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**The Uncertain Future of Section 14(c) of the
Fair Labor Standards Act**

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Summary

There is disagreement among many factions of the disability community regarding the efficacy and integrity of the Section 14(c) wage certificate program of the Fair Labor Standards Act (FLSA) which allows employers to pay workers with disabilities a special minimum wage based on their productivity. Some believe this program may keep disabled employees in isolated workshop environments and often allows them to be paid less than the federal minimum wage. Others believe that some form of financial support is essential to creating and maintaining jobs for people with disabilities. The initial legislation was passed to give individuals with disabilities a chance to work when the perspective on disability was very different than it is today. As views have changed, this program seems to no longer be fully aligned with the national disability agenda. Although Section 14(c) gives individuals with disabilities the experience of working, it allows them to be paid less than prevailing wage, and in some instances isolates them and fails to integrate them fully with their non-disabled peers. Federal legislation was introduced that would repeal Section 14(c) and prohibit the payment of special minimum wages. While this legislation will potentially leave hundreds of thousands of workers without employment, opponents argue that special minimum wage certificates are antithetical to current national disability policy promoting integration and financial independence for individuals with disabilities.

This analysis explored policy options for the future of the special minimum wage certificate program. How can the FLSA be revised to honor the original intent of employing workers with disabilities while aligning with current disability values? At present, 14(c) is a necessary, although less than optimal, component in the employment of individuals with disabilities. Absent further data on the positive or adverse impacts of the 14(c) program, no action should be taken toward the program's elimination.

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Background

In 1938, Congress passed the Javitz-Wagner-O'Day Act, which created a means to allow people who were blind or had other severe disabilities to enter the workforce by requiring that all federal agencies purchase certain supplies and services from nonprofit agencies that employed individuals who are blind and disabled. Today, the program is administered by the Committee for Purchase From People Who Are Blind or Severely Disabled and is called AbilityOne. The Committee has designated two nonprofit agencies to assist with program implementation: National Industries for the Blind (NIB) and Source America, formerly NISH-Creating Employment Opportunities for People with Significant Disabilities. Over 45,000 workers with disabilities are served through AbilityOne.ⁱ

In order to facilitate the hiring of persons with disabilities, Congress also passed the Fair Labor Standards Act (FLSA) in 1938. Section 14(c) of that Act allowed employers to pay special minimum wages (SMW), which may be less than the federal minimum wage, to workers who have disabilities “whose earnings or productive capacity is impaired by a physical or mental disability including those relating to age or injury, for the work to be performed.” As of 2011, approximately 420,000 people with disabilities are employed under Section 14(c) of the Fair Labor Standards Act.ⁱⁱ A significant minority of employees with disabilities are employed through AbilityOne and under a 14(c) certificate.

According to the Department of Labor’s Office of Disability Policy, there are nearly 29 million workers in the United States with disabilities. In May, the Department of Labor reported 13.6% of individuals with disabilities were jobless, an increase of .7% from the prior month, compared to 7.6% for non-disabled workers, an increase of only .1%.ⁱⁱⁱ An August 2008 nationally representative survey of working age (18 to 64) SSI and SSDI beneficiaries found that only 9 percent of beneficiaries were employed at the time they were interviewed and of that, only 21% were employed full time (35 hours per week or more).^{iv} The same study found that 69% of beneficiaries earned less than \$8 per hour and only 22% earned a level above substantial gainful activity (SGA). Median job duration was 26 months. The same Mathematica study found that 40% of working age SSDI beneficiaries had aspirations to join the workforce in some capacity.

Administration of Section 14(c) of the FLSA

The FLSA is overseen and enforced by the Wage and Hour Division (WHD) of the US Department of Labor (DOL). Employers who wish to participate in 14(c) must obtain a special certificate from the WHD.^v It is the employers’ responsibility to determine the productivity measurements for each individual worker and demonstrate the accuracy of that determination to the WHD. To do so the employer must ascertain the prevailing wage within their geographic area for a non-disabled worker performing similar work, and then measure the productivity of each worker relative to a sample of the non-disabled workers. The employer then calculates the commensurate wage as the “productivity percentage.”

The employer is required to review the wage rates at least every 6 months, and wages are adjusted at least once a year to reflect any change in minimum wage rate for workers without disabilities. Businesses and schools are required to renew their 14(c) certificates annually, and work centers biannually. The DOL is responsible for the review of all of the 14(c) certificates, investigation into employers and training as well as outreach to DOL staff and 14(c) employers. Today there are approximately 5,500 employers utilizing the 14(c) program.

There may be favorable tax implications for employers of 14(c) workers. Employers are not required to pay FICA taxes on 14(c) workers categorized as “trainees.”^{vi} If an employer determines that an individual is in the workshop for therapeutic purposes, and doesn’t have a productivity percentage that would move them into traditional

employment, that individual is classified as a “trainee.” However, if a worker’s duties mirrors traditional employment: the employee has a set schedule, takes direction from workshop staff, is eligible for promotion or termination, then a tax liability exists on the part of the employer.

Section 14(c) Workers Today

A June 2001 GAO report found that 84.2% of 14(c) workers were employed in work centers, 9% in businesses, 5.2% in hospitals or other residential care facilities, and 1.6% in schools. Of those employed in the aforementioned areas, 77% provided light assembly work, 67% provided grounds maintenance or janitorial work, 43% produced a product, 34% did office work, 22% worked in food service, and 15% provided laundry services. GAO reported that workers being paid special minimum wages by work centers have a wide range of physical and mental health conditions, and about 46% had more than one disability. The report noted that 74% of 14(c) workers employed by work centers have mental retardation and another developmental disability, 12% have a mental illness, 5% have a visual impairment and 9% have another impairment, such as a hearing or neuromuscular impairment.^{vii}

The same GAO report stated that 14(c) work centers either provided or helped the worker obtain numerous support services, including:

- Assistive devices and technology
- Behavior modification
- Case management
- Daily living skills training
- Increased supervision
- Job coaching
- Job station adaptation
- Occupational therapy
- Personal care assistance
- Psychological counseling
- Speech therapy
- Task adaptation
- Transportation

The provision of these services is not directly related to the 14(c) program. Funding for support services needed by the workers with a disability comes from the work centers’ operating budgets.

Of the 47,000 individuals provided employment through the AbilityOne program, a number of them are also employed under a 14(c) certificate employer at a cost of \$5.38 million in 2010.^{viii} The average wage of workers in the AbilityOne program in the fiscal year 2008, including those in sheltered employment, was \$10.57.^{ix}

Current Policy Debates

While the 14(c) certificate program promotes the employment of large numbers of workers with disabilities, advocacy organizations such as the National Disability Rights Network have asserted that the program is antiquated and requires updating. Critics of the special minimum wage assert that the contracts to the federal government fulfilled by 14(c) certificate employers perpetuate the segregation of people with disabilities, allowing them little if any interaction with non-disabled coworkers.^x They believe there are few incentives for employers to facilitate the integration of workers with disabilities into community environments where they would work alongside non-disabled individuals, a goal that was outlined nationally through the Americans with Disability Act of 1990 and the Rehabilitation Act of 1973.

Supporters for 14(c) retention point out that failure to effectively coordinate earned income with health and welfare benefits creates a disincentive for persons with disabilities to move into jobs for which salaries and benefits are less than governmental subsidies and programs. Higher wages may result in persons with disabilities to working fewer hours and receiving less support. They note that many people who are paid the SMW are working side by side with abled workers. They also can demonstrate that workers under the SMW frequently have the opportunity to interact with members of their committee. Work has its own therapeutic benefits and furthermore, an increase in wage to workers with disabilities may adversely affect medical assistance or social security benefits. Proponents of the maintenance of 14(c) point out that an elimination of the program may, without a suitable alternative, force some individuals with severe disabilities into Medicaid Medical Adult Day Care programs that prohibit them from working entirely.^{xi} Medical Adult Day Care programs are offered under a 1915(c) Medicaid waiver and require that individuals be medically eligible for a nursing facility level of care (as determined by a physician) and have an individualized plan that authorizes Medical Day Care participation including frequency of need. Medical Day Care programs, as with all Medicaid waiver programs, prohibit vocational training that would allow an individual to learn specific skills to perform a job. Individuals unable to maintain integrated employment may languish in these Medical Day Care programs that are not designed to enable them to progress toward independence or employment.

In an effort to end the use of special minimum wage certificates under 14(c), Representative Gregg Harper (R. MS) has introduced legislation which would phase out and completely repeal Section 14(c) of the Fair Labor Standards Act. H.R. 831 would have a significant impact on the over 400,000 workers with disabilities in the 14(c) program, as it does not replace the special minimum wage certificates with any employment programs for individuals with severe disabilities, but ends the program in stages over three years. Certain disability rights groups have come forward in favor of this legislation, most notably the National Federation for the Blind, an organization that has opposed the 14(c) program for 40 years. Others, including ACCSES, an organization of vocational rehabilitation services and community supports for people with disabilities, voiced opposition, asserting that low wages paid to employees with disabilities will be replaced with no wages. Even agencies associated with the National

Industries for the Blind, though not explicitly in favor of HR 831, have articulated a commitment to pay their employees, whose only disability is blindness, at or above the federal or state minimum wage.

While threats to the Section 14(c) program date back to the 1960s and have resulted in a number of program revisions, facility-based work for employees with disabilities has continued. Current trends in disability policy which promote disability as a natural human condition and encourage integration, inclusion and self-sufficiency, stand in opposition of the very nature of the 14(c) program in its current form. Advocates believe the program incentivizes employers to provide sheltered employment at reduced wages. In an August 2012 report to the White House, The National Council on Disability (NCD) recommended that the 14(c) program be phased out gradually to allow adequate time for sheltered 14(c) workers to move into integrated competitive employment. This recommendation was part of a comprehensive plan of recommendations to agencies such as the Department of Education, the Centers for Medicare and Medicaid Services, and the States to apply the “vision of the Americans with Disabilities Act (ADA) to assure equality and opportunity for all and eliminate any policies of discrimination on the basis of disability.”^{xii}

Policy Analysis

Below is a discussion of broad policy recommendations, concrete steps that could be taken with respect to each policy alternative, and the positive and adverse impacts of each option. The options include: retaining Section 14(c) of the FLSA; improving Section 14(c) to move it into line with current disability policy attitudes; and eliminating Section 14(c). Further discussed is the impact each policy direction would have on the relevant federal agencies, how it would affect the impacted workers, and how well the option aligns with current attitudes on disability policy.

Retention of the 14(c) Certificate Program

Proponents of 14(c) argue that the special minimum wage certificates create employment opportunities for workers with severe disabilities that would not exist without the program. Due to lack of regulation and evaluation from the Department of Labor, the effectiveness of the 14(c) program and the benefits or problems associated with the program is impossible to accurately evaluate. Consensus is clear that if the 14(c) program is to be continued, administration of the program needs to change.

The 2001 GAO report outlined a number of improvements that the Department of Labor could make to the 14(c) program. Twelve years later, these recommendations are still relevant and cited in current legislation (H.R. 831) calling for the programs elimination. The GAO found that:

- The DOL does not have accurate data on the number of 14(c) employers or workers.
- The DOL does not track staff resources devoted to the program.

- The DOL does not have accurate information on its compliance efforts and does not use the data it collects to manage its oversight of the program.
- The DOL conducted few self-initiated investigations of 14(c) employers in the past and does not randomly select employers for its current investigations.
- The DOL does not follow up when employers do not respond to its 14(c) certificate renewal notices.
- The DOL provides little training and guidance to its staff to detect and prevent employer noncompliance.
- The DOL provides little guidance or outreach to employers on the requirements of the special minimum wage program.

For the 14(c) program to be retained oversight must be strengthened and DOL must enact GAO recommendations.

- The accuracy of all the GAO recordkeeping relating to the 14(c) program must be evaluated, strengthened and maintained to increase program integrity.
- Increased tracking of employee status and movement will allow the DOL to more accurately understand the way in which individual workers utilize the system.
- The DOL should investigate the means by which employers calculate workforce productivity. Because the productivity evaluations of disabled employees are made by the employers paying their wages, in addition to the tax implications of labeling a worker a “trainee” versus a “regular workshop employee,” there may be little economic incentive for employers to encourage and enable greater productivity, or to transition a worker from a workshop to an integrated setting.
- Further training of DOL staff and 14(c) employers on the requirements of the program is needed to ensure accurate implementation and oversight.
- Additionally, in 1939 the DOL established the Advisory Committee on Sheltered Workshops-now called the Advisory Committee on Special Minimum Wages. This committee was dismantled in 1977, revived in 1981 and again terminated in 1993. This currently defunct committee should be revived to provide improved supervision and credibility to the 14(c) program.

With improved oversight of the Section 14(c) program, DOL will have accurate data to determine if the 14(c) certificate program is functioning correctly – providing adequate supports for workers to develop the skills and work behaviors which enable them to establish greater independence and increase productivity. DOL will have a better understanding of whether Section 14(c) employers are in compliance (exactly how productivity levels for employees are calculated) and how workers progress throughout the program. Better information and regulation of the program to protect the rights and dignity of 14(c) workers may dispel repeated threats of repeal of the program, and create improved work environments and wages for employees.

Enhanced monitoring would require DOL to provide more funding and staffing resources for Section 14(c) compliance in order to adopt the recommendations outlined by the GAO. Given the current economic climate, and budgetary constraints imposed by sequestration, it is unlikely that adequate resources will be shifted to 14(c). In a February 1, 2013 letter to the Senate Appropriations Committee, Acting Secretary of

Labor Seth Harris outlined the negative impact sequestration would have on the Wage and Hour Division's ability to conduct investigations, and respond to compliance complaints.^{xiii} Additionally, under sequestration, Labor's Office of Disability Employment Policy is also being "forced to reduce research, policy and effective practice development and technical assistance initiatives that promote the integration of workers with disabilities into the workforce."^{xiv}

By retaining the 14(c) program, employees with the most severe disabilities who may not be able to enter integrated settings with comparative productivity will be able to continue working under the 14(c) wage certificate and will not face possible entrance into a Medical Day Care setting. Better oversight may allow workers to earn higher wages. However, retention of Section 14(c) at all would likely not appease opponents who feel that the program's existence is antithetical to current disability policy. While improving the administration of the program makes progress toward protecting the workers from possible exploitation by their employers and may allow workers to earn higher wages, opponents such as the National Disability Rights Network and the National Federation for the Blind will continue to argue that work settings which are not integrated, as well as a special minimum wage based on disability, are inherently discriminatory, in violation of the ADA. This assertion is disputed by proponents for change, improvement and retention of 14 (c).

Options for Reduced Use of the Special Minimum Wages in Sheltered Settings

Through regulation, the Department of Labor could restrict access to Section 14(c) certificates in a workshop setting.

- Establish soft time limits for any individual receiving a special minimum wage to ensure that an individual doesn't permanently receive a special minimum wage in a sheltered setting.
- Require that within 30-60 days of an employee beginning work in a sheltered setting, employers work with employees and, as appropriate, those responsible for their care, to establish a transition plan to integrated employment.
- The DOL can reevaluate the way in which productivity percentages are calculated. A more robust and less subjective formula can be developed which eliminates the requirement of employers determining the local prevailing wage as a basis for worker productivity.
- The DOL can require increased reporting on the part of the 14(c) employers in conjunction with the requirements above.
- Additionally, States can expand prevocational training programs, an option currently available through Medicaid 1915(c) waivers.

As with the first option, the above recommendations include increased administrative responsibilities on the part of 14(c) employers which would allow the Department of Labor to garner a better understanding of the efficacy of the 14(c) program. In establishing individualized strategies and timelines for workers to transition from sheltered to integrated employment, DOL will ensure that no employee who is able and interested lingers in a sheltered setting due to lack of employer incentive to establish a

transition to integrated employment. With the implementation of the above recommendations, special minimum wages will continue to be utilized but productivity calculations will gain transparency and consistency. Additionally, sheltered settings will be reduced as employers will have less incentive to shelter workers and regulatory requirements to transition them to mainstream employment. Exceptions to the transition policies and individualized plans will be necessary for individuals who have disabilities that preclude them from succeeding in integrated employment.

Furthermore, aligning the reduction in 14(c) certificates with an increased capacity for individuals to receive prevocational and support services through a HCBS Medicaid waiver is critical. Medicaid waiver funding does not allow for the provision of vocational services, where individuals are supervised for the primary purpose of employment (producing a good or service.)^{xv} However according to September 2011 CMS guidance, employment and prevocational services may be offered as “expanded habilitative services.” Habilitative services are designed to assist individuals in acquiring, retaining and improving the self-help, socialization and adaptive skills necessary to reside successfully in home and community based settings.

Though vocational services cannot be rendered through a Medicaid waiver, prevocational services can create a path to integrated community based employment. Examples of skills developed through prevocational services are:

- Ability to communicate effectively with supervisors, co-workers and customers
- Generally accepted community workplace conduct and dress
- General safety
- Workplace problem solving skills
- Ability to follow directions

As 14(c) is scaled down, it is crucial that states ensure that waivers enabling habilitative services are available to individuals in transition. An individual receiving prevocational services and working toward employment will be less costly for states than those individuals who end up in a Medical Day Care program. Individuals receiving prevocational services through a Medicaid HCBS waiver can work toward achieving a life of independence and rewarding employment. It is critical that these individuals are supported through waivers providing habilitative services, and not those providing Medical Adult Day Care.

In order to implement policies to increase regulation of Section 14(c) to discourage segregated work, greater oversight and staffing will be required from the DOL in order to ensure employer compliance. It’s difficult to foresee how Labor will be able to propose and enforce any new regulation of the 14(c) certificate program without increased funding resources to the WHD. This may be a significant challenge given current budgetary constraints as discussed above.

In addition, while this option will increase prevocational services through a Medicaid waiver, reduces the use of 14(c), works to move disabled workers into integrated settings, requires greater reporting and creates enhanced standards for establishing an employee’s productivity percentage, it does not explicitly prohibit the compensation of a

disabled individual at less than the minimum wage. Opponents will argue that while this is a step in the right direction, and discourages “segregation” of workers with disabilities; the policy remains discriminatory as it allows for the continuation of a special minimum wage. Proponents will argue that payment for actual work performed without artificial supplement is essential for people with disabilities to explore and grow in a competitive environment.

Options for the Elimination of the 14(c) Certificate Program

Any elimination of the 14(c) program would require a gradual phase out in order to allow current 14(c) employees to transition to integrated work. Simply eliminating the program, as in HR 831, is not an adequate solution.

The National Council on Disability calls for passage of legislation which would require that DOL stop issuing 14(c) certificates 30 days after the passage of enacting legislation, and move workers out of sheltered employment in phases:

- Transition individuals in a certificate setting for 10 years or less within two years
- Transition individuals in a certificate setting for 10 to 20 years or less within four years
- Allow all 14(c) certificates to expire in six years and transition individuals in a certificate setting for over 20 years within six years.

As outlined above, if 14(c) should be scaled down or eliminated, it is critical that states establish Medicaid HCBS waiver programs that furnish prevocational training to enable workers to attain the highest level of work in the most integrated setting. Additionally, in order to mitigate the effect of lost services through sheltered employment:

- Increased support services should be provided to individuals and caregivers to assist in the transition of workers out of sheltered employment. These services can be furnished through State Vocational Rehabilitation Agencies and Community Rehabilitation Centers with Medicaid HCBS waivers allowing for pre-vocational services.
- The Department of Education should provide guidance to states and schools which would allow them to provide greater assistance to students with disabilities transitioning to vocational school or integrated workplace settings.

Along with the elimination of the 14(c) program, greater incentives for employers to employ workers with disabilities should be enacted to facilitate their inclusion into competitive workplace settings. Options include:

- Expanded job tax credits and small business deductions created to allow employers to accommodate workers with disabilities and pay them at minimum wage or better.
- Alternatively, a “reasonable accommodation” fund could be created that would allocate resources to employers on a case by case basis in order to provide supportive services to an employee with a disability who is hired.

A transition and close out of the 14(c) certificate program would require an initial increase of oversight from the Wage and Hour Division at DOL in order to ensure that employees receive the necessary support to enable transition to integrated employment. Increased transition and employment supports from Labor's Office of Disability Employment Policy (ODEP), AbilityOne, not for profit community rehabilitation programs, State Vocational Rehabilitation Agencies (through the Department of Education), and State Departments of Disability Services would require increased resources to meet the needs of the over 400,000 workers with disabilities transitioning from the program. Increased services to both workers and employers would be necessary in order to enable the hiring and ongoing employment of workers with disabilities in integrated settings. Better coordination among all agencies, states and nonprofits is vital to scale down the 14(c) certificates and empower transitioning employees.

Legislation would be necessary in order to provide federal tax incentives for employers to hire workers with disabilities into the mainstream workforce. Passage of legislation may prove politically challenging in a slowly recovering economy where even individuals without disabilities often find it difficult to find employment. Federal subsidies of workers with disabilities or employer quotas for hiring individuals with disabilities may result in further discrimination as employers will only retain the employee for the subsidy period, or will cherry pick individuals with acquired disabilities.

While the most technically challenging, this option benefits from being the choice which is in line with disability advocates who claim that Section 14(c) is discriminatory. An elimination of Section 14(c), coupled with a comprehensive plan to transition workers into integrated settings with work at the minimum wage or better is congruent with current disability policy attitudes promoting equal opportunity, full participation, community living and economic self-sufficiency for individuals with disabilities.

Conclusion

Any of the above options is a difficult sell financially in a time when federal agencies have seen unprecedented reductions in their budgets and are left with few choices other than employee furloughs. Furthermore, barring a great deal of interagency coordination, it's unlikely the 14(c) program will be eliminated under Representative Harper's legislation. Though the 14(c) program is far from perfect, it currently provides employment options to hundreds of thousands of American workers with disabilities. Frequently, workers in sheltered settings are getting supportive services from their employers that extend beyond the scope of work.

The disability legislation of the 1990s shifted the national discussion on disability policy away from the perception that segregation and exclusion of individuals with disabilities is a charitable and benevolent means for these individuals to make positive contributions to the society. Today, disability advocates strive for recognition of disability as a natural and normal part of the human experience, like race or gender. Disability in no way should diminish a person's right to full participation in all aspects of

society and policies related to disabilities should be made with an eye to equality, full participation and independence. While there is no disagreement with this sentiment, the reality is that employment options for workers with disabilities are not robust, and the policies of differing programs delivering disability services are thoroughly unaligned. Absent the 14(c) program, many individuals may have no choice but to enter Medical Adult Day Care, where prospects of attaining employment are slim to none.

Before any decision is made with regards to the continuation or elimination of the 14(c) program, further data needs to be gathered by all relevant agencies. Undoubtedly there are workers with disabilities in the 14(c) program who receive benefits that allow them to be productive and achieve economic self-sufficiency, both in integrated and sheltered settings. However, the lack of accountability and oversight from the Department of Labor makes it difficult to demonstrate the true effectiveness of the program. At minimum, Labor should improve oversight of Section 14(c). Employees working under 14(c) certificates in a sheltered setting should be transitioned to more integrated settings in keeping with current national disability policy. The way in which productivity percentages are calculated should be evaluated and revised in order to allow workers with disabilities to earn a wage closer to or equal to the state or federal minimum wage concurrent with their productivity. The Department of Education, Medicaid and States also need to assess capacity and resource needs of their respective provision of services for possible transitions from the 14(c) program.

The elimination of the 14(c) certificate program may be avoided if DOL can demonstrate a proper and responsible use of 14(c) on the part of employers. Section 14(c) is not inherently discriminatory if workers are employed in integrated settings, and are making at least the state or federal minimum wage. In order to avoid future threats to the program, Labor should bring the administration of the program in line with national disability policy priorities. Individuals with disabilities should be empowered to attain a higher level of work in a job that not only challenges and interests them but also pays them at least the minimum wage.

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ⁱⁱ Young, J. (2012) et. al. *National Council on Disability Report on Subminimum Wage and Supported Employment: National Council on Disability*. Retrieved from <http://www.ncd.gov/publications/2012/August232012/>

ⁱⁱⁱ U.S. Department of Labor - *Office of Disability Employment Policy*. (2013, May). As reported by Shaun Healsey (2013, June) in *Disability Scoop, LLC*.

^{iv} Livermore, G. A. (2008). *Earnings and Work Expectations of Social Security Disability Beneficiaries*. Mathematica Policy Research, Inc.

^v Morris, M., Ritchie, H., & Clay, L. (2002). *Section 14C of the Fair Labor Standards Act: Framing Policy Issues*. Law, Health Policy & Disability Center University of Iowa College of Law.

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