To: **ANCOR Membership**
From: **Katherine Berland, Esq., Director of Government Relations**
Date: **August 14, 2014**
Re: **The Workforce Innovation and Opportunity Act, Title IV (Amendments to the Rehabilitation Act of 1973), as enacted**

On July 22, 2014, President Barack Obama signed the Workforce Innovation and Opportunity Act (WIOA), Public Law No. 113-128, into law. As reported by ANCOR almost exactly one year ago, the Senate Health, Education, Labor and Pensions (HELP) Committee had passed an amended version of the Workforce Investment Act (WIA) through to the full Senate. In the year since the HELP Committee action, leaders from both parties in both houses of Congress worked to come to an agreement on the bill that would ultimately pass and become law.

The WIOA reauthorizes programs originally authorized by the Workforce Investment Act of 1998, which expired in 2003. Upon its expiration, Congress did not reauthorize the programs until the present WIOA. It is designed to assist job seekers access employment, education, training, and support services to succeed in the labor market and to match employers with skilled workers.

This document summarizes sections of the law that are of particular interest to ANCOR members. Some information contained herein is duplicative of ANCOR's prior memo, though it will specifically highlight changes made from the HELP Committee's markup to the final law regarding vocational rehabilitation. Note that the final law contains more provisions than are covered in this document. Further note that WIOA as passed differs structurally from the version of WIA that ANCOR analyzed last year, which changes the numbering of Titles, Subtitles, and Chapters, and Subchapters within the law. References throughout this document are to the final version of WIOA which was signed into law on July 22, 2014, with prior references noted where applicable. This paper is focused on Title IV – Amendments to the Rehabilitation Act of 1973 within WIOA. The full text of the law is hyperlinked above, and additional resources may be found on the Department of Labor's Employment and Training Administration Workforce Innovation and Opportunity Act website.

EXECUTIVE SUMMARY

Restrictions on Use of Subminimum Wage: WIOA adds Section 511 to the Rehabilitation Act which requires, starting in 2016, additional criteria that must be met before an individual under the age of 24 may be employed at a subminimum wage. Criteria include ongoing career counseling and monitoring, with regularly-scheduled reassessments. Additionally, there is a new prohibition on educational agencies from contracting with sheltered work providers. Full discussion of the section begins on page 6 of this document.

Realignment of Federal Programs: Several federal agencies have been relocated under WIOA. Notably, The National Institute on Disability, Independent Living, and Rehabilitation (formerly "NIDRR") and the Independent Living Program will now we housed at the Administration on Community Living (ACL) within the Department of Health and Human Services. The final law does not move the Rehabilitation Services

Administration (RSA) (which houses Vocational Rehabilitation). The RSA will remain under the Department of Education umbrella.

Definitions of Supported and Competitive Employment: The new law changes the definition of supported employment to clarify that when the term is used, it refers to "competitive integrated employment". Customized employment, which is "designed to meet the specific abilities of the individual with a significant disability and the business needs of the employer" falls under the definition of supported employment.

WIOA explicitly defines competitive employment as well. To be considered "competitive", the employment must pay at least minimum wage, and include benefits and wages similar to those without disabilities performing the same work. Additionally, the job must afford people with disabilities the same opportunity to interact with non-disabled workers that workers without a disability experience.

Allocation of State VR Funds to Transition Services: WIOA requires that state vocational rehabilitation (VR) agencies allocate at least 15 percent of their VR funds to pre-employment transition services to assist youths transitioning to adulthood. Additionally, state public VR agencies must have formal cooperative agreements with the state Medicaid plan administrative agency in place specifying how VR services will be delivered. They must also have agreements in place with state agencies responsible for administering IDD services.

OVERVIEW OF INTENT AND STRUCTURAL CHANGES

Generally, the changes enacted in WIOA emphasize a high expectation of competitive integrated employment for individuals with disabilities, with a focus on youth/students with significant disabilities. In a statement issued on WIOA, HELP Chairman Tom Harkin (D-IA) said, "Access to training, education, and employment services opens doors to the middle class for workers and helps strengthen our economy. This bipartisan, bicameral reauthorization of the Workforce Investment Act will help ensure that all workers—including those with disabilities—can access these opportunities. It will provide better coordination and value to our workforce development system."

The law reauthorizes the Rehabilitation Act of 1973, which includes vocational rehabilitation (VR) programs. According to a HELP Committee press release, the intent behind the changes is to "raise prospects and expectations for Americans with disabilities, many of whom…are shunted to segregated, subminimum wage settings without ever receiving the opportunities and skills to success in competitive, integrated employment." The changes to VR services are in Title IV, Subtitle B of WIOA, and will be discussed more fully below.

Generally, it requires state VR agencies, working with local educational agencies, to make pre-employment transition services available to students with disabilities. It includes a prohibition against local educational agencies and State educational agencies contracting with programs that will pay youth (defined as under age 24) a subminimum wage. It also includes criteria that youths with significant disabilities must meet before being permitted to work in a sheltered workshop, or other non-competitive or non-integrated settings. The law increases opportunities for individuals currently working in sheltered settings to transition out of those settings.

The law makes several changes to structure that involve where certain agencies are housed. The Independent Living Program has moved from the Department of Education to the Department of Health and Human Services under its Administration for Community Living (ACL). Additionally, the National Institute on

Disability, Independent Living, and Rehabilitation (formerly NIDRR), will move to the ACL as well. It had been proposed that the Rehabilitation Services Administration (RSA) be moved; however the law does not make that change, leaving it operating within the Department of Education.

Title IV – AMENDMENTS TO THE REHABILITATION ACT OF 1973

Subtitle A – Introductory Provisions

Section 402 (former Sec. 2) – Findings, Purpose, Policy

In the findings section, Congress notes that individuals with disabilities make up a substantial portion of the American population, and that disability in no way diminishes the rights of individuals to live independently, with self-determination, and to enjoy full integration into all aspects of American society. It acknowledges that there is a high proportion of students with disabilities leaving secondary education without being employed competitively or being enrolled in post-secondary education, and that there is a need for better supports to transition students with disabilities from school to the postsecondary education system or to competitive, integrated work settings.

The law adds that the purpose includes "increas[ing] employment opportunities and employment outcomes for individuals with disabilities, including through encouraging meaningful input by employers and vocational rehabilitation service providers on successful and prospective employment and placement strategies." Further, it adds that its purpose is to ensure "to the greatest extent possible, that youth with disabilities and student with disabilities who are transitioning from receipt of special education services…have opportunities for postsecondary success."

Section 404 (former Sec. 7) - Definitions

Employment

The law contains a revised definition of "competitive, integrated employment", which specifies that the work must be compensated at a rate that is the same rate as for other similarly situated employees who do not have disabilities, and in compliance with Federal and State wage and hour laws. It also makes clear that integration means the work is performed at a location where the employee has the opportunity to interact with other employees who do not have disabilities. It pointedly includes the inclusion of customized or supported employment within the definition, so long as the work involved satisfies the criteria of competitive, integrated employment.

The new definition of "customized employment" specifies that for individuals with significant disabilities, the work is based on the individual's strengths, needs, and interests, and is designed to meet both the abilities of the individual and the business needs of the employer. It then describes examples that would meet the criteria, including job exploration by the individual, working with an employer to facilitate placement by customizing a job description, developing job duties, and providing services and supports at the job location.

Though these types of work situations are strongly encouraged by the law, there is no mandate on employers to participate in a customized employment plan. Additionally, the law specifically includes in Title IV, Subtitle F, Section 458 the option for employers to employ individuals who are not currently suited for competitive work through the use of Fair Labor Standards Act (FLSA) Section 14(c) waivers (this will be covered in greater detail in another section).

Subtitle B – Vocational Rehabilitation Services

Section 412 (formerly Sec. 101) – State Plans

The law makes several revisions to requirements for State Plans. Notably, it adds several criteria that states must use when setting forth policies and procedures relating to preparing and training rehabilitation professionals. In addition to complying with Federal and State certification and licensing requirements, the law requires that rehabilitation professionals meet certain education and/or experience criteria.

The law creates new reporting requirements for states, and includes a list of data points to be collected and reported on an annual basis.

The law adds a section setting forth how State plans will coordinate with employers. Of particular interest is the new section for a "cooperative agreement regarding individuals eligible for home and community-based waiver programs". This section sets forth the requirement that the State plan must assure that the agency responsible for administering the State Medicaid plan has entered into a formal cooperative agreement with the State agency that provides services and supports for individuals with intellectual disabilities and individuals with developmental disabilities (IID/IDD) with respect to VR services for individuals with the most significant disabilities who have been determined to be eligible for home and community-based services under a Medicaid waiver, Medicaid State plan amendment, or other authority related to a State Medicaid program.

The law revises the timeframe for review of individuals in extended employment or other employment under FLSA 14(c) special certificate provisions. Prior law required an annual review for these individuals for the first two years, and then only if requested by the individual or the individual's representative. The law changes that to a semiannual review for the first two years, and then annually thereafter, with no time limit or end date.

The law requires the State plan to provide assurances with respect to students with disabilities, including strategies it has developed and will implement regarding needs assessments, identification of goals and priorities, and carrying out pre-employment transition strategies.

Subtitle B, Section 413 (formerly Sec. 102) - Eligibility and individualized plan for employment

The law makes several revisions to the eligibility criteria for individualized plans for employment. The law carries a strong presumption of employability. One addition is the requirement that the State unit will provide eligible individuals the opportunity to try different employment experiences, including supported employment, and the opportunity to become employment in competitive integrated employment.

The law requires that the individualized plan for employment be developed no later than 90 days after the eligibility determination date unless extended at the consent of the individual through an agreement with the State.

Section 414 (formerly Sec. 103) - Vocational rehabilitation services

The law maintains the current definition of vocational rehabilitation services as "any services described in an individualized plan for employment necessary to assist an individual with a disability in preparing for, securing, retaining, or regaining an employment outcome that is consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individual".

The law includes a section on VR services for groups of individuals, and says that such services may include the improvement of existing operations, or the establishment or development of community rehabilitation programs that promote community integration and result in competitive integrated employment.

Section 418 (formerly Sec. 109) -Training and Services for Employers

The law significantly augments current law regarding payments the State receives under Section 111 to permit the State to educate and provide services to employers who have hired or are interested in hiring people with disabilities under programs contained in the bill.

Section 422 (formerly Sec. 114) – Provision of pre-employment transition services

The law creates a new section for pre-employment transition services. The bill directs States to establish a local pre-employment transition coordinator for local offices that will attend individualized education plan (IEP) meetings, coordinate with local workforce development boards and other local entities, and coordinate with schools to carry out services described in the law.

Subtitle C – Research and Training

Section 433 (formerly Sec. 202) - National Institute on Disability and Rehabilitation Research

This section establishes the National Institute on Disability and Independent Living Research within the Administration for Community Living (ACL), which is under the Department of Health and Human Services. (It formerly operated under the name of National Institute on Disability and Rehabilitation Research (NIDRR).) The new law moves the institute from the Department of Education to ACL. It is tasked with promoting, coordinating, and providing services for research, demonstration projects, information dissemination, and community outreach that will assist people to live independently. It directs the Institute director to perform specific tasks to achieve these goals.

Notably, it directs the director to make grants to various entities, and requires that the director monitor progress made by grantees towards achieving measureable goals as outlined in the law.

Section 434 (formerly Sec. 203) - Interagency Committee

The law establishes an interagency committee that will meet four times a year and promote coordination, cooperation, and collaboration among Federal departments and agencies that conduct disability and independent living research programs.

At least every two years, the committee will host a disability and rehabilitation research summit bringing together policymakers, representatives from Federal agencies conducting independent living and disability research, nongovernmental funders of independent living and disability research, and organizations representing individuals with disabilities, researchers, and providers.

Based on the proceedings of the summit, the committee will create a comprehensive strategic plan to be used by various levels of government that contains measurable goals and objectives, action-oriented measures, timetables, budgets, and assignment of responsible individuals and agencies for carrying out research activities.

Subtitle D —PROFESSIONAL DEVELOPMENT AND SPECIAL PROJECTS AND DEMONSTRATIONS

Section 442 (formerly Sec. 303) – Demonstration, training, and technical assistance programs

This section includes criteria to be used when awarding grants authorized by the bill. It includes a subsection that sets directs the Commissioner to give priority consideration to grants that focus on improving transition from education to employment for youth with significant disabilities, particularly to competitive employment. It also directs the Commissioner to prioritize projects that provide supported employment and that increase competitive integrated employment for individuals with significant disabilities.

The bill includes a transition initiative for youth with significant disabilities. The purpose of this initiative is to demonstrate and increase systemic reforms necessary for promoting the effective transition of covered students from secondary school to competitive integrated employment settings and opportunities, and ultimately to create enduring systems of service delivery and training that facilitate the transition of covered students from school to post-secondary life with the emphasis on achieving the outcome of competitive integrated employment. It goes on to describe students covered under the initiative, who are individuals with IDD between the ages of 14 and 22, who are within three years of leaving secondary school, and who are at risk of being placed in a day habilitation program, or in a vocational or employment program where they would likely receive less than minimum wage.

This section also authorizes specific awards to be granted under the initiative. It sets forth eligibility requirements for grant recipients, including representatives from the developmental disability and mental health services community (including statewide provider agencies such as the Developmental Disabilities Planning Councils and the University Centers for Excellence in Developmental Disabilities), as well as individuals with disabilities and their advocates, and additional public and private entities, with demonstrated expertise in providing supported employment services in integrated settings at minimum wage or higher with commensurate benefits for covered students and with expertise in the provision of employment supports. The applications subsection describes in detail information that should be contained in grant applications. Included in this section is information relating to how the grantee will coordinate activities with other relevant service providers.

This section also provides a detailed list of activities authorized using award funds, including developing innovative strategies for attaining competitive integrated employment in conjunction with utilizing natural supports, providing support activities for youth with disabilities, providing training to school and transition personnel, and providing assistance to students and families in navigating various programs available to them.

Subtitle F —RIGHTS AND ADVOCACY

Section 458 – Limitations on use of Subminimum Wage

Section 458 inserts new section 511 into the United States Code, in the Title and subsection that refers to employment of individuals with disabilities. The discussion about section 511 is below.

New Sec. 511 – Limitations on Employment of Individuals with Disabilities at a Subminimum Wage

The bill adds new section 511 to Title 29 of the U.S. Code, which governs labor law. Specifically it amends section 791, which focuses on the employment of individuals with disabilities. The new section 511 provides a list of criteria that must be met before an individual may be employed through the use of a FLSA Section 14(c) subminimum wage certificate.

The final law changes this section from the prior HELP Committee version somewhat. Most notably is a new restriction against a "local educational agency" or "State educational agency" from entering into a contract with an entity "for the purpose of operating a program for an individual who is age 24 or younger under which work is compensated at a subminimum wage." This effectively means that schools may not contract with sheltered work providers for transition services.

The law specifies that existing criteria contained within 14(c) must still be met. The new criteria does not apply to individuals who are currently employed by an entity that holds a valid 14(c) certificate or that are older than 24 when their employment under the certificate begins. Those individuals under the age of 24 may be employed under a special certificate if they have completed certain pre-employment transition services consistent with their individualized employment plan and have not achieved employment outcomes within a reasonable amount of time. Additionally, there is a six-month limit on employment under a special certificate for these individuals, which may be extended if the individual wishes it and the individual is reassessed every six months to determine the individual's ability to transition to competitive integrated employment.

Specifically, the bill says that an entity may not employ an individual under age 24 at a subminimum wage unless all the criteria of 14(c) is met AND at least one of the following conditions is met:

- The individual is currently employed by an entity that holds a valid 14(c) certificate;
- The individual has completed, prior to beginning work at a subminimum wage, ALL of the following actions:
    - Receipt of pre-employment transition services;
    - Application for vocational rehabilitation services and either been found ineligible or, if eligible, has not achieved success working towards employment outcomes specified in the individualized employment plan within a reasonable amount of time despite having appropriate supports and services, and the individual's vocational rehabilitation case is closed; and
    - The individual has received career counseling, and understands and consents to work for the employer at a subminimum wage, giving informed consent after receiving information and referrals to resources that include non-subminimum wage employment opportunities.

Section 511 requires the employer to provide ongoing career counseling, information about self-advocacy and self-determination, peer mentoring, and guidance on how to provide informed consent in order for individuals to continue to be employed under a special wage certificate. This ongoing counseling must occur every six months for the first year of the individual's employment at a subminimum wage, and then annually thereafter for the duration of the individual's employment.

This section contains an exception for small businesses (defined as fewer than 15 employees) from the employer requirements by referring individuals to appropriate state agencies for counseling, information, and referrals.

Subtitle H—INDEPENDENT LIVING SERVICES AND CENTERS FOR INDEPENDENT LIVING

Sec. 701A – Independent Living Administration

The bill establishes an Independent Living Administration (ILA) within the Administration for Community Living under the Department of Health and Human Services. The ILA will promote the philosophy of independent living, including the philosophy of consumer control, peer support, self-determination, and advocacy in order to maximize the empowerment and independence of individuals with disabilities. The bill

sets forth the criteria for appointing a Director to head the ILA as well as the organizational structure for the administration.

CONCLUSION

Though it contains some structural and other differences from the HELP Committee-passed bill, the enacted Workforce Innovation and Opportunity Act law is substantially similar. Of particular concern and interest for ANCOR members is new section 511, which places additional restrictions on employing 14(c) special wage certificates. The section created a great deal of discussion among disability organizations, and was a key issue during negotiations between legislators. The final law represents a compromise. It carries a strong presumption of employability among even individuals with the most significant of disabilities, but preserves the use of subminimum wage in instances where it can be shown to be appropriate to an individual's goals and desires.