
NEW MEXICO DISABILITY CONCERNS SUBCOMMITTEE

SUBMINIMUM WAGE STATE AND FEDERAL ACTIONS

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National Conference of State Legislatures
State Exchange on Employment and Disability
September 11, 2019



WHAT I'LL COVER TODAY

1. Labor market overview
2. Subminimum wage – what is it and how does it work?
3. What's happening in New Mexico
4. What are other states doing



U.S. WORKFORCE OVERVIEW

National Unemployment Rate

- People without disabilities = 3.6%
- People with disabilities = 7.2%

National Labor Force Participation Rate

- People without disabilities = 77.4%
- People with disabilities = 34.7%

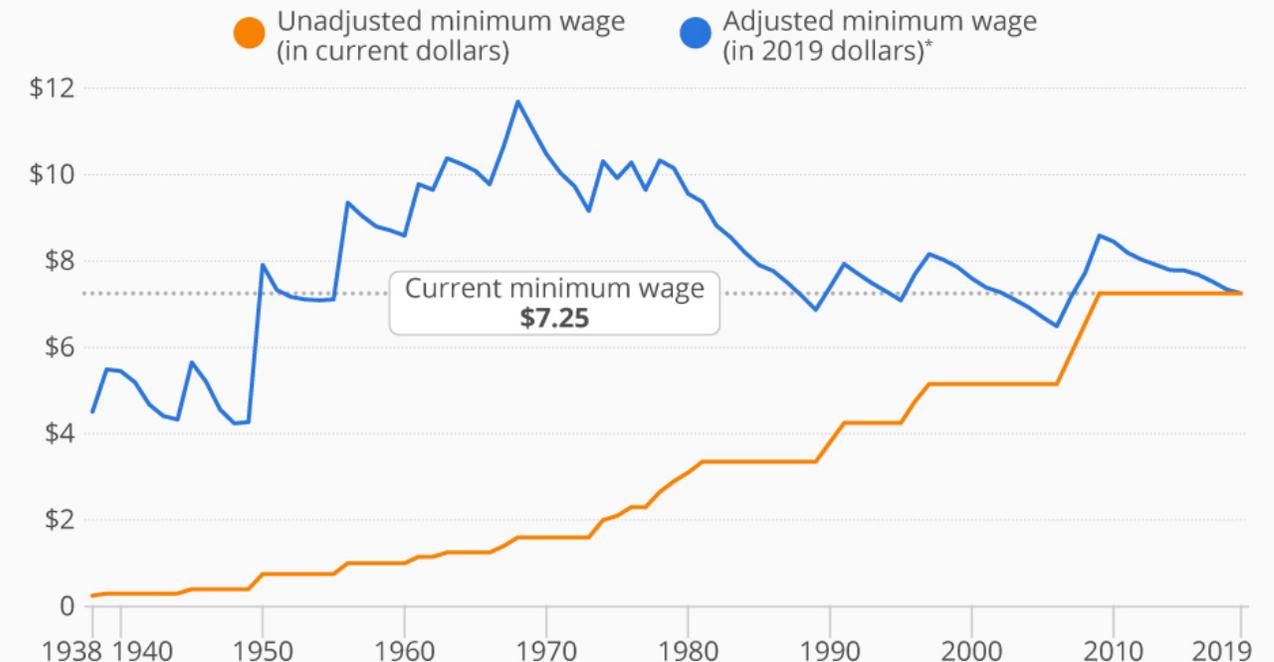
U.S. worker shortage = 1.4 million

FAIR LABOR STANDARDS ACT

- First enacted in 1938
- Sets a federal minimum wage – last adjusted in 2009
- Current federal minimum wage rate: \$7.25/hr

A Brief History of the U.S. Minimum Wage

U.S. federal minimum wage since 1938 adjusted and unadjusted for inflation



FAIR LABOR STANDARDS ACT

Old Evils of Child Labor Curbed by Wage-Hour Law

With Cooperation of the States and Backing of the
Public, a Long Crusade Is Believed to Be
Approaching a Successful Ending

By BEATRICE McCONNELL
Director, Industrial Division, Children's Bureau, U. S. Labor Dept.

Exceptions to the Minimum Wage

29 U.S.C. 201, et seq.

- 3(m): Tipped Wage
- 6(g): Youth Training Wage
- 14(a): Subminimum for Student Workers
- 14(c): Subminimum for People With Disabilities

SUBMINIMUM WAGE FOR PEOPLE WITH DISABILITIES

How It Works

- To pay subminimum wages, employers **must apply for a certificate** from U.S. DOL's Wage and Hour Division.
- Employers must **renew their certificate every 1-2 years.**

**EMPLOYEE RIGHTS
FOR WORKERS WITH DISABILITIES
PAID AT SUBMINIMUM WAGES**

This establishment has a certificate authorizing the payment of subminimum wages to workers who are disabled for the work they are performing. Authority to pay subminimum wages to workers with disabilities generally applies to work covered by the Fair Labor Standards Act (FLSA), McNamara-O'Hara Service Contract Act (SCA), and/or Walsh-Healey Public Contracts Act (PCA). Such subminimum wages are referred to as "commensurate wage rates" and are less than the basic hourly rates stated in an SCA wage determination and/or less than the FLSA minimum wage of \$7.25 per hour. A "commensurate wage rate" is based on the worker's individual productivity, no matter how limited, in proportion to the wage and productivity of experienced workers who do not have disabilities that impact their productivity when performing essentially the same type, quality, and quantity of work in the geographic area from which the labor force of the community is drawn.

Employers shall make this poster available and display it where employees and the parents and guardians of workers with disabilities can readily see it.

WORKERS WITH DISABILITIES

Subminimum wages under section 14(c) are not applicable unless a worker's disability actually impairs the worker's earning or productive capacity for the work being performed. The fact that a worker may have a disability is not in and of itself sufficient to warrant the payment of a subminimum wage.

For purposes of payment of commensurate wage rates under a certificate, a worker with a disability is defined as: An individual whose earnings or productive capacity is impaired by a physical or mental disability, including those related to age or injury, for the work to be performed.

Disabilities which may affect productive capacity include an intellectual or developmental disability, psychiatric disability, a hearing or visual impairment, and certain other impairments. The following do not ordinarily affect productive capacity for purposes of paying commensurate wage rates: educational disabilities; chronic unemployment; receipt of welfare benefits; nonattendance at school; juvenile delinquency; and correctional parole or probation.

WORKER NOTIFICATION

Each worker with a disability and, where appropriate, the parent or guardian of such worker, shall be informed orally and in writing by the employer of the terms of the certificate under which such worker is employed.

KEY ELEMENTS OF COMMENSURATE WAGE RATES

- **Nondisabled worker standard**—The objective gauge (usually a time study of the production of workers who do not have disabilities that impair their productivity for the job) against which the productivity of a worker with a disability is measured.
- **Prevailing wage rate**—The wage paid to experienced workers who do not have disabilities that impact their productivity for the same or similar work and who are performing such work in the area. Most SCA contracts include a wage determination specifying the prevailing wage rates to be paid for SCA-covered work.
- **Evaluation of the productivity of the worker with a disability**—Documented measurement of the production of the worker with a disability (in terms of quantity and quality).

The wages of all workers paid commensurate wages must be reviewed, and adjusted if appropriate, at periodic intervals. As a minimum, the productivity of hourly paid workers must be reassessed at least every six months and a new prevailing wage survey must be conducted at least once every twelve months. In addition, prevailing wages must be reviewed, and adjusted as appropriate, whenever there is a change in the job or a change in the prevailing wage rate, such as when the applicable state or federal minimum wage is increased.

WIOA

The Workforce Innovation and Opportunity Act of 2014 (WIOA) amended the Rehabilitation Act by adding section 511, which places limitations on the payment of subminimum wages to individuals with disabilities by mandating the completion of certain requirements prior to and during the payment of a subminimum wage.

EXECUTIVE ORDER 13658

Executive Order 13658, Establishing a Minimum Wage for Contractors, established a minimum wage that generally must be paid to workers performing on or in connection with a covered contract with the Federal Government. Workers covered by this Executive Order and due the full Executive Order minimum wage include workers with disabilities whose wages are calculated pursuant to a certificate issued under section 14(c) of the FLSA.

FRINGE BENEFITS

Neither the FLSA nor the PCA have provisions requiring vacation, holiday, or sick pay nor other fringe benefits such as health insurance or pension plans. SCA wage determinations may require such fringe benefit payments for a cash equivalent. Workers paid under a certificate authorizing commensurate wage rates must receive the full fringe benefits listed on the SCA wage determination.

OVERTIME

Generally, if a worker is performing work subject to the FLSA, SCA, and/or PCA, that worker must be paid at least 1 1/2 times their regular rate of pay for all hours worked over 40 in a workweek.

CHILD LABOR

Minors younger than 18 years of age must be employed in accordance with the child labor provisions of the FLSA. No persons under 16 years of age may be employed in manufacturing or on a PCA contract.

PETITION PROCESS

Workers with disabilities paid at subminimum wages may petition the Administrator of the Wage and Hour Division of the Department of Labor for a review of their wage rates by an Administrative Law Judge. No particular form of petition is required, except that it must be signed by the worker with a disability or his or her parent or guardian and should contain the name and address of the employer. Petitions should be mailed to: Administrator, Wage and Hour Division, U.S. Department of Labor, Room 6-3502, 200 Constitution Avenue NW, Washington, D.C. 20210.

1-800-487-9243
TTY: 1-877-889-5627
www.dol.gov/whd

WHD-8891118

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Workforce Innovation and Opportunity Act (WIOA)

- Workers with disabilities under 25:
 - must be informed about **competitive integrated employment** options before being paid subminimum wages.
 - must receive **transition services, career counseling and vocational rehabilitation** aimed at emphasizing competitive integrated employment.
- **ALL** workers earning subminimum wages must receive **career counseling** and **self-advocacy training** at least once a year.



SUBMINIMUM WAGE FOR PEOPLE WITH DISABILITIES

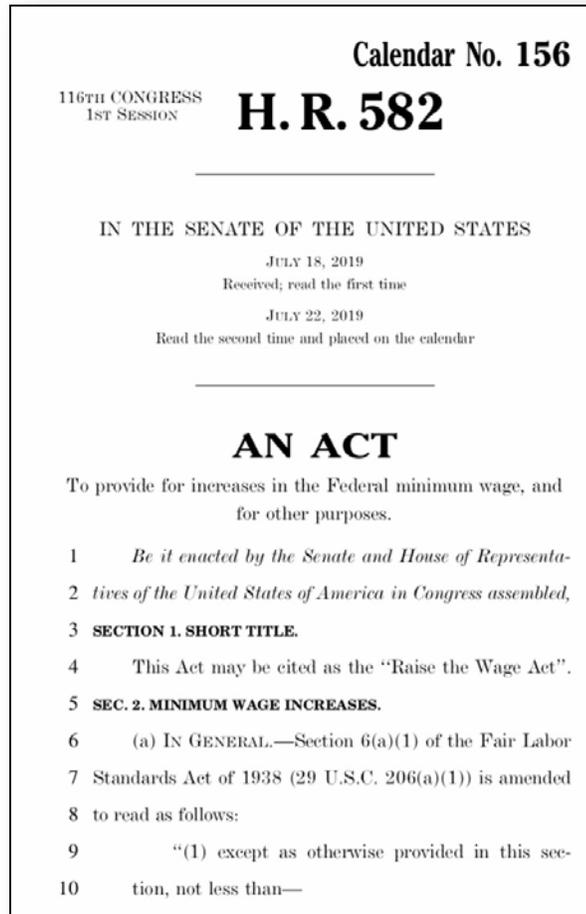
How a Subminimum Wage is Calculated

- Wage is based on the productivity of the worker with a disability in proportion to the wage and productivity of an **experienced** worker with no disability
- Simply having a disability does not justify a subminimum wage
- Must recalculate at least once a year
- Workers can petition an administrative judge to review their wage rate
- Federal wage calculators incorporate state minimum wage increases

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Hours	Minutes	Seconds	Total	
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FEDERAL ACTION



Raise the Wage Act

- Passed U.S. House in 2019, pending in the U.S. Senate
- Dept. of Labor would stop issuing 14(c) certificates
- Subminimum wages would gradually increase over 6 years to minimum wage rate
- After 6 years, all certificates would be invalid

STATE ACTIONS ON SUBMINIMUM WAGE

Workers with Disabilities Earning Subminimum Wages – By the Numbers

- Nationwide = 105,006
 - **New Mexico = 185**
 - Colorado = 672
 - Arizona = 1,125
 - Utah = 1,298

Employer	Employer / Location	State	Date Cert Start	Date Cert End	Cert Status	PCA	SCA	Number of Workers Paid Subminimum Wages
ZUNI ENTREPRENEURIAL ENTERPRISES, INC.	Gallup NM 87301	NM	11/01/2017	10/31/2019	Issued	N	N	18
CARC, INC.	Carlsbad NM 88220	NM	02/01/2019	01/31/2021	Pending			
ADELANTE INDUSTRIES	Albuquerque NM 87109	NM	12/01/2017	11/30/2019	Issued	N	Y	167

**Source: U.S. Department of Labor, July 2019*

STATE ACTIONS ON SUBMINIMUM WAGE

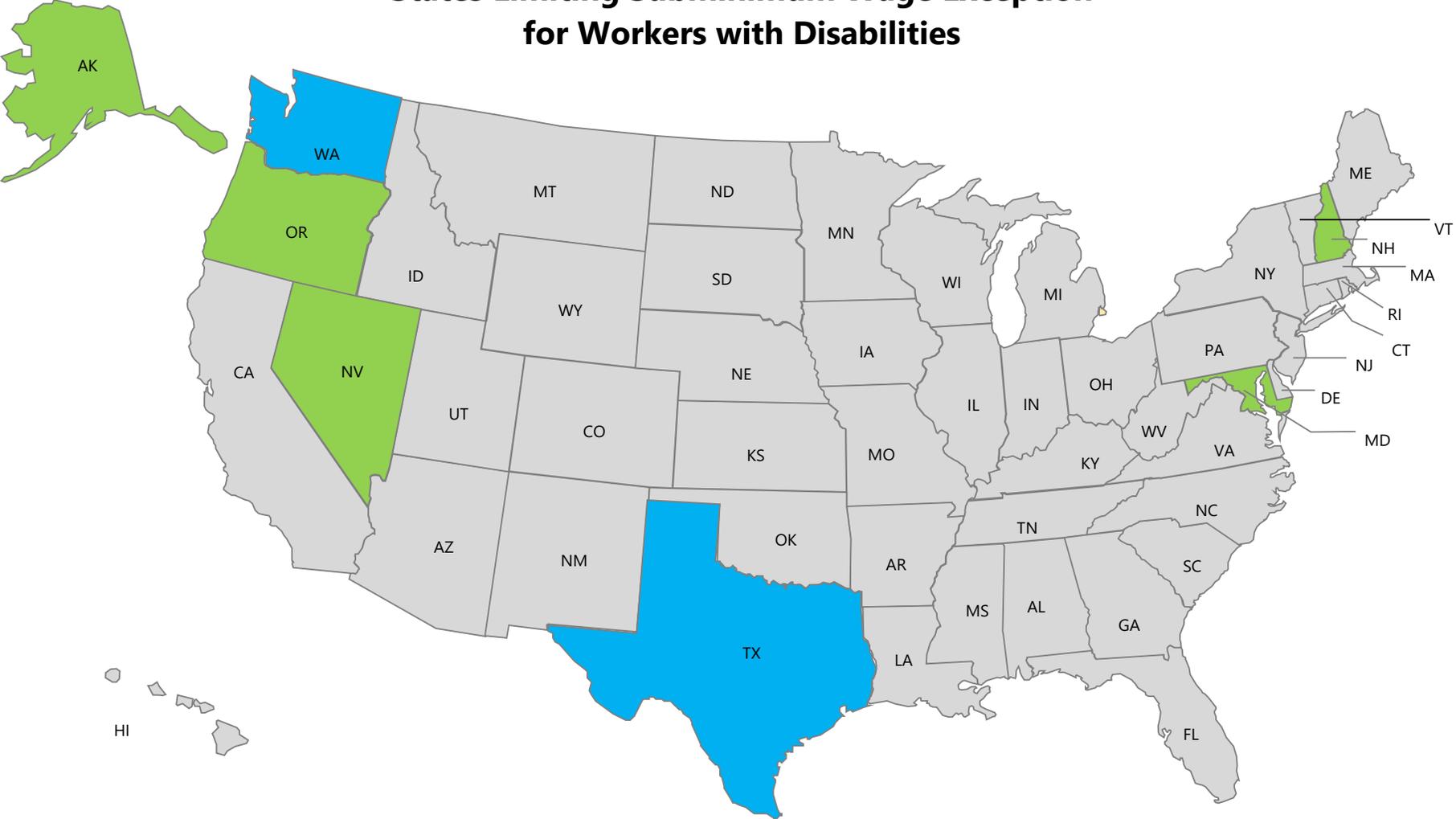
Federal Guidance for States Eliminating Subminimum Wage

2016 WHD Interpretation:

“The FLSA does not preempt a state law that prohibits the payment of wages lower than the state’s minimum wage”



States Limiting Subminimum Wage Exception for Workers with Disabilities

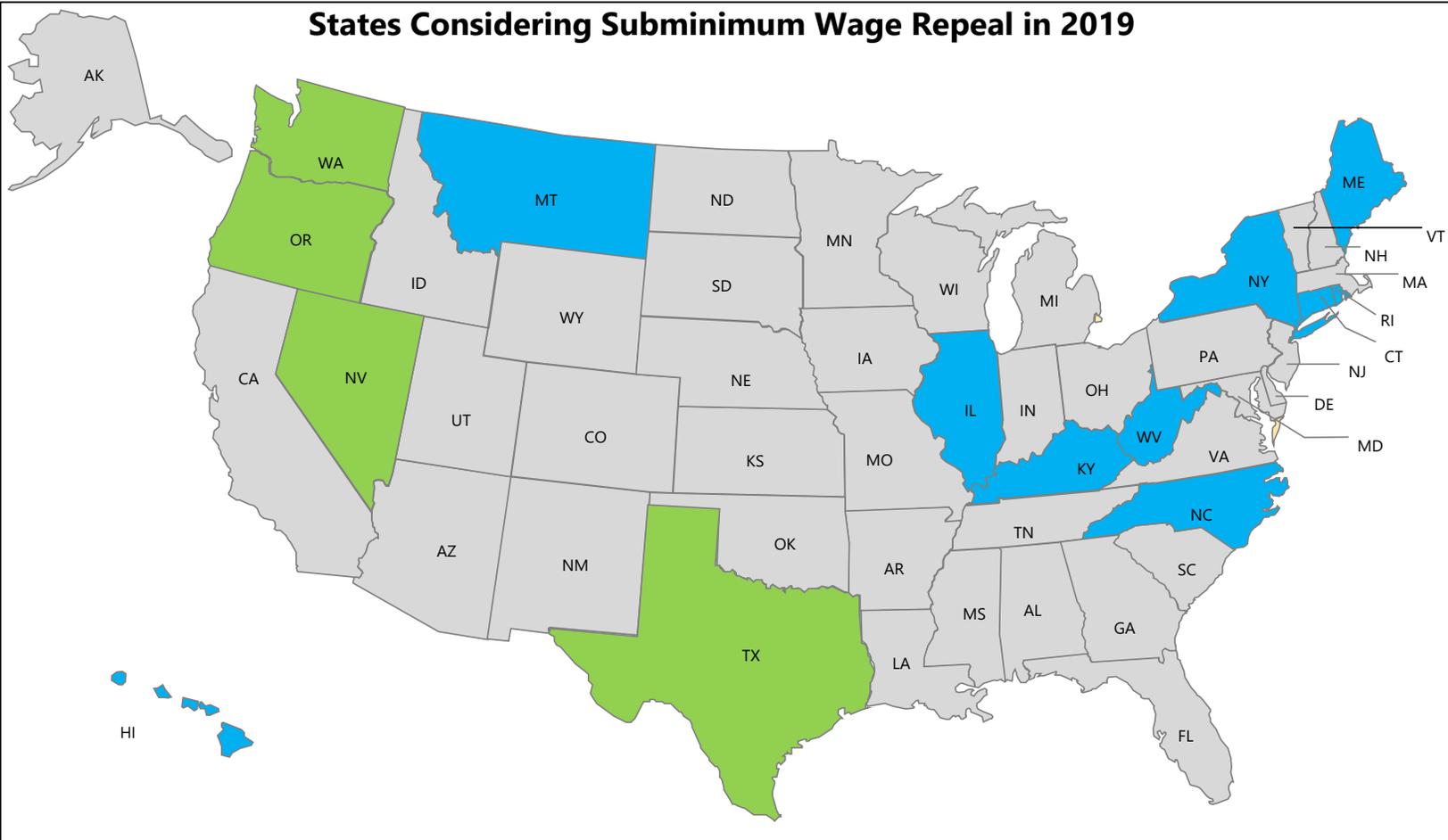


- Applies to some employers
- Applies to all employers



STATE ACTIONS ON SUBMINIMUM WAGE

States Considering Subminimum Wage Repeal in 2019



2019 Enacted Bills

Full Ban:

- Nevada – AB 456
- Oregon – SB 494

Partial Ban:

- Texas – SB 753
- Washington – HB 1706

KEY TAKEAWAYS

1. Compared to neighboring states, New Mexico has a relatively low number of workers with disabilities earning subminimum wages
2. Subminimum wages are getting increased attention in states but only a handful have enacted legislation



NCSL Resources:

- NCSL BLOG: States Weigh Options on Subminimum Wages for Workers With Disabilities
- Disability Employment Legislation Database
- NCSL.org – “2019 Minimum Wage by State”

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