

**NLWJC - Kagan**

**DPC - Box 035 - Folder 003**

**Labor - AFL Council Speech  
and Initiatives**

PRESIDENT'S OFFICE  
2-14-97

THE WHITE HOUSE  
WASHINGTON

*Gene  
This is covered  
for my notes  
we need to discuss  
PK*

MEMORANDUM FOR THE PRESIDENT AND THE VICE PRESIDENT

FROM: GENE B. SPERLING  
KATHLEEN WALLMAN

SUBJECT: POSSIBLE POLICY ANNOUNCEMENTS RELATED TO LABOR ISSUES

DATE: FEBRUARY 13, 1997

The NEC has met and deliberated the merits of several possible executive actions and possible announcements of legislative positions that have implications for organized labor. In view of the Vice President's upcoming trip to the AFL-CIO Convention on February 18, we thought it timely to advance our recommendations to you to see if you find these ripe for decision. If so, the Vice President could be in a position to make appropriate announcements and field likely questions when he addresses the AFL-CIO's Executive Council. Our recommendations are offered below.

1. Possible amendments to federal procurement regulations.

Federal law provides that the government should maintain a position of neutrality in labor disputes between unions and federal contractors. Nevertheless, under current federal contracting policies, contractors may be reimbursed for the costs of resisting unionization efforts and litigating against unfair labor practice charges, and remain eligible to receive new contracts.

To address what it perceives as the unfair "tilt" against unions that these federal contracting policies embody, the AFL-CIO has urged that the Administration direct the Federal Acquisition Regulatory Council, which operates under the auspices of the Office of Federal Procurement Programs within OMB, to initiate a notice and comment rulemaking to amend the Federal Acquisition Regulations (FAR) in three respects. We summarize the actions under consideration and the pros and cons of each. Since all three proposals go to the unions' neutrality principle, and since some members of your NEC believed it important to consider their impact together, we summarize the Cabinet Departments' recommendations at the end of this section rather than at the end of the discussion of each individual proposal.

a. Amend the FAR to cease reimbursement to contractors for costs incurred to defend against unfair labor practice allegations that are in litigation.

The Federal Acquisition Regulations (FAR) currently do not permit federal contractors to be reimbursed for the costs of defending criminal and certain civil proceedings brought by the

government, nor for penalties resulting from those proceedings. In the case of civil proceedings, reimbursement is disallowed, however, only where a monetary penalty could have been imposed. Since the National Labor Relations Act does not include monetary penalties, the current regulations have often been construed to permit reimbursement of defense costs associated with unfair labor practice proceedings initiated by the General Counsel of the NLRB.

**Proposal:** Amend the FAR to make clear that any and all costs relating to defending unfair labor practice charges and complaints brought by the NLRB General Counsel are not allowable, both in evaluating bids for fixed price contracts as well as reimbursement for cost reimbursement contracts.

**Pro:** Taxpayers' dollars should not be used to "tilt the playing field" in favor of employers against unions and employees. Eliminating this reimbursement will bring treatment of NLRB litigation costs in line with other kinds of litigation costs.

**Con:** No serious objections or downsides were identified, although a negative reaction from government contractors who have been permitted thus far to treat these costs as reimbursable is predictable.

**b. Amend the FAR to cease reimbursement for costs incurred to try to persuade employees not to unionize.**

The FAR currently provides that costs incurred by a contractor in maintaining satisfactory labor relations between the contractor and its employees, including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable costs. Under this provision, contractors have sought and been reimbursed for activities that undermine rather than promote satisfactory labor relations. On occasion, the costs that are being paid for by the taxpayers are for persistent anti-union organizing activity.

**Proposal:** Amend the FAR to provide that contractor costs incurred for activities related to influencing employees respecting unionization are specifically unallowable.

**Pro:** Taxpayers should not be subsidizing an employer's efforts to defeat union organizing activities when it is clear that these activities are not designed, and do not have the effect of, "maintaining satisfactory labor relations." A number of other statutes explicitly prohibit the use of government funds to promote, assist, or deter union organizing activities, such as the Job Training Partnership Act, the National Community Service Act, Head Start, and Medicare. Accordingly, there is precedent for this kind of provision. Auditors with responsibilities in these other statutory areas have had to determine whether an employer's labor relations costs were or were not allowable, so it can be done.

- Con:** Disallowing costs for employee meetings by contractors would be characterized by the business community as pulling the rug out from labor-management cooperation. They will argue that it will not be possible in practice to separate legitimate activities from anti-union persuasion. This provision will require auditors to make decisions about what costs are allowable that they are not well equipped to make, and will increase litigation, particularly with respect to Defense Department contracts where the auditors are most likely to be strict enforcers. In addition, this provision will likely be viewed by the contractors as a burdensome requirement not otherwise imposed in the private sector, contrary to expressed Administration procurement reform goals.
- c. **Amend the FAR to allow government contracting officers to consider, when deciding whether a contractor is a "responsible" contractor (a term of art under the existing FAR), the bidder's record of labor and employment policies and practices.**

The FAR provides that a prospective government contractor must be found to be a "responsible contractor" before being awarded a government contract. "Responsibility" requires that a prospective contractor be capable of performing the contract, that it has a satisfactory performance record, and that it has satisfactory "integrity and business ethics".

The concern has been raised that, although violations of the NLRA and other laws may become grounds for non-responsibility determinations under the FAR, more commonly, a contractor has no such finally adjudicated violations, and there are instead pending charges -- sometimes many of them -- that will take time to wend their way through the administrative process at the NLRB, the EEOC or through the courts. Sometimes the allegations are never adjudicated; for example, most unfair labor practice complaints are ultimately settled. Absent an actual civil violation, agencies will not find a contractor non-responsible. (This corresponds to the standard applied by procuring agencies in other areas of law; civil complaints in any area virtually never are grounds for non-responsibility determinations, and the very few known examples of civil complaints serving as grounds for such determinations involve civil complaints before courts rather than administrative agencies.)

**Proposal:** Add to the FAR language indicating that the responsibility determination must take into account whether the bidder has a "satisfactory record of labor and employment policies and practices". This is the approach that the AFL-CIO strongly prefers to the alternative set out below.

**Alternative Proposal:** The Office of Federal Procurement Programs believes that the AFL-CIO's preferred approach, set out above, is unworkable and will be subject to legal challenge because it gives labor relations and employment practices and policies prominence above all others kinds of compliance considerations, and, in effect uses the procurement process to impose a punishment. OFPP proposes that, at the very most, the FAR could be amended to

say that, in making responsibility determination, contracting officers should take into account whether the prospective bidder has "labor relations and employment practices and policies adequate to assure delivery of the required products and services". The AFL-CIO believes that this approach is toothless because applying it to the real world will create a null set.

**Pro:** The existing FAR already allows contracting officers to weigh the bidder's "business ethics", its "integrity" and its "capability" to perform the contract. Labor relations and employment conditions are an equally important and appropriate consideration, and the Administration ought to say so clearly in the FAR in a meaningful way, which argues for the formulation favored by the AFL-CIO, rather than the alternative offered by OFPP.

**Con:** Evaluating "satisfactory" labor relations and employment conditions, which the contracting officer would have to do under either proposal, is a qualitative judgment that contracting officers are not well equipped to make, especially where the disputed actions or conditions have not been adjudicated. Compliance will also be burdensome for contractors who will have to worry about meeting a non-quantifiable standard. Moreover, using the OFPP alternative proposal language may raise expectations unwarrantedly. There may be, in fact, very few cases where labor relations or employment practices or policies are so poor that they threaten performance. Those who try to persuade contracting officers under this new provision will most often be disappointed.

*Option 1: Authorize (a) only.* Commerce and Defense take this view. None of the other departments quarrels with doing at least (a), but the AFL-CIO would view doing only this as a weak gesture that simply highlights in a potentially embarrassing way the little known and arguably surprising practice of reimbursing these costs. AFL-CIO would have the same view if you authorized only (a) and (b), an option that none of the Departments advanced.

*Option 2: Authorize (a) and but not (b); authorize "interpretive guidance" to meet the concept of (c) but do not amend the FAR.* SBA and OMB advocate this approach. They disfavor your authorizing (b) because of the practical difficulties in implementing it and the burdens it would place on contractors. The possibility of issuing interpretive guidance in lieu of amending the FAR was explored with AFL-CIO, but provoked concerns that it might be inadequate to reach the stated goal since such interpretive guidance has no force of law.

*Option 3: Authorize (a) and (c), but not (b).* Treasury advocates this approach. It shares the implementation concerns about (b) articulated by SBA and OMB.

*Option 4: Authorize all three initiatives.* Labor urges this approach, and the Office of the Vice President indicated it favored this approach. We concur. The main argument against (b) is that it is difficult, but not impossible, to implement, so it seems that it can be done. The main arguments against (c) are that it would give labor and employment considerations special status

and that it could raise litigation risks. The counterarguments are that it is a reasonable policy choice for the Administration to go on record, in a meaningful way by amending the FAR, in support of the importance of these considerations. This argues for authorizing the formulation of (c) that the AFL-CIO prefers. As for litigation risk, Justice advises us that the amendment is not, of course, risk free, but there are good arguments in support of it, even in light of the striker replacement lawsuit.

Option 1 Option 2 Option 3 Option 4  Discuss Further

2. Possible executive order encouraging the use of project labor agreements

Project labor agreements, also known as "pre-hire agreements," are specially negotiated agreements between a project owner or construction manager and one or more labor organizations. The agreements are reached at the outset of a project in order to ensure efficient, timely and quality work; establish fair and consistent labor standards and work rules; supply a skilled, experienced and highly competent workforce; and assure stable labor-management relations throughout the term of the project. These agreements have long been used for public and private construction projects that involve a large volume of work, extend over a substantial period of time, include a substantial number of contractors, and entail substantial costs. It is well established that these agreements are effective and may be lawfully used in both the private and public sector for construction industry projects.

**Proposal:** Issue an Executive Order that directs Executive departments and agencies authorized to implement or fund a project for the construction of a federal facility to determine on a project-by-project basis whether a project labor agreement will promote labor-management stability; advance the public interest in economical, efficient, quality and time project performance; and assist project compliance with applicable legal requirements governing health and safety, equal employment opportunity, and labor standards. **The Executive Order would not require the use of a project labor agreement on any particular project.**

**Pro:** Project labor agreements are useful and lawful, but federal agencies may not be aware of their availability and have not been using them in a significant way. Issuing an Executive Order would make clear that federal contracting agencies have this authority and should consider using such agreements in appropriate circumstances.

**Con:** No serious objections or downsides have been identified to an approach that permits but does not require the use of these agreements, although this action, in combination with other actions on the list of labor-related initiatives and announcements you authorize could send a signal as to the tone you intend to take on labor-management issues.

*law for  
case (b) - W  
to discuss (c) - W  
Matters on guidelines  
HHS/DOH/DOJ  
DOLE/DOE/DOH/DOJ  
(b) but on  
W/DOH/DOJ*

**Recommendation:** There was a consensus in support of issuance of an executive order that encourages but does not require the use of these agreements. It would make sense to proceed to do so.

Agree

Disagree

Discuss Further

**3. Possible linkage of flex time legislation to legislation that expands the FMLA**

The two comp time bills currently being considered on the Hill -- both Republican-sponsored -- fail to address FMLA expansion, and provide fewer guarantees of employee choice and fewer protections against potential abuse than your flex time bill, which was sent to Congress last September.

Specifically, the bills do not exclude vulnerable workers; do not include special protections for workers whose employers go bankrupt; do not guarantee real choice for employees; among other shortcomings. The Ashcroft comp time bill in particular has provisions that would effectively eliminate the 40-hour week. The labor movement strongly opposes the Republican comp time bills, and finds these Ashcroft provisions to be particularly offensive.

With respect to FMLA, Democrats in both houses have introduced bills to expand the current law. Several bills are consistent with your proposal to expand FMLA for an additional 24 hours for the purposes of routine medical care for children and elderly parents or school related activities. Other Democratic bills would lower the threshold of FMLA applicability from 50 to 25 employees, a provision that was not included in your bill. Predictably, while most Republicans oppose FMLA expansion, the bills have support from women's groups and the labor movement. Small businesses, including some represented on your Conference on Small Business, have concerns about lowering the threshold for applicability. The Democratic legislative strategy is to try to add FMLA expansion to the Republican bills while criticizing their comp time components.

In light of this strategy, the labor movement has urged that the Administration threaten to veto any bill that does not (1) link FMLA expansion and flex time, and (2) improve the comp time provisions to provide real choice and real protections for employees (as in your flex time bill).

Everyone on your economic team and inside the White House believe that you should propose your flex-time bill linked with FMLA expansion. Everyone also agrees that you should give a clear veto threat to any comp-time or flex-time that does not meet your principles -- which center around ensuring true employee choice and preventing coercion. The principles for an acceptable flex time bill would be the following:

- **Real guarantees of employee choice to earn and use their flex time.**

The underlying issues are:

too  
short

?

- ~~allow employees to use flex time unless it would cause the employer "substantial (and grievous) injury"~~
- limit employers' ability to cash out employees' flex time

- **Real protection for employees against potential employer abuse**

The underlying issues are:

- exclusions for the most vulnerable workers
- special protections for workers whose employers go bankrupt or shut down unexpectedly
- strong remedies for violations

### **ISSUE FOR DECISION:**

*The sole issue for you to decide is whether or not you should issue a veto threat to any bill that does not include FMLA expansion.*

The NEC weighed three options and discussed them at length:

- Option 1:* Threaten to veto even any flex-time bill if it does not include FMLA expansion.
- Option 2:* Threaten to veto any comp-time that does not meet your principles, but not tie your veto threat to inclusion of FMLA expansion.
- Option 3:* Threaten to veto any comp-time bill that does not meet your principles, but make expanding family leave as a principle.

### **Option 1: Veto Without Linkage:**

#### **Pros:**

- Would strengthen the position of congressional democrats to improve the Republican bills.
- Opponents could be seen as unreasonable for failing to meet the President's request to simply let workers take off a couple of hours to take



their children to the doctor.

- Would be strongly favored by the AFL-CIO who could use the linkage as a means of trying to get their troops to be supportive, or at least to prevent active opposition by labor and workers opposed to comp time.
- Some feel that it is highly unlikely that we would get a strong enough flex-time bill, that we would be put in a situation where we would have to veto a good flex-time bill.

**Cons:**

- Could force the President to veto an otherwise acceptable flex-time bill -- if Republicans moved our way on employee choice protections.
- May seem unreasonable -- or hard to explain -- to veto a bill because of what is not included.

**Option 2: Not Insist on Linkage:**

**Pros:**

- Flex-time is popular and affects tens of millions of workers and we should not limit our ability to sign it because FMLA expansion was not included.
- Daschle's staff is also skeptical that Senate Democrats will support a strategy that insists on FMLA expansion as the price for any comp time bill, however strong.

**Cons:**

- Will not be seen as a strong statement by labor and other groups that are generally opposed to comp time.
- Will miss an opportunity to side with groups that we may have to oppose on coming budget and trade issues.

**Option 3:** This Option would add the following measure to the principles that must be met to avoid a Presidential veto:

*"Expanded right to use leave on a recurring basis for family and medical needs."*

**Pros:**

- This is an option created by John Hilley that he feels would give the advantages of linkage, yet by using principles, it gives us more flexibility.
- Allows us to point to several grounds to veto a bad bill.

**Cons:**

- Could get the worst of all worlds: labor feels that we are weak in our veto threat, yet it could still be seen as hard enough to lock the President into vetoing a flex-time bill that meets our flex-time principles.

*What's the  
 keep - follow  
 we need to  
 do 203 leg  
 question  
 about  
 cause monitor  
 to veto a good 4.  
 bill we don't  
 not better  
 use exactly  
 principle  
 for this*

Option 1       Option 2       Option 3       Discuss Further

**Position on Beck legislation aimed at limiting the use of union dues in political activity**

The Republicans in Congress have made clear that they will try to attach a "Beck provision" to some piece of legislation that you want to sign. This provision (named after a Supreme Court case) would prevent a union from using compulsory dues for political purposes unless a union member specifically authorizes such use. It goes much further than current law, which allows a union to use dues for political activity except when a union member specifically objects and demands reimbursement. Unions correctly believe that the Republican Beck provision (there may be a Democratic version that simply codifies current law) would gravely interfere with their political activity. They would like the President to threaten a veto of such legislation.

*Option 1:* State that you will veto Beck legislation if it is attached to campaign finance legislation. None of your advisers advocated this approach because it puts you in the unattractive position of announcing early on an item that would cause you to veto campaign finance legislation, which you have identified as one of your priorities.

*Option 2:* State strong opposition to Beck legislation, no matter what it is attached to, but refrain from making a veto threat. There seemed to be unanimity that this was the better approach. It will make clear your vehement opposition to this legislation and will fortify Congressional Democrats in trying to defeat it. It will not, however, back you into a corner in the event Republicans succeed in attaching the Beck provision to some essential bill -- whether the campaign finance bill or otherwise.

*OK*

5. Restating last year's veto threats on (i) TEAM legislation (ii) Davis-Bacon legislation and (iii) legislation to weaken OSHA.

Last year, you indicated you would veto the TEAM bill and the other two legislative proposals. It is proposed that the Vice President would restate your position in Los Angeles, with language that leaves room for improvements in TEAM legislation that you may conclude somewhere down the road that you may wish to sign.

**Recommendation:** There was consensus among the members of your NEC that restating your previous positions with carefully crafted language that does not prevent you from considering an improved TEAM bill would be the right path to take.

Agree  Disagree  Discuss Further

6. Welfare reform and minimum wage

The AFL-CIO will press the Vice President to take a position on whether worker protection statutes -- particularly the Fair Labor Standards Act (FLSA) -- apply to welfare recipients participating in work activities under the new welfare law. Bruce Reed and Ken Apfel of OMB have been running an interagency process (involving DOL, HHS, USDA, and others) to hammer out an answer to this question. The trick is to figure out how to apply the minimum wage law to workfare participants without imposing large new costs on states. Bruce and Ken are confident that a solution can be worked out that goes a fair way toward satisfying the unions, yet does not upset many governors. But they are a few weeks away from presenting this proposed solution to you. And everyone seems to agree that if the Vice President announces an Administration position favorable to the unions at the Council meeting, both the governors and the Congress could react very negatively. There is a danger that such an announcement would make a complex and studied welfare implementation decision look like a mere gift to the unions.

*We certainly can make that credit contingent on this and using welfare law as the basis for the minimum wage*

**Recommendation:** There was consensus that it would be best if the Vice President did not raise the minimum wage issue at the Council meeting. Nevertheless, members of the Vice President's staff could give John Sweeney some private assurances that the Administration will soon put out its position and that the key questions -- most notably, whether workfare participants count as "employees" for purposes of the minimum wage law -- will come out his way. When asked about the issue, the Vice President should make a strong statement of principle that workers shouldn't be paid a subminimum wage, whether or not they come off the welfare rolls. But he should also be careful to note that the Administration is still in the process of developing its final positions on the complex issues arising from the intersection of the labor laws and welfare law.

*John*

This approach will not fully satisfy members of the AFL Council, who would prefer a clear and public statement of the Administration's position at or prior to the Council meeting,

but it will minimize the likelihood of a backlash from governors and/or Congress, by giving the Administration time to refine its position so as to make it more palatable to the states and by issuing the position in a non-political setting.

**WHITE HOUSE STAFFING MEMORANDUM**

DATE: 2/17 ACTION/CONCURRENCE/COMMENT DUE BY: 2/17 2:00 pm

SUBJECT: Labor issues follow-up

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	<input checked="" type="checkbox"/>	<input type="checkbox"/>	McCURRY	<input type="checkbox"/>	<input type="checkbox"/>
BOWLES	<input checked="" type="checkbox"/>	<input type="checkbox"/>	McGINTY	<input type="checkbox"/>	<input type="checkbox"/>
McLARTY	<input type="checkbox"/>	<input type="checkbox"/>	NASH	<input type="checkbox"/>	<input type="checkbox"/>
PODESTA	<input checked="" type="checkbox"/>	<input type="checkbox"/>	RUFF	<input type="checkbox"/>	<input type="checkbox"/>
MATHEWS	<input checked="" type="checkbox"/>	<input type="checkbox"/>	SMITH	<input type="checkbox"/>	<input type="checkbox"/>
RAINES	<input type="checkbox"/>	<input type="checkbox"/>	REED	<input checked="" type="checkbox"/>	<input type="checkbox"/>
BAER	<input type="checkbox"/>	<input type="checkbox"/>	SOSNIK	<input type="checkbox"/>	<input type="checkbox"/>
ECHAVESTE	<input type="checkbox"/>	<input type="checkbox"/>	LEWIS	<input type="checkbox"/>	<input type="checkbox"/>
EMANUEL	<input checked="" type="checkbox"/>	<input type="checkbox"/>	YELLEN	<input type="checkbox"/>	<input type="checkbox"/>
GIBBONS	<input type="checkbox"/>	<input type="checkbox"/>	STREETT	<input type="checkbox"/>	<input type="checkbox"/>
HALE	<input type="checkbox"/>	<input type="checkbox"/>	SPERLING	<input type="checkbox"/>	<input type="checkbox"/>
HERMAN	<input type="checkbox"/>	<input type="checkbox"/>	HAWLEY	<input type="checkbox"/>	<input type="checkbox"/>
HIGGINS	<input type="checkbox"/>	<input type="checkbox"/>	WILLIAMS	<input type="checkbox"/>	<input type="checkbox"/>
HILLEY	<input checked="" type="checkbox"/>	<input type="checkbox"/>	RADD	<input checked="" type="checkbox"/>	<input type="checkbox"/>
KLAIN	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
BERGER	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
LINDSEY	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

REMARKS: *Please advise*

RESPONSE: \_\_\_\_\_

THE WHITE HOUSE

WASHINGTON

1997-FEB 17 2:58:49

MEMORANDUM FOR THE PRESIDENT AND THE VICE PRESIDENT

FROM: GENE B. SPERLING  
KATHLEEN WALLMAN

SUBJECT: FURTHER INFORMATION IN RESPONSE TO THE PRESIDENT'S NOTES  
ON THE LABOR RELATED ISSUES MEMORANDUM

DATE: February 17, 1997

The President's notes on our memorandum of February 13 raised questions about two subjects.

**Flex Time Legislation and FMLA Expansion**

First, the President indicated that there should be no threat to veto any flex time bill on the ground that it does not include expansion of FMLA. We concur. Since the February 13 memorandum was sent in, Erskine Bowles and John Hilley have talked with Minority Leader Daschle and otherwise developed information making it clear that a veto likely would not be sustainable. Accordingly, the only viable option is option 2, which would involve the Vice President's saying that the Administration believes flex time legislation should be linked to family leave expansion, and that the President would veto comp time legislation that does not embrace the flex time principles that we articulated last year. This would not involve any threat to veto a bill on the ground that it does not include expanded family leave.

**Responsible Contractor Proposal**

Second, we outlined proposals to amend the Federal Acquisition Regulations (FAR) to allow contracting officers to take into account a prospective contractor's record of labor and employment practices in determining whether a contractor should be deemed "responsible", a term utilized in the current regulations, and therefore eligible to receive contract awards. The President's note indicates that these approaches, if pursued, would require additional standards or guidance about how they should be implemented.

We considered whether such guidance could be provided in quantitative terms, but we believe it would be inadvisable to propose, for example, that a certain number of violations should be automatically disqualifying. That would be arbitrary, and self-defeating where the number of potential contractors is small. Nor is it proposed that a certain number of allegations or pending litigations would be disqualifying. In addition to being arbitrary and self-defeating, such an approach could raise due process concerns.

What we think makes sense is to create an opportunity for interested parties to make contracting officers aware of the facts in egregious cases where there is, in effect, a running battle between the employer and the union, or between the employer and the workforce. It is understood that it is the egregious case, not everyday cases, for which this opportunity would be representatives of working people. Having this provision in the regulations also will school the behavior of employers who are or foresee becoming government contractors and discourage them from excesses in dealing with employees and unions. If, after hearing the facts, the contracting officer decides that the contract should be awarded anyway, the person or entity presenting the adverse information would have no standing to sue to challenge the award of the contract.

Guidance about the meaning and application of these new amendments can be provided in two complementary ways:

**1. Explain in the Federal Register notice that the change is proposed for the following reason:**

“The proposed amendments recognize that there may be situations where employment relations are so poor or a prospective contractor’s overall record of employment practices or compliance with employment and labor laws is so inadequate that the contractor’s status as a responsible contractor is questionable. Furthermore, in some instances, a prospective contractor’s employment record or practices may put in doubt the contractor’s capability of performing the contract in a manner consistent with what is expected of a responsible contractor.

“By way of example, one indication of such a situation could be a record of violations of labor and employment laws concerning such matters as worker safety and health; wages, benefits, and other labor standards; equal employment opportunity; or the right of workers to organize and bargain collectively. Under the amended language, contracting officers could weigh, as appropriate, information about such violations or about other evidence of deficient labor or employment policies or practices, such as those affecting the stability of the workforce, that is available to the contracting officer, and could meet with individuals or organizations wishing to provide such information.”

2. **The Administrator of the Office of Federal Procurement Policy can send out an explanatory memorandum to all federal procurement officials after the rulemaking process is finished.**

The Administrator issues such memoranda from time to time to provide explanatory information about regulations and other topics. His memorandum would be along the same lines as the Federal Register notice described above.

**Approve pursuing responsible contractor amendments**

**Disapprove pursuing responsible contractor amendments**

**Discuss Further**



2/14

~~Comp~~ Later Issuer

1. FMA/Cong time

a. Demure of Ashcroft

b. Link two (but not veto)

c. Enunciate principles - if not - we'll veto.

2. Back -

Strongly oppose anything that would deny the  
~~its~~ its right to participate in gov process.

3. Procurement -

(c) no good - needs stde + guidance.

ESM -

KA: Almost definitely going to work out

concern about st. neg. response / will watch

substance - moving slowly to get that job is job -

(w/ food stamps)

Steve: need strongly prioritized that.

Michigan market? exist - below min wage jobs?

incumbent of your portfolio -

Food Stamp - supp program - direct cash out

That is different - diff ways f.s. can come into picture.

FCM would dialow.

KA: we should talk this issue. A good reason not to do now.

Steve: Sweeney looking for an answer this week

Temp level is up.

Major discussion on this issue in Exec Council on Mon -

Treatygoe without participants as well where.

Rivalistic - not as pressing

KA: Further from resolution -

Inquiry why go - in public re TX.

FS/Medicaid/41-ES  
↓  
?

a: What are chances (ATG) essential govt achvs. - re by Health Dept ES.

Let's fundamentally look to be done on how syth wlk on ground.

QVA: Approp to take time. HHS - follow waiver? or just a typical review?

KA: On Med - don't know if it takes a waiver - or just a syst rev.

(1hr) Mass. situation - This is a problem! -

We're going to lose whole ES unless we send a msg. - and soon. (we should meet w/ DOC)

Make sure we're sending same msg to MA as to TX.

Our laws should have or to describe their wk - to the IA group. Elif who's job - all abt judgment calls.

Recipients of health care etc. also should have input.

*Read Elena*

RESIDENT HAS BEEN  
2-14-97

THE WHITE HOUSE  
WASHINGTON

*Gene  
Neil & Company  
for my notes  
we need to discuss  
R&L*

**MEMORANDUM FOR THE PRESIDENT AND THE VICE PRESIDENT**

**FROM: GENE B. SPERLING  
KATHLEEN WALLMAN**

**SUBJECT: POSSIBLE POLICY ANNOUNCEMENTS RELATED TO LABOR ISSUES**

**DATE: FEBRUARY 13, 1997**

The NEC has met and deliberated the merits of several possible executive actions and possible announcements of legislative positions that have implications for organized labor. In view of the Vice President's upcoming trip to the AFL-CIO Convention on February 18, we thought it timely to advance our recommendations to you to see if you find these ripe for decision. If so, the Vice President could be in a position to make appropriate announcements and field likely questions when he addresses the AFL-CIO's Executive Council. Our recommendations are offered below.

**1. Possible amendments to federal procurement regulations.**

Federal law provides that the government should maintain a position of neutrality in labor disputes between unions and federal contractors. Nevertheless, under current federal contracting policies, contractors may be reimbursed for the costs of resisting unionization efforts and litigating against unfair labor practice charges, and remain eligible to receive new contracts.

To address what it perceives as the unfair "tilt" against unions that these federal contracting policies embody, the AFL-CIO has urged that the Administration direct the Federal Acquisition Regulatory Council, which operates under the auspices of the Office of Federal Procurement Programs within OMB, to initiate a notice and comment rulemaking to amend the Federal Acquisition Regulations (FAR) in three respects. We summarize the actions under consideration and the pros and cons of each. Since all three proposals go to the unions' neutrality principle, and since some members of your NEC believed it important to consider their impact together, we summarize the Cabinet Departments' recommendations at the end of this section rather than at the end of the discussion of each individual proposal.

- a. Amend the FAR to cease reimbursement to contractors for costs incurred to defend against unfair labor practice allegations that are in litigation.**

The Federal Acquisition Regulations (FAR) currently do not permit federal contractors to be reimbursed for the costs of defending criminal and certain civil proceedings brought by the

government, nor for penalties resulting from those proceedings. In the case of civil proceedings, reimbursement is disallowed, however, only where a monetary penalty could have been imposed. Since the National Labor Relations Act does not include monetary penalties, the current regulations have often been construed to permit reimbursement of defense costs associated with unfair labor practice proceedings initiated by the General Counsel of the NLRB.

**Proposal:** Amend the FAR to make clear that any and all costs relating to defending unfair labor practice charges and complaints brought by the NLRB General Counsel are not allowable, both in evaluating bids for fixed price contracts as well as reimbursement for cost reimbursement contracts.

**Pro:** Taxpayers' dollars should not be used to "tilt the playing field" in favor of employers against unions and employees. Eliminating this reimbursement will bring treatment of NLRB litigation costs in line with other kinds of litigation costs.

**Con:** No serious objections or downsides were identified, although a negative reaction from government contractors who have been permitted thus far to treat these costs as reimbursable is predictable.

**b. Amend the FAR to cease reimbursement for costs incurred to try to persuade employees not to unionize.**

The FAR currently provides that costs incurred by a contractor in maintaining satisfactory labor relations between the contractor and its employees, including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable costs. Under this provision, contractors have sought and been reimbursed for activities that undermine rather than promote satisfactory labor relations. On occasion, the costs that are being paid for by the taxpayers are for persistent anti-union organizing activity.

**Proposal:** Amend the FAR to provide that contractor costs incurred for activities related to influencing employees respecting unionization are specifically unallowable.

**Pro:** Taxpayers should not be subsidizing an employer's efforts to defeat union organizing activities when it is clear that these activities are not designed, and do not have the effect of, "maintaining satisfactory labor relations." A number of other statutes explicitly prohibit the use of government funds to promote, assist, or deter union organizing activities, such as the Job Training Partnership Act, the National Community Service Act, Head Start, and Medicare. Accordingly, there is precedent for this kind of provision. Auditors with responsibilities in these other statutory areas have had to determine whether an employer's labor relations costs were or were not allowable, so it can be done.

**Con:** Disallowing costs for employee meetings by contractors would be characterized by the business community as pulling the rug out from labor-management cooperation. They will argue that it will not be possible in practice to separate legitimate activities from anti-union persuasion. This provision will require auditors to make decisions about what costs are allowable that they are not well equipped to make, and will increase litigation, particularly with respect to Defense Department contracts where the auditors are most likely to be strict enforcers. In addition, this provision will likely be viewed by the contractors as a burdensome requirement not otherwise imposed in the private sector, contrary to expressed Administration procurement reform goals.

- t. Amend the FAR to allow government contracting officers to consider, when deciding whether a contractor is a "responsible" contractor (a term of art under the existing FAR), the bidder's record of labor and employment policies and practices.**

The FAR provides that a prospective government contractor must be found to be a "responsible contractor" before being awarded a government contract. "Responsibility" requires that a prospective contractor be capable of performing the contract, that it has a satisfactory performance record, and that it has satisfactory "integrity and business ethics".

The concern has been raised that, although violations of the NLRA and other laws may become grounds for non-responsibility determinations under the FAR, more commonly, a contractor has no such finally adjudicated violations, and there are instead pending charges -- sometimes many of them -- that will take time to wend their way through the administrative process at the NLRB, the EEOC or through the courts. Sometimes the allegations are never adjudicated; for example, most unfair labor practice complaints are ultimately settled. Absent an actual civil violation, agencies will not find a contractor non-responsible. (This corresponds to the standard applied by procuring agencies in other areas of law; civil complaints in any area virtually never are grounds for non-responsibility determinations, and the very few known examples of civil complaints serving as grounds for such determinations involve civil complaints before courts rather than administrative agencies.)

**Proposal:** Add to the FAR language indicating that the responsibility determination must take into account whether the bidder has a "satisfactory record of labor and employment policies and practices". This is the approach that the AFL-CIO strongly prefers to the alternative set out below.

**Alternative Proposal:** The Office of Federal Procurement Programs believes that the AFL-CIO's preferred approach, set out above, is unworkable and will be subject to legal challenge because it gives labor relations and employment practices and policies prominence above all others kinds of compliance considerations, and, in effect uses the procurement process to impose a punishment. OFPP proposes that, at the very most, the FAR could be amended to

say that, in making responsibility determination, contracting officers should take into account whether the prospective bidder has "labor relations and employment practices and policies adequate to assure delivery of the required products and services". The AFL-CIO believes that this approach is toothless because applying it to the real world will create a null set.

**Pro:** The existing FAR already allows contracting officers to weigh the bidder's "business ethics", its "integrity" and its "capability" to perform the contract. Labor relations and employment conditions are an equally important and appropriate consideration, and the Administration ought to say so clearly in the FAR in a meaningful way, which argues for the formulation favored by the AFL-CIO, rather than the alternative offered by OFPP.

**Con:** Evaluating "satisfactory" labor relations and employment conditions, which the contracting officer would have to do under either proposal, is a qualitative judgment that contracting officers are not well equipped to make, especially where the disputed actions or conditions have not been adjudicated. Compliance will also be burdensome for contractors who will have to worry about meeting a non-quantifiable standard. Moreover, using the OFPP alternative proposal language may raise expectations unwarrantedly. There may be, in fact, very few cases where labor relations or employment practices or policies are so poor that they threaten performance. Those who try to persuade contracting officers under this new provision will most often be disappointed.

*Option 1: Authorize (a) only.* Commerce and Defense take this view. None of the other departments quarrels with doing at least (a), but the AFL-CIO would view doing only this as a weak gesture that simply highlights in a potentially embarrassing way the little known and arguably surprising practice of reimbursing these costs. AFL-CIO would have the same view if you authorized only (a) and (b), an option that none of the Departments advanced.

*Option 2: Authorize (a) and but not (b); authorize "interpretive guidance" to meet the concept of (c) but do not amend the FAR.* SBA and OMB advocate this approach. They disfavor your authorizing (b) because of the practical difficulties in implementing it and the burdens it would place on contractors. The possibility of issuing interpretive guidance in lieu of amending the FAR was explored with AFL-CIO, but provoked concerns that it might be inadequate to reach the stated goal since such interpretive guidance has no force of law.

*Option 3: Authorize (a) and (c), but not (b).* Treasury advocates this approach. It shares the implementation concerns about (b) articulated by SBA and OMB.

*Option 4: Authorize all three initiatives.* Labor urges this approach, and the Office of the Vice President indicated it favored this approach. We concur. The main argument against (b) is that it is difficult, but not impossible, to implement, so it seems that it can be done. The main arguments against (c) are that it would give labor and employment considerations special status

and that it could raise litigation risks. The counterarguments are that it is a reasonable policy choice for the Administration to go on record, in a meaningful way by amending the FAR, in support of the importance of these considerations. This argues for authorizing the formulation of (c) that the AFL-CIO prefers. As for litigation risk, Justice advises us that the amendment is not, of course, risk free, but there are good arguments in support of it, even in light of the striker replacement lawsuit.

Option 1    Option 2    Option 3    Option 4    Discuss Further

2. Possible executive order encouraging the use of project labor agreements

Project labor agreements, also known as “pre-hire agreements,” are specially negotiated agreements between a project owner or construction manager and one or more labor organizations. The agreements are reached at the outset of a project in order to ensure efficient, timely and quality work; establish fair and consistent labor standards and work rules; supply a skilled, experienced and highly competent workforce; and assure stable labor-management relations throughout the term of the project. These agreements have long been used for public and private construction projects that involve a large volume of work, extend over a substantial period of time, include a substantial number of contractors, and entail substantial costs. It is well established that these agreements are effective and may be lawfully used in both the private and public sector for construction industry projects.

**Proposal:** Issue an Executive Order that directs Executive departments and agencies authorized to implement or fund a project for the construction of a federal facility to determine on a project-by-project basis whether a project labor agreement will promote labor-management stability; advance the public interest in economical, efficient, quality and time project performance; and assist project compliance with applicable legal requirements governing health and safety, equal employment opportunity, and labor standards. **The Executive Order would not require the use of a project labor agreement on any particular project.**

**Pro:** Project labor agreements are useful and lawful, but federal agencies may not be aware of their availability and have not been using them in a significant way. Issuing an Executive Order would make clear that federal contracting agencies have this authority and should consider using such agreements in appropriate circumstances.

**Con:** No serious objections or downsides have been identified to an approach that permits but does not require the use of these agreements, although this action, in combination with other actions on the list of labor-related initiatives and announcements you authorize could send a signal as to the tone you intend to take on labor-management issues.

*Handwritten notes:*  
Lawyer (a) - see memo  
to discuss (b) - see memo  
to discuss (c) - see memo  
to discuss (d) - see memo  
to discuss (e) - see memo  
to discuss (f) - see memo  
to discuss (g) - see memo  
to discuss (h) - see memo  
to discuss (i) - see memo  
to discuss (j) - see memo  
to discuss (k) - see memo  
to discuss (l) - see memo  
to discuss (m) - see memo  
to discuss (n) - see memo  
to discuss (o) - see memo  
to discuss (p) - see memo  
to discuss (q) - see memo  
to discuss (r) - see memo  
to discuss (s) - see memo  
to discuss (t) - see memo  
to discuss (u) - see memo  
to discuss (v) - see memo  
to discuss (w) - see memo  
to discuss (x) - see memo  
to discuss (y) - see memo  
to discuss (z) - see memo



**Recommendation:** There was a consensus in support of issuance of an executive order that encourages but does not require the use of these agreements. It would make sense to proceed to do so.

Agree

Disagree

Discuss Further

**3. Possible linkage of flex time legislation to legislation that expands the FMLA**

The two comp time bills currently being considered on the Hill -- both Republican-sponsored -- fail to address FMLA expansion, and provide fewer guarantees of employee choice and fewer protections against potential abuse than your flex time bill, which was sent to Congress last September.

Specifically, the bills do not exclude vulnerable workers; do not include special protections for workers whose employers go bankrupt; do not guarantee real choice for employees; among other shortcomings. The Ashcroft comp time bill in particular has provisions that would effectively eliminate the 40-hour week. The labor movement strongly opposes the Republican comp time bills, and finds these Ashcroft provisions to be particularly offensive.

With respect to FMLA, Democrats in both houses have introduced bills to expand the current law. Several bills are consistent with your proposal to expand FMLA for an additional 24 hours for the purposes of routine medical care for children and elderly parents or school related activities. Other Democratic bills would lower the threshold of FMLA applicability from 50 to 25 employees, a provision that was not included in your bill. Predictably, while most Republicans oppose FMLA expansion, the bills have support from women's groups and the labor movement. Small businesses, including some represented on your Conference on Small Business, have concerns about lowering the threshold for applicability. The Democratic legislative strategy is to try to add FMLA expansion to the Republican bills while criticizing their comp time components.

In light of this strategy, the labor movement has urged that the Administration threaten to veto any bill that does not (1) link FMLA expansion and flex time, and (2) improve the comp time provisions to provide real choice and real protections for employees (as in your flex time bill).

Everyone on your economic team and inside the White House believe that you should propose your flex-time bill linked with FMLA expansion. Everyone also agrees that you should give a clear veto threat to any comp-time or flex-time that does not meet your principles -- which center around ensuring true employee choice and preventing coercion. The principles for an acceptable flex time bill would be the following:

- **Real guarantees of employee choice to earn and use their flex time.**

too  
short

The underlying issues are:

- ~~allow employees to use flex time unless it would cause the employer "substantial (and grievous) injury"~~
- limit employers' ability to cash out employees' flex time

- **Real protection for employees against potential employer abuse**

The underlying issues are:

- exclusions for the most vulnerable workers
- special protections for workers whose employers go bankrupt or shut down unexpectedly
- strong remedies for violations

**ISSUE FOR DECISION:**

*The sole issue for you to decide is whether or not you should issue a veto threat to any bill that does not include FMLA expansion.*

The NEC weighed three options and discussed them at length:

- Option 1:* Threaten to veto even any flex-time bill if it does not include FMLA expansion.
- Option 2:* Threaten to veto any comp-time that does not meet your principles, but not tie your veto threat to inclusion of FMLA expansion.
- Option 3:* Threaten to veto any comp-time bill that does not meet your principles, but make expanding family leave as a principle.

**Option 1: Veto Without Linkage:**

**Pros:**

- Would strengthen the position of congressional democrats to improve the Republican bills.
- Opponents could be seen as unreasonable for failing to meet the President's request to simply let workers take off a couple of hours to take

their children to the doctor.

- Would be strongly favored by the AFI-CIO who could use the linkage as a means of trying to get their troops to be supportive, or at least to prevent active opposition by labor and workers opposed to comp time.
- Some feel that it is highly unlikely that we would get a strong enough flex-time bill, that we would be put in a situation where we would have to veto a good flex-time bill.

**Cons:**

- Could force the President to veto an otherwise acceptable flex-time bill -- if Republicans moved our way on employee choice protections.
- May seem unreasonable -- or hard to explain -- to veto a bill because of what is not included.

**Option 2: Not Insist on Linkage:**

**Pros:**

- Flex-time is popular and affects tens of millions of workers and we should not limit our ability to sign it because FMLA expansion was not included.
- Daschle's staff is also skeptical that Senate Democrats will support a strategy that insists on FMLA expansion as the price for any comp time bill, however strong.

**Cons:**

- Will not be seen as a strong statement by labor and other groups that are generally opposed to comp time.
- Will miss an opportunity to side with groups that we may have to oppose on coming budget and trade issues.

**Option 3:** This Option would add the following measure to the principles that must be met to avoid a Presidential veto:

*"Expanded right to use leave on a recurring basis for family and medical needs."*

**Pros:**

- This is an option created by John Hilley that he feels would give the advantages of linkage, yet by using principles, it gives us more flexibility.
- Allows us to point to several grounds to veto a bad bill.

**Cons:**

- Could get the worst of all worlds: labor feels that we are weak in our veto threat, yet it could still be seen as hard enough to lock the President into vetoing a flex-time bill that meets our flex-time principles.

*What's the  
 issue? - yolo  
 we need to  
 do 2 or 3  
 things  
 about  
 this  
 call Nixon  
 to veto a  
 bill we  
 don't  
 like  
 not better  
 use Senate  
 filibuster  
 for this*

Option 1       Option 2       Option 3       Discuss Further

**Position on Beck legislation aimed at limiting the use of union dues in political activity**

The Republicans in Congress have made clear that they will try to attach a "Beck provision" to some piece of legislation that you want to sign. This provision (named after a Supreme Court case) would prevent a union from using compulsory dues for political purposes unless a union member specifically authorizes such use. It goes much further than current law, which allows a union to use dues for political activity except when a union member specifically objects and demands reimbursement. Unions correctly believe that the Republican Beck provision (there may be a Democratic version that simply codifies current law) would gravely interfere with their political activity. They would like the President to threaten a veto of such legislation.

*Option 1:* State that you will veto Beck legislation if it is attached to campaign finance legislation. None of your advisers advocated this approach because it puts you in the unattractive position of announcing early on an item that would cause you to veto campaign finance legislation, which you have identified as one of your priorities.

*Option 2:* State strong opposition to Beck legislation, no matter what it is attached to, but refrain from making a veto threat. There seemed to be unanimity that this was the better approach. It will make clear your vehement opposition to this legislation and will fortify Congressional Democrats in trying to defeat it. It will not, however, back you into a corner in the event Republicans succeed in attaching the Beck provision to some essential bill -- whether the campaign finance bill or otherwise.

*OK*

5. Restating last year's veto threats on (i) TEAM legislation (ii) Davis-Bacon legislation and (iii) legislation to weaken OSHA.

Last year, you indicated you would veto the TEAM bill and the other two legislative proposals. It is proposed that the Vice President would restate your position in Los Angeles, with language that leaves room for improvements in TEAM legislation that you may conclude somewhere down the road that you may wish to sign.

**Recommendation:** There was consensus among the members of your NEC that restating your previous positions with carefully crafted language that does not prevent you from considering an improved TEAM bill would be the right path to take.

Agree                       Disagree                       Discuss Further

6. Welfare reform and minimum wage

The AFL-CIO will press the Vice President to take a position on whether worker protection statutes -- particularly the Fair Labor Standards Act (FLSA) -- apply to welfare recipients participating in work activities under the new welfare law. Bruce Reed and Ken Apfel of OMB have been running an interagency process (involving DOL, HHS, USDA, and others) to hammer out an answer to this question. The trick is to figure out how to apply the minimum wage law to workfare participants without imposing large new costs on states. Bruce and Ken are confident that a solution can be worked out that goes a fair way toward satisfying the unions, yet does not upset many governors. But they are a few weeks away from presenting this proposed solution to you. And everyone seems to agree that if the Vice President announces an Administration position favorable to the unions at the Council meeting, both the governors and the Congress could react very negatively. There is a danger that such an announcement would make a complex and studied welfare implementation decision look like a mere gift to the unions.

**Recommendation:** There was consensus that it would be best if the Vice President did not raise the minimum wage issue at the Council meeting. Nevertheless, members of the Vice President's staff could give John Sweeney some private assurances that the Administration will soon put out its position and that the key questions -- most notably, whether workfare participants count as "employees" for purposes of the minimum wage law -- will come out his way. When asked about the issue, the Vice President should make a strong statement of principle that workers shouldn't be paid a subminimum wage, whether or not they come off the welfare rolls. But he should also be careful to note that the Administration is still in the process of developing its final positions on the complex issues arising from the intersection of the labor laws and welfare law.

This approach will not fully satisfy members of the AFL Council, who would prefer a clear and public statement of the Administration's position at or prior to the Council meeting,

Use caution!  
Can handle  
that situation  
confident  
only use  
welfare reform  
minimum wage  
paying about  
minimum wage

John Sweeney

but it will minimize the likelihood of a backlash from governors and/or Congress, by giving the Administration time to refine its position so as to make it more palatable to the states and by issuing the position in a non-political setting.

THE WHITE HOUSE  
WASHINGTON

MEMORANDUM FOR DAVID STRAUSS

FROM: KATHLEEN WALLMAN *KW*  
SUBJECT: AFL-CIO SPEECH  
DATE: JANUARY 23, 1997  
COPIES: GENE SPERLING, ELENA KAGAN ✓

Attached is a note concerning an idea that Elena Kagan and I are exploring to see whether it may be worthy of inclusion in the Vice President's remarks. I have asked the Counsel's office to work on the legal aspects of this and to work towards a possible executive order. If this works out, I believe that the announcement that the Vice President could make would be on par with the strikebreakers executive order of a few years ago in terms of its significance in labor law, and harder to challenge in court, too.

*File:  
Labor - executive  
reimbursement*

January 21, 1997

MEMORANDUM FOR GENE SPERLING

COPY: ELENA KAGAN  
FROM: KATHLEEN WALLMAN  
RE: AFL-CIO CONVENTION

As you know, the Vice President's office is working on a speech for the Vice President to deliver during Presidents' Day weekend at the AFL-CIO convention. This memorandum outlines an idea that should be explored for inclusion in the speech.

When Elena Kagan and I were in the Counsel's office, the AFL-CIO's General Counsel, John Hiatt, identified a concern that may be worth fixing. He said that he was aware of two situations in which major federal contractors are seeking and receiving reimbursement under their contracts for the costs of resisting union organizing efforts and for litigating unfair labor practices cases.

It may not be possible or appropriate for us to be involved in matters related to the specific contracts that Mr. Hiatt mentioned. However, he has raised a good question: Why should the companies be allowed to pass through the costs of fighting unionization? Other companies that do not hold federal contracts that allow this pass-through have to decide whether the costs of resisting unionization are worth incurring: Can they be absorbed by the enterprise, or can they be passed on to consumers in a competitive market, who may choose to do business elsewhere? Federal contractors' ability to pass through these costs may give them an advantage in negotiating with the unions that other companies don't have.

I would like to explore further whether my supposition that the AFL-CIO has a point here is correct. If Elena is willing, I would like to work with her on this since she is familiar with Hiatt's arguments.



THE WHITE HOUSE  
WASHINGTON

OK by me

January 21, 1997

MEMORANDUM FOR GENE SPERLING

COPY: ELENA KAGAN ✓  
FROM: KATHLEEN WALLMAN *KW*  
RE: AFL-CIO CONVENTION

As you know, the Vice President's office is working on a speech for the Vice President to deliver during Presidents' Day weekend at the AFL-CIO convention. This memorandum outlines an idea that should be explored for inclusion in the speech.

When Elena Kagan and I were in the Counsel's office, the AFL-CIO's General Counsel, John Hiatt, identified a concern that may be worth fixing. He said that he was aware of two situations in which major federal contractors are seeking and receiving reimbursement under their contracts for the costs of resisting union organizing efforts and for litigating unfair labor practices cases.

It may not be possible or appropriate for us to be involved in matters related to the specific contracts that Mr. Hiatt mentioned. However, he has raised a good question: Why should the companies be allowed to pass through the costs of fighting unionization? Other companies that do not hold federal contracts that allow this pass-through have to decide whether the costs of resisting unionization are worth incurring: Can they be absorbed by the enterprise, or can they be passed on to consumers in a competitive market, who may choose to do business elsewhere? Federal contractors' ability to pass through these costs may give them an advantage in negotiating with the unions that other companies don't have.

I would like to explore further whether my supposition that the AFL-CIO has a point here is correct. If Elena is willing, I would like to work with her on this since she is familiar with Hiatt's arguments.

Bruce -

FYI. This is fine with me.

The DOC Solicitor's office and Steve Kelman of OMB ~~are~~ already looking at ways to fix this. I think everyone will agree that we shouldn't be reimbursing companies for the cost of union-busting activities.

Elena

February 7, 1997

POSSIBLE ANNOUNCEMENT SUBJECTS  
FOR VICE PRESIDENT'S REMARKS TO  
AFL-CIO EXECUTIVE COUNCIL  
FEBRUARY 18, 1997  
LOS ANGELES, CALIFORNIA

1. "The law says that the federal government should remain neutral in disputes between unions and federal contractors. But our regulations and policies allow federal contractors with the most egregious records of abusive labor practices to remain eligible to receive federal contracts. Believe it or not, they can even get reimbursed for the costs they incur in trying to persuade employees not to join unions, and for the cost of fighting unfair labor practices allegations. But not any more."

a. Announce that POTUS and VPOTUS have told Procurement Council that the Federal Acquisition Regulations should be amended to end reimbursement of costs of fighting unfair labor practices

b. Costs of persuading employees not to join unions -- no closure.

*-DOL does that now. some ags don't want to.*

c. Remaining eligible for contracts

i. For contractors with past, proven violations: Kelman will write memo to procurement agencies saying that contracting officers should take into account compliance with labor and employment laws in deciding whether bidder has good enough "business ethics" record. Outcry from contracting community.

ii. For contractors with no past, proven violations, but lots of charges and proceedings against them: Kelman says it is unworkable to ask contracting officers to evaluate outstanding proceedings. Possible due process issues, too. Could be done, if linked to other issues; outcry from procurement and contracting communities in any event.

iii. Problem: Kelman says that requiring contractors to make additional disclosures of past violations or outstanding proceedings is unworkable.

iv. Possible bridge: might be able to bridge these gaps with broad enough language in Kelman's memo about importance of examining compliance.

2. Project labor agreements: "The federal government should be using more project labor agreements in its construction projects. [outline benefits of agreements] Today, the President is issuing an Executive Order that directs each and every federal agency that

*1+2  
so together*

has a construction project to let out to bid to determine for each project whether and how to use a project labor agreement in that project." Status: ready to go.

3. TEAM Act: restate veto threat
4. Davis Bacon: restate veto threat
5. Legislation weakening OSHA: restate veto threat
6. Flex-time and FMLA expansion: NEC convened meeting with Legislative Affairs, Cabinet Affairs and Labor on February 6.

Legislative Affairs and NEC will send decision memo to POTUS next week addressing the issue of whether to threaten to veto flex-time legislation that does not contain FMLA expansion. The alternative announcement for VPOTUS is to express strong support for linkage.

7. Beck legislation: need process.

*Veto threat of S.9*

THE WHITE HOUSE  
WASHINGTON

January 21, 1997

MEMORANDUM FOR GENE SPERLING

COPY: ELENA KAGAN ✓  
FROM: KATHLEEN WALLMAN *KW*  
RE: AFL-CIO CONVENTION

As you know, the Vice President's office is working on a speech for the Vice President to deliver during Presidents' Day weekend at the AFL-CIO convention. This memorandum outlines an idea that should be explored for inclusion in the speech.

When Elena Kagan and I were in the Counsel's office, the AFL-CIO's General Counsel, John Hiatt, identified a concern that may be worth fixing. He said that he was aware of two situations in which major federal contractors are seeking and receiving reimbursement under their contracts for the costs of resisting union organizing efforts and for litigating unfair labor practices cases.

It may not be possible or appropriate for us to be involved in matters related to the specific contracts that Mr. Hiatt mentioned. However, he has raised a good question: Why should the companies be allowed to pass through the costs of fighting unionization? Other companies that do not hold federal contracts that allow this pass-through have to decide whether the costs of resisting unionization are worth incurring: Can they be absorbed by the enterprise, or can they be passed on to consumers in a competitive market, who may choose to do business elsewhere? Federal contractors' ability to pass through these costs may give them an advantage in negotiating with the unions that other companies don't have.

I would like to explore further whether my supposition that the AFL-CIO has a point here is correct. If Elena is willing, I would like to work with her on this since she is familiar with Hiatt's arguments.

*Bruce -*

*FYI. This is fine with me.*

*The DOC Solicitor's Office and Steve Kelman of OMB ~~have~~ already looking at ways to fix this. I think everyone will agree that we shouldn't be reimbursing companies for the cost of union-busting activities.*

*Elena*

THE WHITE HOUSE  
WASHINGTON

MEMORANDUM FOR DAVID STRAUSS

FROM: KATHLEEN WALLMAN *KW*  
SUBJECT: AFL-CIO  
COPIES: GENE SPERLING, ELENA KAGAN, WENDY WHITE ✓  
DATE: January 30, 1997

In light of our meeting with John Hiatt and others, and a subsequent conversation with John, we are exploring whether we can equip the Vice President to make a broader announcement about the federal government maintaining neutrality in disputes between unions and federal contractors that goes beyond ending the practice of reimbursing expenses incurred in fighting the unions. We are looking at whether he could announce executive action to make sure that contracting agencies are able to take into account a bidder's labor practices record when awarding or renewing a contract, particularly where there is reason to believe that there is a pattern or practice of abusive labor practices.

We are also exploring whether we can equip the Vice President to announce executive action to encourage more expansive use of "project labor agreements" in federal construction contracts. These are labor agreements that cover a single construction project, and that define the labor terms that apply to the tradespeople hired by the winning bidder to do that particular construction job, such as a federal courthouse. Project labor agreements introduce union protections where none otherwise would exist, and using them more frequently in federal construction contracts would be an important step.

In my subsequent conversation with John Hiatt, I emphasized that we have a very short amount of time to get specific on these ideas. We will proceed quickly.

THE PRESIDENT HAS SEEN

2-18-97

THE WHITE HOUSE  
WASHINGTON

February 17, 1997

MR. PRESIDENT:

Attached is a Sperling/Wallman follow-up memo on Labor-related issues. *They have asked that you act upon it as soon as possible so that any decisions you make can be incorporated into the Vice President's remarks at the AFL-CIO convention on Tuesday in California. At the latest, they would appreciate it if you could act on the memo before you leave for New York.*

After you returned the February 13 memo, Erskine convened a meeting to discuss several of the issues. This memo, discussed and agreed upon in that meeting, addresses two of the direct questions you had: 1) flex time legislation and the Family and Medical Leave Act; and 2) whether to proceed with a responsible contractor proposal.

We have attached the February 13 memo with your notations.

Phil Caplan

FURTHER INFORMATION  
ON THE LABOR  
RELATED ISSUES  
MEMORANDUM  
A: [Signature]  
[Signature]

agree w/you on both  
PB - responsible contract  
Caughey now seems  
reasonable

2-18-97

THE WHITE HOUSE  
WASHINGTON

1997 FEB 17 AM 8:49

## MEMORANDUM FOR THE PRESIDENT AND THE VICE PRESIDENT

FROM: GENE B. SPERLING  
KATHLEEN WALLMAN

SUBJECT: FURTHER INFORMATION IN RESPONSE TO THE PRESIDENT'S NOTES  
ON THE LABOR RELATED ISSUES MEMORANDUM

DATE: February 17, 1997

The President's notes on our memorandum of February 13 raised questions about two subjects.

**Flex Time Legislation and FMLA Expansion**

First, the President indicated that there should be no threat to veto any flex time bill on the ground that it does not include expansion of FMLA. We concur. Since the February 13 memorandum was sent in, Erskine Bowles and John Hillely have talked with Minority Leader Daschle and otherwise developed information making it clear that a veto likely would not be sustainable. Accordingly, the only viable option is option 2, which would involve the Vice President's saying that the Administration believes flex time legislation should be linked to family leave expansion, and that the President would veto comp time legislation that does not embrace the flex time principles that we articulated last year. This would not involve any threat to veto a bill on the ground that it does not include expanded family leave.

**Responsible Contractor Proposal**

Second, we outlined proposals to amend the Federal Acquisition Regulations (FAR) to allow contracting officers to take into account a prospective contractor's record of labor and employment practices in determining whether a contractor should be deemed "responsible", a term utilized in the current regulations, and therefore eligible to receive contract awards. The President's note indicates that these approaches, if pursued, would require additional standards or guidance about how they should be implemented.

THE PRESIDENT HAS SEEN  
2-18-97

Motivations  
Unit complaints  
at work

We considered whether such guidance could be provided in quantitative terms, but we believe it would be inadvisable to propose, for example, that a certain number of violations should be automatically disqualifying. That would be arbitrary, and self-defeating where the number of potential contractors is small. Nor is it proposed that a certain number of allegations or pending litigations would be disqualifying. In addition to being arbitrary and self-defeating, such an approach could raise due process concerns.

again - allegation - possibility  
in the past -

What we think makes sense is to create an opportunity for interested parties to make contracting officers aware of the facts in egregious cases where there is, in effect, a running battle between the employer and the union, or between the employer and the workforce. It is understood that it is the egregious case, not everyday cases, for which this opportunity would be representatives of working people. Having this provision in the regulations also will school the behavior of employers who are or foresee becoming government contractors and discourage them from excesses in dealing with employees and unions. If, after hearing the facts, the contracting officer decides that the contract should be awarded anyway, the person or entity presenting the adverse information would have no standing to sue to challenge the award of the contract.

11/97

Guidance about the meaning and application of these new amendments can be provided in two complementary ways:

1. **Explain in the Federal Register notice that the change is proposed for the following reason:**

“The proposed amendments recognize that there may be situations where employment relations are so poor or a prospective contractor’s overall record of employment practices or compliance with employment and labor laws is so inadequate that the contractor’s status as a responsible contractor is questionable. Furthermore, in some instances, a prospective contractor’s employment record or practices may put in doubt the contractor’s capability of performing the contract in a manner consistent with what is expected of a responsible contractor.

“By way of example, one indication of such a situation could be a record of violations of labor and employment laws concerning such matters as worker safety and health; wages, benefits, and other labor standards; equal employment opportunity; or the right of workers to organize and bargain collectively. Under the amended language, contracting officers could weigh, as appropriate, information about such violations or about other evidence of deficient labor or employment policies or practices, such as those affecting the stability of the workforce, that is available to the contracting officer, and could meet with individuals or organizations wishing to provide such information.”



2. **The Administrator of the Office of Federal Procurement Policy can send out an explanatory memorandum to all federal procurement officials after the rulemaking process is finished.**

The Administrator issues such memoranda from time to time to provide explanatory information about regulations and other topics. His memorandum would be along the same lines as the Federal Register notice described above.

**Approve pursuing responsible contractor amendments**

**Disapprove pursuing responsible contractor amendments**

**Discuss Further**

THE PRESIDENT HAS SEEN

2-14-97

THE WHITE HOUSE

WASHINGTON

*Call  
Neil & Congress  
for my notes  
we need to discuss  
PK*

MEMORANDUM FOR THE PRESIDENT AND THE VICE PRESIDENT

FROM: GENE B. SPERLING  
KATHLEEN WALLMAN

SUBJECT: POSSIBLE POLICY ANNOUNCEMENTS RELATED TO LABOR ISSUES

DATE: FEBRUARY 13, 1997

The NEC has met and deliberated the merits of several possible executive actions and possible announcements of legislative positions that have implications for organized labor. In view of the Vice President's upcoming trip to the AFL-CIO Convention on February 18, we thought it timely to advance our recommendations to you to see if you find these ripe for decision. If so, the Vice President could be in a position to make appropriate announcements and field likely questions when he addresses the AFL-CIO's Executive Council. Our recommendations are offered below.

1. **Possible amendments to federal-procurement regulations.**

Federal law provides that the government should maintain a position of neutrality in labor disputes between unions and federal contractors. Nevertheless, under current federal contracting policies, contractors may be reimbursed for the costs of resisting unionization efforts and litigating against unfair labor practice charges, and remain eligible to receive new contracts.

To address what it perceives as the unfair "tilt" against unions that these federal contracting policies embody, the AFL-CIO has urged that the Administration direct the Federal Acquisition Regulatory Council, which operates under the auspices of the Office of Federal Procurement Programs within OMB, to initiate a notice and comment rulemaking to amend the Federal Acquisition Regulations (FAR) in three respects. We summarize the actions under consideration and the pros and cons of each. Since all three proposals go to the unions' neutrality principle, and since some members of your NEC believed it important to consider their impact together, we summarize the Cabinet Departments' recommendations at the end of this section rather than at the end of the discussion of each individual proposal.

a. **Amend the FAR to cease reimbursement to contractors for costs incurred to defend against unfair labor practice allegations that are in litigation.**

The Federal Acquisition Regulations (FAR) currently do not permit federal contractors to be reimbursed for the costs of defending criminal and certain civil proceedings brought by the

government, nor for penalties resulting from those proceedings. In the case of civil proceedings, reimbursement is disallowed, however, only where a monetary penalty could have been imposed. Since the National Labor Relations Act does not include monetary penalties, the current regulations have often been construed to permit reimbursement of defense costs associated with unfair labor practice proceedings initiated by the General Counsel of the NLRB.

**Proposal:** Amend the FAR to make clear that any and all costs relating to defending unfair labor practice charges and complaints brought by the NLRB General Counsel are not allowable, both in evaluating bids for fixed price contracts as well as reimbursement for cost reimbursement contracts.

**Pro:** Taxpayers' dollars should not be used to "tilt the playing field" in favor of employers against unions and employees. Eliminating this reimbursement will bring treatment of NLRB litigation costs in line with other kinds of litigation costs.

**Con:** No serious objections or downsides were identified, although a negative reaction from government contractors who have been permitted thus far to treat these costs as reimbursable is predictable.

**b. Amend the FAR to cease reimbursement for costs incurred to try to persuade employees not to unionize.**

The FAR currently provides that costs incurred by a contractor in maintaining satisfactory labor relations between the contractor and its employees, including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable costs. Under this provision, contractors have sought and been reimbursed for activities that undermine rather than promote satisfactory labor relations. On occasion, the costs that are being paid for by the taxpayers are for persistent anti-union organizing activity.

**Proposal:** Amend the FAR to provide that contractor costs incurred for activities related to influencing employees respecting unionization are specifically unallowable.

**Pro:** Taxpayers should not be subsidizing an employer's efforts to defeat union organizing activities when it is clear that these activities are not designed, and do not have the effect of, "maintaining satisfactory labor relations." A number of other statutes explicitly prohibit the use of government funds to promote, assist, or deter union organizing activities, such as the Job Training Partnership Act, the National Community Service Act, Head Start, and Medicare. Accordingly, there is precedent for this kind of provision. Auditors with responsibilities in these other statutory areas have had to determine whether an employer's labor relations costs were or were not allowable, so it can be done.

**Con:** Disallowing costs for employee meetings by contractors would be characterized by the business community as pulling the rug out from labor-management cooperation. They will argue that it will not be possible in practice to separate legitimate activities from anti-union persuasion. This provision will require auditors to make decisions about what costs are allowable that they are not well equipped to make, and will increase litigation, particularly with respect to Defense Department contracts where the auditors are most likely to be strict enforcers. In addition, this provision will likely be viewed by the contractors as a burdensome requirement not otherwise imposed in the private sector, contrary to expressed Administration procurement reform goals.

- c. **Amend the FAR to allow government contracting officers to consider, when deciding whether a contractor is a “responsible” contractor (a term of art under the existing FAR), the bidder’s record of labor and employment policies and practices.**

The FAR provides that a prospective government contractor must be found to be a “responsible contractor” before being awarded a government contract. “Responsibility” requires that a prospective contractor be capable of performing the contract, that it has a satisfactory performance record, and that it has satisfactory “integrity and business ethics”.

The concern has been raised that, although violations of the NLRA and other laws may become grounds for non-responsibility determinations under the FAR, more commonly, a contractor has no such finally adjudicated violations, and there are instead pending charges -- sometimes many of them -- that will take time to wend their way through the administrative process at the NLRB, the EEOC or through the courts. Sometimes the allegations are never adjudicated; for example, most unfair labor practice complaints are ultimately settled. Absent an actual civil violation, agencies will not find a contractor non-responsible. (This corresponds to the standard applied by procuring agencies in other areas of law; civil complaints in any area virtually never are grounds for non-responsibility determinations, and the very few known examples of civil complaints serving as grounds for such determinations involve civil complaints before courts rather than administrative agencies.)

**Proposal:** Add to the FAR language indicating that the responsibility determination must take into account whether the bidder has a “satisfactory record of labor and employment policies and practices”. This is the approach that the AFL-CIO strongly prefers to the alternative set out below.

**Alternative Proposal:** The Office of Federal Procurement Programs believes that the AFL-CIO’s preferred approach, set out above, is unworkable and will be subject to legal challenge because it gives labor relations and employment practices and policies prominence above all other kinds of compliance considerations, and, in effect uses the procurement process to impose a punishment. OFPP proposes that, at the very most, the FAR could be amended to

say that, in making responsibility determination, contracting officers should take into account whether the prospective bidder has "labor relations and employment practices and policies adequate to assure delivery of the required products and services". The AFL-CIO believes that this approach is toothless because applying it to the real world will create a null set.

**Pro:** The existing FAR already allows contracting officers to weigh the bidder's "business ethics", its "integrity" and its "capability" to perform the contract. Labor relations and employment conditions are an equally important and appropriate consideration, and the Administration ought to say so clearly in the FAR in a meaningful way, which argues for the formulation favored by the AFL-CIO, rather than the alternative offered by OFPP.

**Con:** Evaluating "satisfactory" labor relations and employment conditions, which the contracting officer would have to do under either proposal, is a qualitative judgment that contracting officers are not well equipped to make, especially where the disputed actions or conditions have not been adjudicated. Compliance will also be burdensome for contractors who will have to worry about meeting a non-quantifiable standard. Moreover, using the OFPP alternative proposal language may raise expectations unwarrantedly. There may be, in fact, very few cases where labor relations or employment practices or policies are so poor that they threaten performance. Those who try to persuade contracting officers under this new provision will most often be disappointed.

*Option 1: Authorize (a) only.* Commerce and Defense take this view. None of the other departments quarrels with doing at least (a), but the AFL-CIO would view doing only this as a weak gesture that simply highlights in a potentially embarrassing way the little known and arguably surprising practice of reimbursing these costs. AFL-CIO would have the same view if you authorized only (a) and (b), an option that none of the Departments advanced.

*Option 2: Authorize (a) and but not (b); authorize "interpretive guidance" to meet the concept of (c) but do not amend the FAR.* SBA and OMB advocate this approach. They disfavor your authorizing (b) because of the practical difficulties in implementing it and the burdens it would place on contractors. The possibility of issuing interpretive guidance in lieu of amending the FAR was explored with AFL-CIO, but provoked concerns that it might be inadequate to reach the stated goal since such interpretive guidance has no force of law.

*Option 3: Authorize (a) and (c); but not (b).* Treasury advocates this approach. It shares the implementation concerns about (b) articulated by SBA and OMB.

*Option 4: Authorize all three initiatives.* Labor urges this approach, and the Office of the Vice President indicated it favored this approach. We concur. The main argument against (b) is that it is difficult, but not impossible, to implement, so it seems that it can be done. The main arguments against (c) are that it would give labor and employment considerations special status

and that it could raise litigation risks. The counterarguments are that it is a reasonable policy choice for the Administration to go on record, in a meaningful way by amending the FAR, in support of the importance of these considerations. This argues for authorizing the formulation of (c) that the AFL-CIO prefers. As for litigation risk, Justice advises us that the amendment is not, of course, risk free, but there are good arguments in support of it, even in light of the striker replacement lawsuit.

Option 1  Option 2  Option 3  Option 4  Discuss Further

*Law by (a) - WLS KH  
Use (b) - New KH  
to discuss (c) - New KH  
to discuss (b) - New KH  
to discuss (c) - New KH  
to discuss (a) - New KH  
to discuss (b) - New KH  
to discuss (c) - New KH  
to discuss (a) - New KH*

**2. Possible executive order encouraging the use of project labor agreements**

Project labor agreements, also known as “pre-hire agreements,” are specially negotiated agreements between a project owner or construction manager and one or more labor organizations. The agreements are reached at the outset of a project in order to ensure efficient, timely and quality work; establish fair and consistent labor standards and work rules; supply a skilled, experienced and highly competent workforce; and assure stable labor-management relations throughout the term of the project. These agreements have long been used for public and private construction projects that involve a large volume of work, extend over a substantial period of time, include a substantial number of contractors, and entail substantial costs. It is well established that these agreements are effective and may be lawfully used in both the private and public sector for construction industry projects.

**Proposal:** Issue an Executive Order that directs Executive departments and agencies authorized to implement or fund a project for the construction of a federal facility to determine on a project-by-project basis whether a project labor agreement will promote labor-management stability; advance the public interest in economical, efficient, quality and time project performance; and assist project compliance with applicable legal requirements governing health and safety, equal employment opportunity, and labor standards. **The Executive Order would not require the use of a project labor agreement on any particular project.**

- Pro:** Project labor agreements are useful and lawful, but federal agencies may not be aware of their availability and have not been using them in a significant way. Issuing an Executive Order would make clear that federal contracting agencies have this authority and should consider using such agreements in appropriate circumstances.
- Con:** No serious objections or downsides have been identified to an approach that permits but does not require the use of these agreements, although this action, in combination with other actions on the list of labor-related initiatives and announcements you authorize could send a signal as to the tone you intend to take on labor-management issues.

**Recommendation:** There was a consensus in support of issuance of an executive order that encourages but does not require the use of these agreements. It would make sense to proceed to do so.

Agree

Disagree

Discuss Further

**3. Possible linkage of flex time legislation to legislation that expands the FMLA**

The two comp time bills currently being considered on the Hill -- both Republican-sponsored -- fail to address FMLA expansion, and provide fewer guarantees of employee choice and fewer protections against potential abuse than your flex time bill, which was sent to Congress last September.

Specifically, the bills do not exclude vulnerable workers; do not include special protections for workers whose employers go bankrupt; do not guarantee real choice for employees; among other shortcomings. The Ashcroft comp time bill in particular has provisions that would effectively eliminate the 40-hour week. The labor movement strongly opposes the Republican comp time bills, and finds these Ashcroft provisions to be particularly offensive.

With respect to FMLA, Democrats in both houses have introduced bills to expand the current law. Several bills are consistent with your proposal to expand FMLA for an additional 24 hours for the purposes of routine medical care for children and elderly parents or school related activities. Other Democratic bills would lower the threshold of FMLA applicability from 50 to 25 employees, a provision that was not included in your bill. Predictably, while most Republicans oppose FMLA expansion, the bills have support from women's groups and the labor movement. Small businesses, including some represented on your Conference on Small Business, have concerns about lowering the threshold for applicability. The Democratic legislative strategy is to try to add FMLA expansion to the Republican bills while criticizing their comp time components.

In light of this strategy, the labor movement has urged that the Administration threaten to veto any bill that does not (1) link FMLA expansion and flex time, and (2) improve the comp time provisions to provide real choice and real protections for employees (as in your flex time bill).

Everyone on your economic team and inside the White House believe that you should propose your flex-time bill linked with FMLA expansion. Everyone also agrees that you should give a clear veto threat to any comp-time or flex-time that does not meet your principles -- which center around ensuring true employee choice and preventing coercion. The principles for an acceptable flex time bill would be the following:

- **Real guarantees of employee choice to earn and use their flex time.**

too short

The underlying issues are:

- ~~allow employees to use flex time unless it would cause the employer "substantial (and grievous) injury"~~
- limit employers' ability to cash out employees' flex time

- **Real protection for employees against potential employer abuse**

The underlying issues are:

- exclusions for the most vulnerable workers
- special protections for workers whose employers go bankrupt or shut down unexpectedly
- strong remedies for violations

**ISSUE FOR DECISION:**

*The sole issue for you to decide is whether or not you should issue a veto threat to any bill that does not include FMLA expansion.*

The NEC weighed three options and discussed them at length:

- Option 1:* Threaten to veto even any flex-time bill if it does not include FMLA expansion.
- Option 2:* Threaten to veto any comp-time that does not meet your principles, but not tie your veto threat to inclusion of FMLA expansion.
- Option 3:* Threaten to veto any comp-time bill that does not meet your principles, but make expanding family leave as a principle.

**Option 1: Veto Without Linkage:**

**Pros:**

- Would strengthen the position of congressional democrats to improve the Republican bills.
- Opponents could be seen as unreasonable for failing to meet the President's request to simply let workers take off a couple of hours to take



their children to the doctor.

- Would be strongly favored by the AFI-CIO who could use the linkage as a means of trying to get their troops to be supportive, or at least to prevent active opposition by labor and workers opposed to comp time.
- Some feel that it is highly unlikely that we would get a strong enough flex-time bill, that we would be put in a situation where we would have to veto a good flex-time bill.

**Cons:**

- Could force the President to veto an otherwise acceptable flex-time bill -- if Republicans moved our way on employee choice protections.
- May seem unreasonable -- or hard to explain -- to veto a bill because of what is not included.

**Option 2: Not Insist on Linkage:**

**Pros:**

- Flex-time is popular and affects tens of millions of workers and we should not limit our ability to sign it because FMLA expansion was not included.
- Daschle's staff is also skeptical that Senate Democrats will support a strategy that insists on FMLA expansion as the price for any comp time bill, however strong.

**Cons:**

- Will not be seen as a strong statement by labor and other groups that are generally opposed to comp time.
- Will miss an opportunity to side with groups that we may have to oppose on coming budget and trade issues.

**Option 3:** This Option would add the following measure to the principles that must be met to avoid a Presidential veto:

*"Expanded right to use leave on a recurring basis for family and medical needs."*

**Pros:**

- This is an option created by John Hilley that he feels would give the advantages of linkage, yet by using principles, it gives us more flexibility.
- Allows us to point to several grounds to veto a bad bill.

**Cons:**

- Could get the worst of all worlds: labor feels that we are weak in our veto threat, yet it could still be seen as hard enough to lock the President into vetoing a flex-time bill that meets our flex-time principles.

*What's the  
 Rep. - folder  
 we need to  
 do for 3.4  
 of us do  
 some  
 Chris Monahan  
 to veto a good 4.  
 bill we don't  
 not veto  
 we should  
 definitely  
 for this*

Option 1       Option 2       Option 3       Discuss Further

**Position on Beck legislation aimed at limiting the use of union dues in political activity**

The Republicans in Congress have made clear that they will try to attach a "Beck provision" to some piece of legislation that you want to sign. This provision (named after a Supreme Court case) would prevent a union from using compulsory dues for political purposes unless a union member specifically authorizes such use. It goes much further than current law, which allows a union to use dues for political activity except when a union member specifically objects and demands reimbursement. Unions correctly believe that the Republican Beck provision (there may be a Democratic version that simply codifies current law) would gravely interfere with their political activity. They would like the President to threaten a veto of such legislation.

*Option 1:* State that you will veto Beck legislation if it is attached to campaign finance legislation. None of your advisers advocated this approach because it puts you in the unattractive position of announcing early on an item that would cause you to veto campaign finance legislation, which you have identified as one of your priorities.

*Option 2:* State strong opposition to Beck legislation, no matter what it is attached to, but refrain from making a veto threat. There seemed to be unanimity that this was the better approach. It will make clear your vehement opposition to this legislation and will fortify Congressional Democrats in trying to defeat it. It will not, however, back you into a corner in the event Republicans succeed in attaching the Beck provision to some essential bill -- whether the campaign finance bill or otherwise.

*OK*

5. Restating last year's veto threats on (i) TEAM legislation (ii) Davis-Bacon legislation and (iii) legislation to weaken OSHA.

Last year, you indicated you would veto the TEAM bill and the other two legislative proposals. It is proposed that the Vice President would restate your position in Los Angeles, with language that leaves room for improvements in TEAM legislation that you may conclude somewhere down the road that you may wish to sign.

**Recommendation:** There was consensus among the members of your NEC that restating your previous positions with carefully crafted language that does not prevent you from considering an improved TEAM bill would be the right path to take.

Agree                       Disagree                       Discuss Further

6. Welfare reform and minimum wage

The AFL-CIO will press the Vice President to take a position on whether worker protection statutes -- particularly the Fair Labor Standards Act (FLSA) -- apply to welfare recipients participating in work activities under the new welfare law. Bruce Reed and Ken Apfel of OMB have been running an interagency process (involving DOL, HHS, USDA, and others) to hammer out an answer to this question. The trick is to figure out how to apply the minimum wage law to workfare participants without imposing large new costs on states. Bruce and Ken are confident that a solution can be worked out that goes a fair way toward satisfying the unions, yet does not upset many governors. But they are a few weeks away from presenting this proposed solution to you. And everyone seems to agree that if the Vice President announces an Administration position favorable to the unions at the Council meeting, both the governors and the Congress could react very negatively. There is a danger that such an announcement would make a complex and studied welfare implementation decision look like a mere gift to the unions.

**Recommendation:** There was consensus that it would be best if the Vice President did not raise the minimum wage issue at the Council meeting. Nevertheless, members of the Vice President's staff could give John Sweeney some private assurances that the Administration will soon put out its position and that the key questions -- most notably, whether workfare participants count as "employees" for purposes of the minimum wage law -- will come out his way. When asked about the issue, the Vice President should make a strong statement of principle that workers shouldn't be paid a subminimum wage, whether or not they come off the welfare rolls. But he should also be careful to note that the Administration is still in the process of developing its final positions on the complex issues arising from the intersection of the labor laws and welfare law.

This approach will not fully satisfy members of the AFL Council, who would prefer a clear and public statement of the Administration's position at or prior to the Council meeting,

*We certainly can handle that. But we need to be careful about the way we handle it. We need to be careful about the way we handle it. We need to be careful about the way we handle it.*

*John*

but it will minimize the likelihood of a backlash from governors and/or Congress, by giving the Administration time to refine its position so as to make it more palatable to the states and by issuing the position in a non-political setting.