

## **Advisory Memorandum**

**To:** The U.S. Commission on Civil Rights

**From:** The New Mexico Advisory Committee to the U.S. Commission on Civil Rights

**Date:** March 2021

**Subject:** Wage Theft & Subminimum Wages

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The New Mexico Advisory Committee (Committee) to the U.S. Commission on Civil Rights (Commission) convened a series of online public meeting to hear testimony regarding wage theft and subminimum wages in June and July of 2020.

The following advisory memorandum results from the testimony provided during the online panels, as well as related testimony submitted to the Committee in writing during the relevant period of public comment. It begins with a brief background of the issue to be considered by the Committee. It then identifies primary findings as they emerged from the testimony. Finally, the Committee conveys their recommendations for addressing related civil rights concerns. This memo is intended to focus specifically on wage theft and subminimum wages. While other important topics may have surfaced throughout the Committee's inquiry, those matters that are outside the scope of this specific civil rights mandate are left for another discussion. This memo and the recommendations included within it were adopted unanimously by the Committee on November 18, 2020.

### **New Mexico Advisory Committee to the U.S. Commission on Civil Rights**

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## **Background**

### ***Wage Theft***

Wage theft is the unlawful practice of employers not paying their employees the full amount for the work they have performed or the wages they were guaranteed.<sup>1</sup> Wage theft can be perpetrated in several different ways, both by breaking the law and by not adhering to a contractual relationship.<sup>2</sup> Common examples include not paying workers minimum wage, withholding overtime pay, forcing employees to work off the clock and during breaks or mealtimes, and simply not paying them for all the services they have performed for the company.<sup>3</sup>

In New Mexico, individuals experiencing wage theft can file claims with the New Mexico Department of Workforce Solutions.<sup>4</sup> The Labor Relations Division enforces payment of wages, minimum wage, and overtime labor laws under the Wage Pay Act and the Minimum Wage Act.<sup>5</sup> The Labor Relations Division is currently staffed by seven wage and hour investigators and one attorney.<sup>6</sup> When a wage claim is filed, the Division investigates the claim to determine if wages or benefits are owed.<sup>7</sup> The Division also provides seminars and materials to employer and employee groups on the compliance requirements of the various state labor laws.<sup>8</sup>

According to the Division's investigator manual, when a claim is filed, investigators "should pursue all evidence in documents and testimony that may lead to the truth."<sup>9</sup> The Manual explains to investigators that "[i]f your investigation leads you to believe that a wage claim is "just and valid," then your responsibility is to cooperate with the employee in the enforcement of the claim against the employer."<sup>10</sup> Although most of Division's enforcement activities take place through administrative decisions and civil lawsuits, the New Mexico wage laws provide for criminal liability for violations of the Wage Payment Act or the Minimum Wage Act.<sup>11</sup>

In 2017, a coalition of organizations<sup>12</sup> filed a lawsuit against the State of New Mexico for its failure to process wage theft claims and enforce stricter anti-wage theft laws passed by the New Mexico

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<sup>1</sup> Wagetheft.org, "What is Wage Theft?" Found: <https://www.wagetheft.org/faq> (last accessed March 2, 2021).

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> N.M. Stat. Ann. § 50-4-26; § 50-4-8; New Mexico Department of Workforce Solutions, Investigations Manual Labor Relations Division, Nov. 12, 2019, p. ii, <https://www.dws.state.nm.us/en-us/Labor-Relations/Labor-Information/Wage-and-Hour>.

<sup>6</sup> Cady Sartorius, testimony, Briefing Before the New Mexico Advisory Committee to the U.S. Commission on Civil Rights, Online Panel, June 30, 2020, Transcript, pp. 6 (hereafter cited as *Transcript 2*)

<sup>7</sup> N.M. Stat. Ann. § 50-4-8 (A); Investigations Manual Labor Relations Division, Nov. 12, 2019, p. ii.

<sup>8</sup> Cady Sartorius Testimony, *New Mexico Briefing*, transcript 2, pp. 6; New Mexico Department of Workforce Solutions Website. "About Us: Labor Relations Division." Found: <https://www.dws.state.nm.us/About-Us> (last accessed March 2, 2021)

<sup>9</sup> Investigations Manual Labor Relations Division, Nov. 12, 2019, p. ii, [https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/LRD\\_Manual\\_Final\\_11-14-19.pdf?ver=2020-02-03-170003-853](https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/LRD_Manual_Final_11-14-19.pdf?ver=2020-02-03-170003-853)

<sup>10</sup> N.M. Stat. Ann. § 50-4-8(A); Investigation Manual Labor Relations Division, p. ii.

<sup>11</sup> N.M. Stat. Ann. § 50-4-26 (A). Investigator Manual. Page 61. Found:

[https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/LRD\\_Manual\\_Final\\_11-14-19.pdf?ver=2020-02-03-170003-853](https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/LRD_Manual_Final_11-14-19.pdf?ver=2020-02-03-170003-853)

<sup>12</sup> The coalition included El CENTRO de Igualdad y Derechos, New Mexico Comunidades en Acción y de Fé (CAFÉ), Organizers in the Land of Enchantment (OLÉ), and Somos Un Pueblo Unido.

Legislature in 2009.<sup>13</sup> The coalition accused the Division of avoiding action on claims worth more than \$10,000 and claims over eight years old; and advising employees to instead file a lawsuit against their employer.<sup>14</sup> In addition, the state refused to provide Spanish language materials to notify individuals about the process of recovering lost wages and making a claim.<sup>15</sup>

A year later, the parties settled on policy and procedural changes the Department of Workforce Solutions must make that include:

- investigate all wage claims, regardless of their dollar value;
- take enforcement action on wage claims going back three years, or longer if the violation is part of a continuing course of conduct;
- no longer close wage claims for impermissible procedural reasons; and,
- provide language access services to all wage claimants who need it, by requesting each claimant's language preference on the claim form, providing interpretation in each telephonic and in-person interaction, translating all form letters and claim forms into Spanish, allowing claimants to fill out claim forms in any language, and offering an interpreter to anyone who telephones the agency.<sup>16</sup>

### ***Subminimum Wages***

The federal minimum wage is the lowest hourly wage that businesses may legally pay to covered, nonexempt workers.<sup>17</sup> Some states and local governments also have minimum wages, but they cannot be less than the federal minimum wage.<sup>18</sup>

The Fair Labor Standards Act is a federal law that establishes a federal minimum wage required to be paid to all employees<sup>19</sup> and regulates the number of hours per week that employees are permitted to work.<sup>20</sup> In contrast to wage theft where the minimum wage is guaranteed by law but unlawfully withheld, there are some instances and specific categories of workers who can lawfully receive a wage that is less than minimum wages.<sup>21</sup> There are several exceptions to the minimum

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<sup>13</sup> *Olivas v. Bussey*, D-101-CV-2017-00139 (N.M. 1<sup>st</sup> Jud. District, Jan. 17, 2017). <http://nmpovertylaw.org/wp-content/uploads/2018/03/Complaint-Olivas-v-Bussey-2017-01-17.pdf>.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 28.

<sup>16</sup> Settlement Agreement, *Olivas v. Bussey*, D-101-CV-2017-00139 (N.M. 1<sup>st</sup> Jud. District, Dec. 19, 2017). <http://nmpovertylaw.org/wp-content/uploads/2018/03/Complaint-Olivas-v-Bussey-2017-01-17.pdf>.

<sup>17</sup> Department of Labor, Employment Law Guide, <https://webapps.dol.gov/elaws/elg/minwage.htm>; see 29 U.S.C. § 206 (a).

<sup>18</sup> "Minimum Wage," Department of Labor, accessed Jan. 19, 2020, <https://www.dol.gov/general/topic/wages/minimumwage>

<sup>19</sup> Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 206(a)(1).

<sup>20</sup> 29 U.S.C. § 207 et. seq.

<sup>21</sup> 29 U.S.C. § 214 et. seq.

wage requirement including workers with disabilities, full-time students<sup>22</sup>, tipped employees<sup>23</sup>, and interns/apprentices.<sup>24</sup>

New Mexico also has its own Minimum Wage Act that established additional standards for the state. As of January 1, 2020, the state minimum wage was \$9.00/hour.<sup>25</sup> In 2019, the New Mexico Legislature passed new legislation that amended the Minimum Wage Act to extend minimum wage protection to domestic workers, caregivers, and others in the state who had previously been excluded.<sup>26</sup> While this bill greatly expanded the number of workers required to receive minimum wages, there were still some exceptions outlined including agricultural laborers, dairy workers, housecleaners, caregivers who work on contract, interns, and people with disabilities.

Section 14(c) of the Fair Labor Standards Act authorizes the payment of subminimum wages to persons with disabilities in often segregated or “sheltered” workplaces.<sup>27</sup> Employers must apply for a 14(c) certificate and submit to federal monitoring to ensure that the subminimum wages are used if and only if workers are “in fact disabled for the work they are to perform.”<sup>28</sup> A recent study of this topic by the National Council on Disability, an independent federal agency tasked with advising the federal government on disability policy, states there are “approximately 321,131 Americans with disabilities who, even while living in the community, still earn subminimum wages in segregated sheltered workshops under Section 14(c) of the FLSA.”<sup>29</sup>

The U.S. Department of Labor maintains a public database listing employers with 14(c) certificates.<sup>30</sup> According to these data, as of January 2020 there were only 3 employers in New Mexico with pending or issued Section 14(c) certificates: Zuni Entrepreneurial Enterprises (ZEE), Inc., Adelante Development Center, Inc., and CARC, Inc.<sup>31</sup> All three employers were identified as “Community Rehabilitation Programs.”<sup>32</sup> ZEE, Inc. employs around 15 people, CARC employs 59 people, and Adelante employs 125 people at subminimum wages.<sup>33</sup> Examples of the types of

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<sup>22</sup> 29 U.S.C. § 214(b).

<sup>23</sup> See U.S.C. § 203(m) & (t).

<sup>24</sup> 29 U.S.C. § 214(a).

<sup>25</sup> N.M. Stat. Ann. § 50-4-22 (A)(2).

<sup>26</sup> Domestic Service in Minimum Wage Act, SB85. 54th Legislature - State Of New Mexico - First Session, 2019. Found at: <https://nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=85&year=19>; 2019 Legis. Bill Hist. NM S.B. 85

<sup>27</sup> 29 U.S.C. § 214(c); see also, U.S. Dep’t of Labor Wage and Hour Division, 14(c) Certificate Holders, <https://www.dol.gov/agencies/whd/workers-withdisabilities/section-14c/certificate-holders> (last accessed May 21, 2020).

<sup>28</sup> 29 C.F.R. § 525.12(b)

<sup>29</sup> National Council on Disability, “National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future,” 12, at [https://ncd.gov/sites/default/files/Documents/NCD\\_Deal\\_Report\\_508.pdf](https://ncd.gov/sites/default/files/Documents/NCD_Deal_Report_508.pdf) (accessed June 17, 2019), citing Letter from Patricia Davidson, Deputy Administrator for Program Operations, United States Department of Labor to Senator Elizabeth Warren (July 5, 2018).

<sup>30</sup> U.S. Dep’t of Labor, Wage and Hour Division, 14(c) Certificate Holders, at <https://www.dol.gov/whd/workerswithdisabilities/certificates.htm>.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Mark Schinnerer, testimony, Briefing Before the New Mexico Advisory Committee to the U.S. Commission on Civil Rights, Online Panel, July 1, 2020, Transcript, pp. 8 (hereafter cited as *Transcript 3*)

jobs performed in 14(c) sheltered work environments include jobs in horticulture, dining hall service, document destruction services, pecan processing, and janitorial and grounds work.<sup>34</sup>

No specific wage floor is mandated, however, the Section 14(c) rate is to be, broadly, “commensurate with those [wages] paid to nonhandicapped workers, employed in the vicinity in which the individuals under certificates are employed for essentially the same type, quality, and quantity of work.”<sup>35</sup> The Section 14(c) wage is to be “related to the individual’s productivity.”<sup>36</sup>

A comparison must be made between the “productivity of the workers with disabilities” and “the norm established for nondisabled workers” — with careful documentation maintained by the employer.<sup>37</sup> In practice, determining commensurate wage requires the employer first develop standards for a job position, with guidance from the Department of Labor.<sup>38</sup> Then, the employer measures the quality and quantity of work from a worker without a disability in the same position, typically over the course of an hour.<sup>39</sup> Next, the person with a disability is tested to determine their level of productivity in one hour doing the same tasks.<sup>40</sup> The wage is determined based on the productivity of the person with a disability compared to the person without a disability correlated as a percentage of the local prevailing wage for that work.<sup>41</sup> For example, if a person with a disability accomplishes 60% of the work compared to the person without disabilities, they would receive 60% of the prevailing wage as their hourly rate. Employers are required to survey at least three employers in the community to determine the prevailing wage, which might be higher than the state or federal minimum wage.<sup>42</sup>

Further, the employer must agree to (a) review the wage rates paid to such workers at least once every six months and (b) review the wages of all Section 14(c) employees at least once each year to ensure that the Section 14(c) wages “reflect changes in the prevailing wage paid to experienced nondisabled individuals employed in the locality for essentially the same type of work.”<sup>43</sup> The Department of Labor performs audits of certificate holders to ensure that all requirements are being met and the program is being implemented correctly.<sup>44</sup> The worker (“or the parent or guardian” of the worker) may appeal to the Department of Labor concerning the circumstances of his or her employment.<sup>45</sup>

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<sup>34</sup> CARC, Inc. Website. “Supported Employment.” Found: <http://www.carcinc.org/places-to-work.html> (last accessed March 2, 2021).

<sup>35</sup> 29 U.S.C. § 214(c)(1)(B).

<sup>36</sup> 29 U.S.C. § 214(c)(1)(C).

<sup>37</sup> 29 C.F.R. § 525.9(a)(3).

<sup>38</sup> Mark Schinnerer Testimony, *New Mexico Briefing*, transcript 3, pp. 7.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> 29 U.S.C. § 214(c)(2)(B).

<sup>44</sup> N.M. Stat. Ann. § 12-6-3; Mark Schinnerer Testimony, *New Mexico Briefing*, transcript 3, pp. 6.

<sup>45</sup> 29 C.F.R. § 525.22(a).

In practice, the level of wages that an individual receives can vary greatly. The Committee heard testimony with multiple specific examples of wages paid in New Mexico under the 14(c) program. Adam Shand testified that when he was participating in the 14(c) program his wages ranged from \$.64 an hour to \$2.15 an hour.<sup>46</sup> ZEE, Inc. reported that the lowest wage they were currently paying an employee was \$5.75 an hour.<sup>47</sup> Other panelists reported secondhand accounts of wages they witnessed former clients or employees receiving, including one person receiving \$.50 an hour, another who had paycheck for a 30 hour week that was only \$1.78, and one instance where a person received a paycheck for \$.01.<sup>48</sup>

In March of 2019, a class action lawsuit was filed against Adelante Development Center over violations of state and municipal minimum wage laws and concern with its use of its Section 14(c) certificate.<sup>49</sup> The suit alleged that Adelante Development Center took advantage of the program and paid workers less than the state minimum wage.<sup>50</sup> The suit asserts, “[w]hile Adelante claims that its sheltered workshops offer people with disabilities a chance to learn skills in a rehabilitative environment that will prepare them for other jobs in the community, in reality Plaintiffs and their coworkers perform rote, repetitive tasks in a setting where they are isolated and entirely segregated from the broader community.”<sup>51</sup> As of September 2020, this litigation is still ongoing.<sup>52</sup>

States and localities have the option of eliminating the 14(c) subminimum wage program and instead requiring all employers to pay at least the minimum wage, regardless of disability.<sup>53</sup> A few states, including Vermont, Maine, and Washington, have taken concrete steps either to stop funding new entrants to its sheltered workshop system or to dramatically reduce its reliance on such settings.<sup>54</sup> Maryland, Alaska, New Hampshire, and the city of Seattle have passed legislation banning the payment of subminimum wages or providing greater protections than Section 14(c).<sup>55</sup>

Competitive integrated employment is an alternative to employment under a 14(c) certificate or segregated employment. Competitive integrated employment is work that is compensated directly by employers at greater than minimum or prevailing wages with commensurate benefits and occurs

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<sup>46</sup> Adam Shand Testimony, *New Mexico Briefing*, transcript 3, pp.16.

<sup>47</sup> Claudine Abeita Testimony, *New Mexico Briefing*, transcript 3, pp. 31.

<sup>48</sup> Alex Luce Testimony, *New Mexico Briefing*, transcript 3, pp. 31; Jessie Calero Testimony, *New Mexico Briefing*, transcript 3, pp. 32; Pamela Stafford Testimony, *New Mexico Briefing*, transcript 3, pp. 31.

<sup>49</sup> Complaint, *Duggan v. Adelante Development Center*, No. D-202-CV-2019--02064202 (N.M. 2<sup>nd</sup> Jud. District, March 12, 2019) <https://www.dnm.org/uploads/PDFs/2019%2003%2012%20endorsed%20Complaint.pdf>.

<sup>50</sup> *Id.* at 2.

<sup>51</sup> *Id.* at 3.

<sup>52</sup> Email from Tim Gardner, one of the litigants, to Brooke Peery, Designated Federal Officer, on September 3, 2020.

<sup>53</sup> Tim Gardner, testimony, Briefing Before the New Mexico Advisory Committee to the U.S. Commission on Civil Rights, Online Panel, June 16, 2020, Transcript, pp. 15 (hereafter cited as *Transcript 1*)

<sup>54</sup> National Council on Disability, “National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future,” 61-99, at [https://ncd.gov/sites/default/files/Documents/NCD\\_Deal\\_Report\\_508.pdf](https://ncd.gov/sites/default/files/Documents/NCD_Deal_Report_508.pdf)

<sup>55</sup> *Ibid.*, 21.

in a typical work setting where employees with disabilities are fully integrated with employees without disabilities and have opportunity for career advancement and work mobility.<sup>56</sup>

In 2014, the Workforce Innovation and Opportunity Act<sup>57</sup> established an Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities to study and report findings and recommendations to the Secretary of Labor and Congress on (1) ways to increase competitive integrated employment for individuals with intellectual or developmental disabilities or other individuals with significant disabilities; (2) use of the 14(c) certificate program; and (3) ways to improve oversight of the use of 14(c) certificates.<sup>58</sup> A key recommendation of the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities was that “Congress amend the Fair Labor Standards Act (FLSA) to allow for a multi-year, well-planned phase out of Section 14(c).”<sup>59</sup>

### **Overview of Testimony**

The New Mexico Advisory Committee is comprised of New Mexico citizens who strove to approach exploration of the issue of wage theft and subminimum wages from an open-minded and neutral posture. During a series of online panels the Committee heard from academic experts, community advocates, state government officials, employers, and directly impacted individuals. The agendas, minutes, and presentation slides for these panels can be found in Appendix A. The Committee invited broad participation through written testimony and received a number of written statements offering supplemental information on the topic. Written testimony was accepted until August 1, 2020, when the official record was closed.<sup>60</sup>

The Committee went to great lengths to solicit participation from stakeholders representing diverse perspectives. The Committee made many outreach attempts over several months to engage employers and trade representatives from industries more likely to see wage theft, soliciting their participation at the public meeting, through written testimony, and/or by joining a Committee meeting. Regrettably, after multiple attempts by Committee members and U.S. Commission on Civil Rights staff, the views of these stakeholders remain largely absent from this memorandum. A full list of individuals and organizations that were invited, but were unable or unwilling to participate is attached in Appendix D.

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<sup>56</sup> Renee Tajudeen, Office of Disability Employment Policy, written testimony entitled “Testimony to the New Mexico Advisory Committee to the U.S. Commission on Civil Rights”

<sup>57</sup> Workforce Innovation and Opportunity Act, 29 U.S.C. § 795g, Pub. L. 113-128, 128 Stat. 1425 (2014).

<sup>58</sup> 29 U.S.C. § 795(f).

<sup>59</sup> Renee Tajudeen, Office of Disability Employment Policy, written testimony entitled “Testimony to the New Mexico Advisory Committee to the U.S. Commission on Civil Rights”; citing Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities. Final Report. Found at:

[https://www.dol.gov/odep/topics/pdf/ACICIEID\\_Final\\_Report\\_9-8-16.pdf](https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf)

<sup>60</sup> Written testimony submitted can be found in Appendix C.

## **Findings**

The section below provides findings from the Committee's work and reflects views of the cited panelists, not necessarily the members of the Committee. While the Committee has not independently verified each assertion, panelists were chosen to testify due to their professional experience, academic credentials, subject matter expertise, and/or firsthand experience with the topics at hand.

### ***Wage Theft***

1. New Mexico's Department of Workforce Solutions and its Labor Relations Division has made significant improvements to operations and made progress in implementing the provisions of the settlement agreement. The Labor Relations Division has:
  - a. Implemented better training and procedures in the last few years in accordance with their settlement agreement, including the development of a new investigator manual and training that has been posted publicly online.<sup>61</sup>
  - b. Eliminated previous restrictions and barriers to wage theft claims, including the \$10,000 cap on cases and the 1-year look back restriction.<sup>62</sup>
  - c. Adopted 53 standardized forms that were developed with input from the plaintiffs of the litigation.<sup>63</sup>
  - d. Increased their language services, including sending multilingual notices with all correspondence notifying people in 20 different languages of their right to language services, utilizing more bilingual staff and translation services, and translating settlement agreements into Spanish.<sup>64</sup>
  - e. Implemented a new more centralized case tracking system to manage their case load more efficiently.<sup>65</sup>
  - f. Started to work more closely with district attorney's offices to prosecute larger cases.<sup>66</sup>
2. Language access continues to be a barrier to filing wage theft complaints.
  - a. The Labor Relations Division reported that more bilingual staff are needed to adequately meet the language needs of their clients.<sup>67</sup>
  - b. Barriers to communication and language access are deterring factors that keep immigrants from filing wage theft complaints.<sup>68</sup>

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<sup>61</sup>Stephanie Welch Testimony, *New Mexico Briefing*, transcript 1, pp. 4-5; Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 11.

<sup>62</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 11.

<sup>63</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 11.

<sup>64</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 11.

<sup>65</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 12.

<sup>66</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 12.

<sup>67</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 9.

<sup>68</sup> Marian J. Méndez-Cera Testimony, *New Mexico Briefing*, transcript 1, pp. 11 & 13.

3. Although the Labor Relations Division has made progress in reducing their caseload, there is still a significant backlog of cases waiting to be addressed.
  - a. The caseload has decreased from between 1,850 and 1,900 cases in the summer of 2019 to around 1,500 cases in summer 2020.<sup>69</sup> On average the Division has around 150 new cases filed each month.<sup>70</sup>
  - b. The Labor Relations Division uses an informal triage system to assign cases to investigators and try to resolve cases more quickly. They check for factors like language preference, that the case was filed with the right department, and if the employer is a repeat offender.<sup>71</sup> The division planned to implement a more robust triage system in 2020 that prioritized early settlement and/or mediation but this was delayed due to COVID-19.<sup>72</sup>
  - c. The Labor Relations Division is limited in its ability to address the backlog because of current staffing levels. There are currently seven investigators and only one attorney on staff. The Labor Relations Division estimates that it would need at least ten investigators and three attorneys to efficiently process the backlog, address new cases, increase litigation capacity, and fully perform all administrative functions.<sup>73</sup>
  - d. The backlog of cases and the subsequent amount of time workforce solutions takes to process cases may act as a deterrent for individuals filing new wage theft claims.<sup>74</sup>
  - e. Case backlogs and delays in case processing may increase the risk of employer retaliation.<sup>75</sup>
  - f. The current backlog affects the Labor Relations Division's ability to perform other essential functions such as public outreach and employer education.<sup>76</sup>
  - g. The Labor Relations Division partnered with the Department of Labor in 2019 to better coordinate their work on cases and so that DOL could help reduce the case load.<sup>77</sup>
  - h. There are concerns that budget cuts as a result of COVID-19 could result in a worsening of the backlog.<sup>78</sup>
4. While New Mexico has comparatively strong worker protections and wage laws, there is insufficient enforcement of these laws.<sup>79</sup>

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<sup>69</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 9.

<sup>70</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 9.

<sup>71</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 9.

<sup>72</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 10.

<sup>73</sup> Cady Sartorius Testimony, *New Mexico Briefing*, transcript 2, pp. 6; Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 16.

<sup>74</sup> Marian J. Méndez-Cera Testimony, *New Mexico Briefing*, transcript 1, pp. 12.

<sup>75</sup> Marian J. Méndez-Cera Testimony, *New Mexico Briefing*, transcript 1, pp. 12.

<sup>76</sup> Cady Sartorius Testimony, *New Mexico Briefing*, transcript 2, pp. 7.

<sup>77</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 11.

<sup>78</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 9.

<sup>79</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 9.

- a. Claims that are more than \$10,000 are less likely to be processed by The Labor Relations Division and in the past have not been enforced at all because of lack of attorney capacity within the department.<sup>80</sup>
  - b. District attorneys can file civil lawsuits for claims over \$10,000, but this is largely not happening.<sup>81</sup>
  - c. There is not enough low-cost legal assistance to take claims to court when needed.<sup>82</sup>
5. Outreach to workers and employers about wage law and rights is an important element of successful wage theft enforcement. The Labor Relations Division has made outreach a priority and has enacted improvements in recent years, but more outreach efforts are needed.
  - a. The Labor Relations Division utilizes online platforms for community outreach, including hosting webinars for employees and participating in online events to connect to workers and educate them about their rights.<sup>83</sup>
  - b. Past examples of outreach efforts administered by Labor Relations Division include traveling to and participating in local workshops and constituent days to speak directly to workers and provide them information on their rights.<sup>84</sup>
  - c. Labor Relations Division published an article in the State Bar of New Mexico Bar Bulletin to educate lawyers in New Mexico about the feasibility of pursuing wage theft cases and the need for more lawyer involvement.<sup>85</sup>
  - d. Despite the Labor Relations Division's outreach efforts, a lack of awareness among workers about their rights persists.<sup>86</sup> More outreach is especially needed for domestic and agricultural worker who are harder to engage.<sup>87</sup>
  - e. Outreach needs to be done in multiple languages to effectively impact all affected workers.<sup>88</sup>
6. The Labor Relations Division is not currently tracking the data needed to ensure they are enforcing wage laws fairly and without discrimination.

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<sup>80</sup> Stephanie Welch Testimony, *New Mexico Briefing*, transcript 1, pp. 5.

<sup>81</sup> Stephanie Welch Testimony, *New Mexico Briefing*, transcript 1, pp. 6.

<sup>82</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 8.

<sup>83</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 7.

<sup>84</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 7.

<sup>85</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 7; Richard L. Branch and Deborah L. Williamson. "Wage Theft in New Mexico: Opportunities for Firms to Create Wins for Workers." *State Bar of New Mexico Barr Bulletin*. Pp. 6-7. July 22, 2020. Volume 59, No. 14

<sup>86</sup> Stephanie Welch Testimony, *New Mexico Briefing*, transcript 1, pp. 5; Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 8.

<sup>87</sup> Stephanie Welch Testimony, *New Mexico Briefing*, transcript 1, pp. 6; Marian J. Méndez-Cera Testimony, *New Mexico Briefing*, transcript 1, pp. 13.

<sup>88</sup> Marian J. Méndez-Cera Testimony, *New Mexico Briefing*, transcript 1, pp. 13.

- a. The Labor Relations Division is currently not tracking data on industry or important demographic info such as gender, race, ethnicity, or immigration status.<sup>89</sup> Labor Relations Division is tracking the preferred language.<sup>90</sup>
  - b. The Labor Relations Division reported logistic and administrative concerns about how demographic data would be recorded and how reliable it would be in demonstrating conclusive trends.<sup>91</sup>
  - c. The Labor Relations Division has been attempting to improve its data collection system, but there have been delays due to COVID-19.<sup>92</sup>
7. Wage theft adversely affects low wage workers who are least likely to be able to cope with any loss of wages and are likely to be living paycheck to paycheck.<sup>93</sup>
  - a. When low wage workers are victims of wage theft, they can experience deteriorating living conditions, food insecurity, insufficient access to medical care, increased stress and anxiety, reliance on short-term subprime predatory loans, and/or limited ability to invest in educational opportunities.<sup>94</sup>
  - b. In work environments where workers feel like they cannot claim their rights because of economic insecurity, other forms of workplace abuse and harassment are more likely to occur.<sup>95</sup>
8. Wage theft has negative impacts on the community, including undercutting businesses that are following wage laws and reducing the tax base for local economies.<sup>96</sup>
9. The fear of retaliation by employers is a significant factor for why employees do not report wage theft.
  - a. Thirty one percent of workers who had experienced wage theft did not report it because they were afraid of retaliation.<sup>97</sup> Almost a quarter of those who wanted to complain, but did not, had seen other workers get into trouble for complaining.<sup>98</sup>
  - b. Thirty eight percent of workers who had experienced wage theft or discrimination tried to report the violations and experienced retaliation as a result. This retaliation

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<sup>89</sup> Stephanie Welch Testimony, *New Mexico Briefing*, transcript 1, pp. 6; Cady Sartorius Testimony, *New Mexico Briefing*, transcript 2, pp. 18.

<sup>90</sup> Stephanie Welch Testimony, *New Mexico Briefing*, transcript 1, pp. 6; Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 8.

<sup>91</sup> Cady Sartorius & Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 18.

<sup>92</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 7.

<sup>93</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 8; Cady Sartorius Testimony, *New Mexico Briefing*, transcript 2, pp. 7.

<sup>94</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 8; Marian J. Méndez-Cera Testimony, *New Mexico Briefing*, transcript 1, pp. 12.

<sup>95</sup> Marian J. Méndez-Cera Testimony, *New Mexico Briefing*, transcript 1, pp. 11.

<sup>96</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 8; Matthew Capece, written testimony entitled “United Brotherhood of Carpenters Comments”

<sup>97</sup> Stephanie Welch, written testimony entitled “Presentation Supplement” citing: Two Groups, One Community: The Impact of Wage Theft and Other Employment Violations on Native Americans and Latino Immigrant Workers in Gallup, The McKinley Worker Justice Coalition, April 2017, available at <http://somosunpueblounido.org/assets/somos-hia-report-english.pdf> (hereafter cited as Two Group, One Community)

<sup>98</sup> Stephanie Welch, written testimony entitled “Presentation Supplement” citing: Human Rights Alert: New Mexico’s Invisible and Downtrodden Workers, NMCLP, 2013, available at [https://media.kjzz.org/s3fs-public/field/docs/2013/07/Report-FINAL-PDF-2013-06-28\\_1.pdf](https://media.kjzz.org/s3fs-public/field/docs/2013/07/Report-FINAL-PDF-2013-06-28_1.pdf) (hereafter cited as Human Rights Alert)

included losing hours, having to work in a hostile work environment, and being fired.<sup>99</sup>

- c. Immigrant workers are even more likely to experience wage theft and fear of reprisal is the main reason they do not report.<sup>100</sup>
- d. Forty six percent of dairy workers said they had wanted to complain about poor working conditions in the prior year but did not do so. Almost all these workers said this was because of their fear of retaliation.<sup>101</sup>
- e. A vital protection against retaliation is not available to farmworkers. The National Labor Relations Act protects workers' rights to organize, bargain collectively, and strike, but it excludes farmworkers.<sup>102</sup>

### *At-Risk Communities & Industries*

10. Immigrants, both documented and undocumented, are more likely to be victim of wage theft and face additional barriers in filing wage theft claims.

- a. Twenty seven percent of immigrants surveyed had experienced at least one instance of wage theft by an employer in New Mexico.<sup>103</sup>
- b. Immigrant workers might not understand how to navigate the wage theft claim system, what their rights are, or the consequences for their employer.<sup>104</sup>
- c. Immigrants do not have the same unemployment benefits or safety net provisions. This can increase their fear of retribution and limit their opportunities to leave unfair work environments.<sup>105</sup>
- d. Wage theft is not limited to undocumented workers. Although instances are higher with undocumented immigrants, twenty-two percent of immigrants with legal documentation reported wage theft.<sup>106</sup>
- e. Employers may exploit the vulnerable position of immigrants and their limited employment options to provide for their family.<sup>107</sup> Immigrants are also more likely to be subject to other types of employer abuses such as verbal abuse and physical violence.<sup>108</sup>

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<sup>99</sup> Welch, written testimony citing: Two Groups, One Community

<sup>100</sup> Welch, written testimony citing: Two Groups, One Community; Somos in Pueblo Unidos, written testimony entitled "Mexican Immigrants and Wage Theft in New Mexico"; Matthew Capece, written testimony entitled "United Brotherhood of Carpenters Comments"

<sup>101</sup> Welch, written testimony citing: Human Rights Alert

<sup>102</sup> Stephanie Welch, written testimony entitled "Presentation Supplement"

<sup>103</sup> Somos un Pueblos Unidos, written testimony entitled "Mexican Immigrants and Wage Theft in New Mexico"

<sup>104</sup> Marian J. Méndez-Cera Testimony, *New Mexico Briefing*, transcript 1, pp. 11.

<sup>105</sup> Marian J. Méndez-Cera Testimony, *New Mexico Briefing*, transcript 1, pp. 12.

<sup>106</sup> Somos un Pueblo Unidos, written testimony entitled "Mexican Immigrants and Wage Theft in New Mexico"

<sup>107</sup> Marian J. Méndez-Cera Testimony, *New Mexico Briefing*, transcript 1, pp. 12.

<sup>108</sup> Somos un Pueblo Unidos, written testimony entitled "Mexican Immigrants and Wage Theft in New Mexico"

- f. Immigrant workers are more likely to face barriers in filing claims virtually. They are less likely to have access to internet, computers, and phones and more likely to lack basic computer skills.<sup>109</sup>
11. Domestic workers, the restaurant industry, and the hospitality industry were all reported as industries whose workers are more likely to be victim of wage theft.<sup>110</sup>
12. The construction industry sees a high concentration of wage theft. The industries' reliance on subcontractors and labor brokers allows many employers to deny responsibility for ensuring fair wages.<sup>111</sup>
  - a. One study found that the 1.3 to 2.16 million construction workers in the U.S. were misclassified as independent contractors or paid unreported compensation in 2017.<sup>112</sup>
  - b. The industry relies heavily on immigrant workers who are less likely to engage with authorities to report wage theft and are more likely to also face other illegal labor practices such as labor trafficking.<sup>113</sup>
13. Rural and agriculture workers are in an industry particularly vulnerable to wage theft.
  - a. Enforcement of wage theft is less likely to be carried out on location for rural workers and is therefore not as effective.<sup>114</sup>
  - b. Rural and agricultural workers are more likely to be reliant on their employers for information on their rights.<sup>115</sup>
  - c. Poverty and unemployment rates are higher in rural areas which results in increased fear of retaliation or fear of being unable to find another job.<sup>116</sup>
  - d. Access to the technology to file online claims can be limited and unreliable in rural areas of the state.<sup>117</sup>

## COVID-19

14. Although the number of wage theft cases filed with the Labor Relations Division has decreased since March 2020 and the beginning of COVID-19 restrictions and closures, there is concern that there is more opportunity for unfair wage practices and greater fear of retaliation in the current economic environment.

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<sup>109</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 9.

<sup>110</sup> Marian J. Méndez-Cera Testimony, *New Mexico Briefing*, transcript 1, pp. 11; Stephanie Welch Testimony, *New Mexico Briefing*, transcript 1, pp. 6.

<sup>111</sup> Matthew Capece, written testimony entitled "United Brotherhood of Carpenters Comments"

<sup>112</sup> Matthew Capece, written testimony entitled "United Brotherhood of Carpenters Comments"; citing Russell Ormiston, Dale Belman, and Mark Erlich, An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry, 5 (2020) found at: <https://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf>

<sup>113</sup> Matthew Capece, written testimony entitled "United Brotherhood of Carpenters Comments"; citing Riham Feshir, "Hennepin County's first labor-trafficking case ends in guilty plea," *Minnesota Public Radio News*, November 18, 2019 found at: <https://www.mprnews.org/story/2019/11/18/contractor-ricardo-batres-pleads-guilty-in-rare-labor-trafficking-case>

<sup>114</sup> Stephanie Welch Testimony, *New Mexico Briefing*, transcript 1, pp. 6.

<sup>115</sup> Stephanie Welch Testimony, *New Mexico Briefing*, transcript 1, pp. 6.

<sup>116</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 8.

<sup>117</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 9.

- a. There are some claims that workers did not receive their last paycheck for hours worked before businesses shutdown temporarily or permanently due to COVID-19.<sup>118</sup>
  - b. COVID-19 and the subsequent increase in the unemployment rate has created an opportunity for increased exploitation of workers who are desperate to obtain and keep work.<sup>119</sup>
  - c. There have been concerns about unsafe working conditions related to keeping employees safe from exposure to COVID-19, but that is separate from wage concerns.<sup>120</sup>
  - d. COVID-19 has resulted in a reduction in both hours and wages for many hourly-wage workers.<sup>121</sup>
15. COVID-19 has increased the delay in investigation by the Labor Relations Division and created new barriers to enforcement.
- a. Some Labor Relations Division activities have halted because of COVID-19 stay-at-home orders, including accepting complaints in person at Labor Relations Division offices, notarizing settlement agreements and other official documents, and investigations of work sites.<sup>122</sup>
  - b. Labor Relations Division cannot actively investigate claims during lockdown and new claims are being added to the backlog.<sup>123</sup>
  - c. The New Mexico court system was temporarily shut down and is now operating on a limited basis which halted the progress of some active cases.<sup>124</sup>
  - d. Both mediations and language interpretation services have been able to successfully transition to online platforms and resume.<sup>125</sup>
16. Immigrants and the Hispanic and Latino communities face unique challenges in New Mexico because of COVID-19.
- a. Immigrant workers are disproportionately represented in “essential” frontline industries and are at greater risk for exposure to COVID-19. Nearly half of working immigrants in New Mexico are essential employees that continue to work outside of the home.<sup>126</sup>
  - b. Undocumented immigrants are ineligible for emergency cash benefits, such as stimulus checks. They also do not qualify for other safety net benefits such as

<sup>118</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 10.

<sup>119</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 10; Marian J. Méndez-Cera Testimony, *New Mexico Briefing*, transcript 1, pp. 12.

<sup>120</sup> Cady Sartorius Testimony, *New Mexico Briefing*, transcript 2, pp. 4.

<sup>121</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 10.

<sup>122</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 10; Cady Sartorius Testimony, *New Mexico Briefing*, transcript 2, pp. 5.

<sup>123</sup> Gabriela Ibañez Guzmán Testimony, *New Mexico Briefing*, transcript 1, pp. 10.

<sup>124</sup> Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 5.

<sup>125</sup> Cady Sartorius Testimony, *New Mexico Briefing*, transcript 2, pp. 14; Richard Branch Testimony, *New Mexico Briefing*, transcript 2, pp. 5.

<sup>126</sup> Marian J. Méndez-Cera, written testimony entitled “COVID-19’s Impact on Latino Families Economic Well-Being in New Mexico”

unemployment insurance or SNAP that have helped many families respond to the COVID-19 related loss of income.<sup>127</sup>

- c. Immigrants are more likely to be uninsured and lack access to reliable and affordable healthcare.<sup>128</sup>
- d. Twenty percent of Hispanic parents/primary caregivers have had their business shut down and/or have seen significant drops in revenue. Thirty-three percent of parents/primary caregivers have had trouble paying for their rent or mortgage.<sup>129</sup>
- e. Thirty percent of families surveyed did not receive any payment from the CARES Act, and 40% of all families did not receive any additional payments for their children.<sup>130</sup>

### ***Subminimum Wages for People with Disabilities***

1. New Mexico is not providing adequate support or sufficient implementation and enforcement of the 14(c)-certificate program.
  - a. Employers in the 14(c) program are required to get state-level approval in addition to federal approval for their subminimum wage programs. The state of New Mexico is not currently enforcing this requirement.<sup>131</sup>
  - b. The rate for reimbursement for services is very low in New Mexico compared to other states.<sup>132</sup>
2. Current 14(c) program and standards do not incentivize work for either the individual or employer and there is no funding mechanism that supports the stated goal of encouraging competitive employment.<sup>133</sup>
3. Employment programs operated through 14(c) are not leading to competitive employment.
  - a. Despite the stated goal of the 14(c) program of preparing individuals with disabilities for competitive employment and the additional funding provided to achieve that goal, the current implementation of the program does not incentivize service providers to move individuals into competitive programs.<sup>134</sup>

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<sup>127</sup> Marian J. Méndez-Cera, written testimony entitled “Essential by Excluded”

<sup>128</sup> Marian J. Méndez-Cera, written testimony entitled “Essential by Excluded”

<sup>129</sup> Marian J. Méndez-Cera, written testimony entitled “COVID-19’s Impact on Latino Families Economic Well-Being in New Mexico”

<sup>130</sup> Marian J. Méndez-Cera, written testimony entitled “COVID-19’s Impact on Latino Families Economic Well-Being in New Mexico”

<sup>131</sup> Tim Gardner Testimony, *New Mexico Briefing*, transcript 1, pp. 16.

<sup>132</sup> Claudine Abeita Testimony, *New Mexico Briefing*, transcript 3, pp. 4.

<sup>133</sup> Mark Schinnerer Testimony, *New Mexico Briefing*, transcript 3, pp. 9.

<sup>134</sup> Jessie Calero Testimony, *New Mexico Briefing*, transcript 3, pp. 14; Pamela Stafford Testimony, *New Mexico Briefing*, transcript 3, pp. 20.

- b. When individuals lose the option of 14(c) employment, they do not always move to competitive employment but might instead leave the work force and move to volunteer or non-vocational activities.<sup>135</sup>
  - c. 14(c) jobs often lack the opportunity for internal promotion or growth and lack processes for transitioning into competitive employment.<sup>136</sup>
- 4. The 14(c) subminimum wage programs provide an opportunity for employment that an individual might not have otherwise.
  - a. The 14(c) program can provide an opportunity for employment for people who might be otherwise unemployed. For example, a study of Maine after the 14(c) programs were eliminated found that two thirds of those previously employed are no longer working and those who are working earn less per week because of the reduction in the number of hours worked.<sup>137</sup>
  - b. Some people choose and prefer to be in a sheltered work environment that the 14(c) program provides. This employment provides an opportunity for socializing and to build a feeling of self-worth for people who are receiving financial stability from other avenues.<sup>138</sup>
  - c. Employment for people with disabilities is not a “one size fits all” model. Some individuals will work in full-time competitive employment, but others need the flexibility and support of sheltered work programs like 14(c) provides in New Mexico.<sup>139</sup>
  - d. In New Mexico, participation in 14(c) greatly increases the chances of employment for participants. For example, CARC has 79% employment rate for individuals with developmental disabilities under their care, compared to 29% employment rate in New Mexico for individuals with developmental disabilities and 20% nationally.<sup>140</sup>
- 5. People with disabilities may have limited opportunities for employment.
  - a. Employers are skeptical that people with disabilities can be productive employees, and many employers are not equipped to create a working environment that is responsive to intellectual disabilities.<sup>141</sup>
  - b. Individuals are not always aware of all their options. Many people are advised at 18 that they have two options: enroll in a day program or enter a subminimum wage

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<sup>135</sup> Mark Schinnerer Testimony, *New Mexico Briefing*, transcript 3, pp. 6 & 8; Mark Schinnerer presentation slides at slide 25.

<sup>136</sup> Adam Shand Testimony, *New Mexico Briefing*, transcript 3, pp.16; Mark Schinnerer Testimony, *New Mexico Briefing*, transcript 3, pp. 9.

<sup>137</sup> Schinnerer, *Transcript 3* at 6 & 10; Angela Lybarger, written testimony entitled “14c Testimony to U.S. Commission on Civil Rights”; Mark Schinnerer, presentation slides at slide 25; Mike Kivitz, written testimony entitled “Questions Regarding USDOL 14C”

<sup>138</sup> Randy Creighton, written testimony entitled “14c testimony on behalf of Laura E. Creighton”; Angela Lybarger, written testimony entitled “14c Testimony to U.S. Commission on Civil Rights”; Mike Kivitz, written testimony entitled “Questions Regarding USDOL 14C”

<sup>139</sup> Alex Luce Testimony, *New Mexico Briefing*, transcript 3, pp. 12; Pamela Stafford Testimony, *New Mexico Briefing*, transcript 3, pp. 19.

<sup>140</sup> Mark Schinnerer Testimony, *New Mexico Briefing*, transcript 3, pp. 6; Mark Schinnerer, presentation slides at slide 14

<sup>141</sup> Claudine Abeita Testimony, *New Mexico Briefing*, transcript 3, pp. 4; Mike Daly Testimony, *New Mexico Briefing*, transcript 3, pp. 5; Mark Schinnerer Testimony, *New Mexico Briefing*, transcript 3, pp. 6; Mike Kivitz, written testimony entitled “Questions Regarding USDOL 14C”

- job.<sup>142</sup> Benefits and job counseling are limited in New Mexico and are often inaccessible, under-resourced, and over-burdened.<sup>143</sup>
- c. Individuals who receive federal or state benefits have limitations on the number of hours they can work a week and the amount of wages they can retain.<sup>144</sup>
6. Maintaining the 14(c) certificate and implementing the program can be burdensome for service providers.
    - a. There are trainings and travel required to obtain the certificate. Once the certificate is obtained, meeting its requirements is time consuming for both participants and providers.<sup>145</sup>
    - b. At least one provider in New Mexico is voluntarily phasing out the program because of the effort to maintain the program is not worth it.<sup>146</sup>
    - c. It is challenging to both find appropriate work for individuals in the 14(c) program and then support them in that work. For example, the program does not provide any compensation for transportation costs to and from work.<sup>147</sup>
  7. Subminimum wages, especially at the levels that 14(c) allows, raises concerns about equality.
    - a. Individuals with disabilities are the only category of people subject to a commensurate wage where their earnings are directly tied to their efficiency.<sup>148</sup>
    - b. Many organizations and individuals have recommended the elimination of subminimum wages on the basis of equality, dignity, inclusivity, and a right to work, including the International Convention on the Rights of People with Disabilities, National Council on Disability, and the Department of Labor's Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities.<sup>149</sup>
  8. People with disabilities have additional economic needs and additional burdens to independently meeting their economic needs.

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<sup>142</sup> Pamela Stafford Testimony, *New Mexico Briefing*, transcript 3, pp. 18.

<sup>143</sup> Jessie Calero Testimony, *New Mexico Briefing*, transcript 3, pp. 13; Shelly Rogers, public comment at Briefing Before the New Mexico Advisory Committee to the U.S. Commission on Civil Rights, Online Panel, June 16, 2020, Transcript, pp. 29

<sup>144</sup> Claudine Abeita Testimony, *New Mexico Briefing*, transcript 3, pp. 4; Mark Schinnerer Testimony, *New Mexico Briefing*, transcript 3, pp. 7 & 27.

<sup>145</sup> Claudine Abeita Testimony, *New Mexico Briefing*, transcript 3, pp. 4; Mike Daly Testimony, *New Mexico Briefing*, transcript 3, pp. 4-5; Mark Schinnerer Testimony, *New Mexico Briefing*, transcript 3, pp. 9; National Council on Disability, "National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future," 12, at [https://ncd.gov/sites/default/files/Documents/NCD\\_Deal\\_Report\\_508.pdf](https://ncd.gov/sites/default/files/Documents/NCD_Deal_Report_508.pdf)

<sup>146</sup> Mike Daly Testimony, *New Mexico Briefing*, transcript 3, pp. 4.

<sup>147</sup> Claudine Abeita Testimony, *New Mexico Briefing*, transcript 3, pp. 4; Mark Schinnerer Testimony, *New Mexico Briefing*, transcript 3, pp. 9.

<sup>148</sup> Tim Gardner Testimony, *New Mexico Briefing*, transcript 1, pp. 15; Naomi Sandweiss Testimony, *New Mexico Briefing*, transcript 3, pp. 16; Pamela Stafford Testimony, *New Mexico Briefing*, transcript 3, pp. 20; Jessie Calero Testimony, *New Mexico Briefing*, transcript 3, pp. 24.

<sup>149</sup> Tim Gardner Testimony, *New Mexico Briefing*, transcript 1, pp. 15; Renee Tajudeen, Office of Disability Employment Policy, written testimony entitled "Testimony to the New Mexico Advisory Committee to the U.S. Commission on Civil Rights"; <sup>149</sup> National Council on Disability, "National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future," 12, at [https://ncd.gov/sites/default/files/Documents/NCD\\_Deal\\_Report\\_508.pdf](https://ncd.gov/sites/default/files/Documents/NCD_Deal_Report_508.pdf); Adam Shand Testimony, *New Mexico Briefing*, transcript 3, pp. 23; Jessie Calero Testimony, *New Mexico Briefing*, transcript 3, pp. 22.

- a. People with disabilities are 250% more likely to live in poverty, the highest rate of any subcategory of Americans.<sup>150</sup>
  - b. Participation in federal benefits programs severely limits the amount of income an individual can keep and does not provide enough income to meet all economic needs, regardless of the wage.<sup>151</sup> For example, Supplemental Security Income and Social Security Disability Insurance (SSI/SSDI) allows individual to retain \$74 a month income, and Medicaid only allows for \$100 a month in income.<sup>152</sup>
  - c. Full competitive employment eliminates the need for federal wage subsidy income and programs such as ABLE New Mexico<sup>153</sup> allow people with disabilities to save and manage their income.<sup>154</sup>
9. There are benefits to employers who hire people with disabilities, including a more productive work culture, but many employers in New Mexico have not considered hiring people with disabilities or have not been approached with the idea.<sup>155</sup>
  10. The opportunity to have employment, in either 14(c) or in competitive employment, provides people with disabilities many benefits including an increased sense of dignity, opportunities for social interaction, and the pride of being contributing members to the community.<sup>156</sup>

## **Recommendations**

Among their duties, advisory committees of the Commission are authorized to advise the Agency (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws; and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.<sup>157</sup> In keeping with these responsibilities, and in consideration of the oral and written testimony received on this topic, the New Mexico Advisory Committee submits the following recommendations to the Commission:

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<sup>150</sup> Tim Gardner Testimony, *New Mexico Briefing*, transcript 1, pp. 15; Jessie Calero Testimony, *New Mexico Briefing*, transcript 3, pp. 11.

<sup>151</sup> Jessie Calero Testimony, *New Mexico Briefing*, transcript 3, pp. 14.

<sup>152</sup> Mark Schinnerer Testimony, *New Mexico Briefing*, transcript 3, pp. 7.

<sup>153</sup> ABLE New Mexico is a program that allows qualified individuals with disabilities to save and invest money without losing eligibility for certain public benefit programs, like Medicaid or SSI. Cited from Adam Shand, written testimony entitled “ABLE New Mexico One-Page Fact Sheet.”

<sup>154</sup> Shelly Rogers, public comment at Briefing Before the New Mexico Advisory Committee to the U.S. Commission on Civil Rights, Online Panel, June 16, 2020, Transcript, pp. 29; Adam Shand, written testimony entitled “ABLE New Mexico One-Page Fact Sheet.”

<sup>155</sup> Pamela Stafford Testimony, *New Mexico Briefing*, transcript 3, pp. 18.

<sup>156</sup> Naomi Sandweiss Testimony, *New Mexico Briefing*, transcript 3, pp. 15; Adam Shand Testimony, *New Mexico Briefing*, transcript 3, pp. 17; Stafford, *Transcript 3* at 18; Angela Lybarger, written testimony entitled “14c Testimony to U.S. Commission on Civil Rights”; Jessie Calero Testimony, *New Mexico Briefing*, transcript 3, pp. 14.

<sup>157</sup> 45 C.F.R. § 703.2 (a).

1. The U.S. Commission on Civil Rights should send this advisory memorandum and issue a formal request to Congress and the President to pass legislation to:
  - a. Increase funding for federal and state-level wage theft enforcement and require increased staffing levels, increased community education, and improvements to language access.
  - b. Require the collection of more robust demographic data in wage theft claims to determine any civil rights implications and identify at-risk demographic populations.
  - c. Strengthen protections for immigrant workers who are victims of wage theft and ensure they can securely aid themselves and authorities in prosecuting perpetrators of wage theft.
  - d. Expand vicarious liability laws for upper-tier contractors that use subcontractors or labor brokers that engage in wage thefts to ensure full accountability for violators and greater enforcement of current wage protections.
  - e. Extend minimum wage protections of the Fair Labor Standards Act to all employee categories that are currently excluded, including workers with disabilities, full-time students, tipped employees, and interns/apprentices.
  - f. Increase the amount of wages people with disabilities can retain while receiving federal benefits such as SSDI or Medicaid.
  - g. Repeal Section 14(c) with a planned phaseout period to allow transition among service providers and people with disabilities to alternative service models prioritizing competitive integrated employment.
  - h. Until the 14(c)-certificate program is fully phased out, strengthen the administration and enforcement of the existing program, including:
    - i. Provide funding to service providers to evaluate every 14(c) participant with the goal of determining the services they would require to gain skills to be successful in competitive integrated employment, if the person with disabilities expresses an employment goal.
    - ii. Create a wage floor or minimum 14(c) wage requirement to address reports of abusively low wage rates that have been reported.
2. The U.S. Commission on Civil Rights should send this advisory memorandum and issue a formal request to the United State Department of Labor to:
  - a. Increase community education and raise awareness of workers' wage rights and the wage theft claim process. Education efforts should be targeted at employers, attorneys, and employees and include specific strategies for reaching at-risk communities such as rural workers and immigrant communities.
  - b. Increase the support the DOL provides to state level support of enforcement, including supporting through funding, administrative support, case load management, and community education.

- c. Strengthen protections for immigrant workers who are victims of wage theft and ensure they can securely aid themselves and authorities in prosecuting perpetrators of wage theft.
  - d. Until the 14(c)-certificate program is fully phased out, strengthen enforcement of the existing program, including:
    - i. Enforcing requirements for benefits and job counseling, requirements for employee reporting, and increase incentives for competitive integrated employment.
    - ii. Implementing more robust data collection for the 14(c) program, including participation rates, wage rates, and frequency of transition to competitive employment.
  - e. Increasing civil rights oversight activities regarding both wage theft and the 14(c)-certificate program.
3. The U.S. Commission on Civil Rights should send this advisory memorandum and issue a formal request to the New Mexico State Legislature to:
- a. Increase funding for Workforce Solutions and the Labor Relations Division and their wage theft enforcement activities. Require increased staffing levels, reduction in the case backlog, increased community education, and improvements to language access.
  - b. Require the collection of more robust demographic data on wage theft claims to determine any civil rights implications and identify at-risk demographic populations.
  - c. Strengthen protections for immigrant workers who are victims of wage theft and ensure they can securely aid themselves and authorities in prosecuting perpetrators of wage theft.
  - d. Expand vicarious liability laws for upper-tier contractors that use subcontractors or labor brokers that engage in wage thefts to ensure full accountability for violators and greater enforcement of current wage protections.
  - e. Extend minimum wage protections of the New Mexico Minimum Wage Act to all employee categories that are currently excluded, including agricultural laborers, dairy workers, housecleaners and caregivers who work on contract, interns, and people with disabilities.
  - f. Encourage more competitive integrated employment opportunities by increasing funding rates and introducing new incentives for employers or service providers paying minimum wage or higher and employing individuals with disabilities.
  - g. Repeal Section 14(c) with a planned phaseout period to allow transition among service providers and people with disabilities to alternative service model prioritizing competitive integrated employment.
  - h. Until the 14(c)-certificate program is fully phased out, strengthen the administration and enforcement of the existing program, including:

- i. Provide funding to service providers to evaluate every 14(c) participant with the goal of determining the services they would require to gain skills to be successful in competitive integrated employment, if the person with disabilities expresses an employment goal.
  - ii. Create a wage floor or minimum 14(c) wage requirement to address reports of abusively low wage rates that have been reported.
- 4. The U.S. Commission on Civil Rights should send this advisory memorandum and issue a formal request to the New Mexico State Department of Workforce Solutions:<sup>158</sup>
  - a. Increase enforcement of claims over \$10,000 through increased staffing, continued partnering with local district attorneys.
  - b. Decrease the processing time for new wage theft claims and prioritize the reduction of the current backlog of cases.
  - c. Continue to improve and expand language access services and materials.
  - d. Strengthen protections for immigrant workers who are victims of wage theft and ensure they can securely aid themselves and authorities in prosecuting perpetrators of wage theft.
  - e. Increase community education and raise awareness of workers' wage rights and the wage theft claim process. Education efforts should be targeted at employers, attorneys, and employees and include specific strategies for reaching at-risk communities such as rural workers and immigrant communities.
  - f. Collect more robust demographic data on wage theft claims to determine any civil rights implications and identify at-risk demographic populations.
  - g. Provide more thorough and supportive benefits and job counseling to people with disabilities participating in the 14(c)-certificate program or competitive integrated employment.
  - h. Raise awareness among employers of benefits of inclusive employment, including communication about tax incentives, no-cost accommodation consultation services, accommodation reimbursement, and tasks incentives.
  - i. Until the 14(c) certificate program is fully phased out, strengthen enforcement of the existing program, including:
    - i. Enforcing requirements for benefits and job counseling, requirements for employee reporting, and increase incentives for competitive integrated employment.
    - ii. Creating a wage floor or minimum 14(c) wage requirement to address reports of abusively low wage rates that have been reported.

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<sup>158</sup> The New Mexico Advisory Committee would like to acknowledge the testimony provided by WFS. The Committee recognizes that department is limited by factors out of its control like funding and staffing levels. We make these recommendations with acknowledgement of these limitations and an understanding that the current administration is already implementing some of these recommendations on a limited scale and to the best of their ability.

- iii. Implementing more robust data collection for the 14(c) program, including participation rates, wage rates, and frequency of transition to competitive employment.

## **Appendix**

### A. Panel Agendas, Minutes, and Presentation Slides

- a. June 16, 2020 Online Panel
- b. June 30, 2020 Online Panel
- c. July 1, 2020 Online Panel

### B. Hearing Transcripts

- a. June 16, 2020 Online Panel (AKA Transcript 1)
- b. June 30, 2020 Online Panel (AKA Transcript 2)
- c. July 1, 2020 Online Panel (AKA Transcript 3)

### C. Written Testimony

### D. List of Individuals and Organizations Invited, but Declined to Participate

## **Appendix A – Panel Agendas, Minutes, and Presentation Slides**

*June 16, 2020 Online Panel*

*June 30, 2020 Online Panel*

*July 1, 2020 Online Panel*

Documents found at:

[https://securisync.intermedia.net/us2/s/folder?public\\_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L05NL1N1Ym1pbmltdW0gV2FnZXMgYW5kIFdhZ2UgVGhlZnQvQXBwZW5kaXggQQ%3D%3D](https://securisync.intermedia.net/us2/s/folder?public_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L05NL1N1Ym1pbmltdW0gV2FnZXMgYW5kIFdhZ2UgVGhlZnQvQXBwZW5kaXggQQ%3D%3D)

## **Appendix B – Panel Transcripts**

*June 16, 2020 Online Panel: Transcript 1*

*June 30, 2020 Online Panel: Transcript 2*

*July 1, 2020 Online Panel: Transcript 3*

Documents found at:

[https://securisync.intermedia.net/us2/s/folder?public\\_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L05NL1N1Ym1pbmltdW0gV2FnZXMgYW5kIFdhZ2UgVGhlZnQvQXBwZW5kaXggQg%3D%3D](https://securisync.intermedia.net/us2/s/folder?public_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L05NL1N1Ym1pbmltdW0gV2FnZXMgYW5kIFdhZ2UgVGhlZnQvQXBwZW5kaXggQg%3D%3D)

## **Appendix C – Written Testimony**

All written testimony can be found at:

[https://securisync.intermedia.net/us2/s/folder?public\\_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L05NL1N1Ym1pbmltdW0gV2FnZXMgYW5kIFdhZ2UgVGhlZnQvQXBwZW5kaXggQw%3D%3D](https://securisync.intermedia.net/us2/s/folder?public_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L05NL1N1Ym1pbmltdW0gV2FnZXMgYW5kIFdhZ2UgVGhlZnQvQXBwZW5kaXggQw%3D%3D)

Testimony submitted by:

Adam Shand

Angela Lybarger

Jessie Calero

Marian J. Mendez-Cera

Mike Kivitz

Renee Tajudeen

Randy Creighton

Richard Branch

Somos un Pueblo Unidos

Stephanie Welch

Matthew Capece

## **Appendix D - List of Individuals and Organizations Invited, but Declined to Participate**

Department of Labor, Wage and Hour Division

Department of Labor, New Mexico District Manager

Little Green Bucket

Rocky Mountain Mineral Association

New Mexico Oil & Gas Association

New Mexico Restaurant Association

New Mexico Cattle Grower's Association

Dairy Producers of New Mexico