pay and productivity are inextricably linked. While it is important to say that productivity is of critical importance to business and that every reasonable effort should be made to assist individuals with significant disabilities to enhance their productivity, there is an alternative construction to resolve this dilemma -- that of contribution. The concept of contribution offers a richer and broader perspective to solve the equation of employee pay than a sole reliance on productivity. Of course one aspect of employee contribution is productivity but it is of critical importance to understand that employers do not use the productivity yardstick to gauge all facets of employee contribution in typical workplaces. Indeed, many tasks performed in the workplace are simply accomplished episodically, once a week, every other day, or once or twice a day. Yet others are performed in a manner that counting productivity is neither economically or logistically feasible. What matters most in those cases is that the task gets done and gets done correctly.

The concept of pay for productivity used by Congress for sub-minimum wage is based on the strictest interpretation of employer expectations. Employers always expect, rhetorically at least, high productivity from employees and compensate them at a reasonable rate less than the value of the productivity. It is true that unless the value of the employees' productivity exceeds pay offered, a for-profit entity cannot stay in business for long. Even non-profit and governmental entities must strike a balance, theoretically, between pay and productivity to remain viable and successful. The traditional formula has been that employee pay must be equal to or less than the employer's productivity demands. However, this tight formulization does not take into consideration that, beyond the demand for productivity, businesses have needs. The concept of adding value by meeting business needs allows for a focus on those aspects of a business that bring added value to the workplace. When the value equation shifts from meeting demands to meeting needs, pay at or above the minimum wage becomes possible.

The most common way to add value to a business, beyond typical productivity, is to meet unmet needs. The concept of unmet needs refers to a host of workplace tasks that need to be performed, theoretically at least, but that, in actuality, are not being performed. By targeting unmet business needs as an organizing concept, individuals with disabilities who have specific

contributions to offer can move beyond the demands associated with productivity standards. Since 2001, the Office of Disability Employment Policy (ODEP) of the US Department of Labor has been promoting this strategy through its initiative on Customized Employment. Through a series of nearly 40 multi-year implementation projects, the Customized Employment (CE) Initiative has set pay of at least the minimum wage as the threshold for a successful job. This initiative has shown that the contribution of meeting an unmet need is valued differently by many employers than that of the original task that was not performed. In other words, CE provides a strategy to broaden the *pay for productivity* equation to an enhanced, *pay for contribution* equation.

Beyond addressing unmet needs, customized employment allows for additional strategies to unbundle the demand of employers. For instance, many employers assign episodic duties to highly paid employees that could easily be performed by workers at a much lower (though at or above minimum wage) pay grade. It has been demonstrated clearly from the days of Marc Gold's ground-breaking research to the present-day examples of individuals in customized, supported employment that individuals with even the most significant disabilities have discrete contributions to offer to employers if the demand of pre-set productivity standards is not present. Gold found it was possible to teach virtually any individual, regardless of severity of intellectual disability, to perform tasks in a quality manner. This finding fits perfectly with the concept of customized employment that allows a business-friendly strategy to remove the barrier of productivity.

Another perspective regarding the presumed need for sub-minimum wage pay is that individual performance is neither a static nor a general concept. A colleague from the University of Massachusetts, John Butterworth, notes the following:

The regulations regarding sub-minimum wage clearly indicate that it is intended to be contextual in nature, and that even if an individual is paid sub-minimum wage for a particular type of job at a particular time there should be no assumption that the individual is incapable of earning minimum wage or higher in a different position, or in the same position, with the benefit of experience. In practice, it appears that the contextual nature of sub-minimum wage has often been ignored. Anecdotal evidence and observation indicate that when an individual is incapable of working at a rate to meet the requirements of the prevailing wage for a certain position, this is

often used as evidence by service providers that the individual is incapable of working in the community at minimum wage or higher.

It is estimated that approximately 425,000 individuals with significant disabilities are in services that use sub-minimum wage as the basis of pay in the USA. For the first time in the history of the disability field, concerted efforts are being made to remove Section 14 (c) from the FLSA. Conversely, those who favor its continued use are stating their case. What seems to be occurring is less of a debate around sub-minimum wage payments than focusing on the continued existence of the industry of organizations that use Section 14 (c) as an essential ingredient of their viability. It has been suggested that the payment of sub-minimum wages is somehow connected to the national value that, *disability is a natural part of the human experience*, as stated in the Americans with Disabilities Act. How can the case be made that disability is being treated as a natural part of our human experience when people with disabilities are virtually the only segment of society for whom it is legal to pay sub-minimum wages? In fact, this beautifully stated national value seems to argue strongly for the removal, not the continuation, of sub-minimum wage.

At this point, only the most traditionally devalued segments of our society are allowed to receive less than minimum wage. This is especially critical in that in recent years there has been an increasing focus on the concept of asset development and access to a living wage for persons with disabilities. How can persons with significant disabilities ever be expected to build assets and earn a living wage if they must start in the hole created by sub-minimum wage? In the Americans with Disabilities Act (ADA), Congress provided that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." Equality of opportunity to earn a living wage that results in economic self-sufficiency is only possible for *all* Americans if they are guaranteed access to at least the minimum wage as payment for their work.

Another argument by those in favor of continuing Section 14 (c) is that of personal choice – persons with disabilities should have the right to choose to be employed in services that typically pay less than the minimum wage. However, if disability is to ever be seen as an aspect of life potentially associated with all citizens, not just an aberration associated with a small portion of society, personal choice should be over-ridden as it is for all citizens on the issue of

pay. Job seekers without disabilities do not have the choice to apply for a job for pay of less than the minimum wage.

There seems to be a legitimate concern voiced by the organizations that use 14 (c) as the primary basis of employee pay that its removal from FLSA would be negative, resulting in the loss of sheltered employment for many of the 425,000 individuals who are paid sub-minimum wages. This concern seems to be linked with the observation that the access to employment at regular wages offered by Customized Employment are relatively new and not widely accepted and understood by traditional providers of competitive employment services. Both of these points should signal a cautious and measured approach to any effort to remove 14 (c) from FLSA. However, these concerns should provide the framework for a long term plan to gradually reduce the use of 14 (c) as more and more individuals receive regular (possibly customized) jobs in the community rather than a rationale to keep this outmoded concept.

As the arguments pro and con emerge regarding sub-minimum wage payments it seems of fundamental importance to separate the issues of pay and programmatic services. It is the position of this paper that the value of the contributions made by individuals with disabilities to employers goes far beyond how fast their hands and bodies move. By focusing on employer needs, it is possible to achieve pay at or above minimum standards for all people. The fact that thousands of sheltered workshops depend on sub-minimum wage payments is a different issue. While no one wants tens of thousands of individuals to be dumped back non-activity, sitting at home (or worse), this doesn't have to happen. Providers of sheltered employment could embrace these new concepts and partner in a plan to gradually reduce reliance on 14 (c) as they increase customized, supported employment outcomes or, if locally desired, to recast their business model based on a minimum wage threshold for payments to individuals who choose a sheltered form of employment.

At the end of the day, it all boils down to a decision as to how we wish to view the issue of disability and life. Do we see people with disabilities, including *all* people with the most significant disabilities, as co-workers, neighbors, friends, citizens and contributors in the *regular* sense, with support and accommodation as necessary, or do we see them in a *special* sense as individuals who are not expected to join society fully, living lives apart and different from the rest of us. The positive concept of moving beyond productivity as the primary indicator of

human worth in the workplace provides a pathway to follow. Contribution can then be the basis of legitimizing typical pay in typical settings.

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