NLWJC - Kagan
DPC - Box 060 - Folder-008

Welfare - FLSA etc [1]

WR-FLEA

cc Bruce Reed
Elena Kagan
Cynthia Rice
Diana Fortuna
return to me
Emily

STATE OF DELAWARE
OFFICE OF THE GOVERNOR

THOMAS R. CARPER
GOVERNOR

July 18, 1997

The Honorable William V. Roth
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Roth: Bill

I would like to take this opportunity to make you aware of my support for congressional efforts to address a problem that Delaware, and many other states, will soon face in our welfare-to-work efforts.

One of the highest priorities in my administration has been the development and implementation of "A Better Chance" (ABC), our plan, approved unanimously by the state legislature, to transform the current welfare system into a system that creates positive incentives for welfare recipients to obtain paid employment. The key principles that form the basis of ABC are that work should pay more than welfare and that welfare should be transitional, not a way of life. ABC recipients are expected to find paid jobs, stay employed, and achieve long term economic self sufficiency. Under ABC, priority is always given to placing individuals into paid work over placement in work experience.

To date, we've been extremely successful. We've nearly tripled the number of ABC recipients who are working, and we've placed hundreds of ABC recipients in full-time jobs.

However, our experience has shown us that there are some welfare recipients that are unable to gain employment readily. Under these circumstances, we believe that it is critical to these individuals that they gain the skills necessary for obtaining paid employment. In Delaware, the purpose of work experience is to improve the employability of individuals not otherwise able to obtain employment by providing work experience and training to assist them to move promptly into paid public or private sector employment.

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In Delaware, individuals in work experience continue to receive a welfare check and state law requires that these individuals can participate in work experience for the number of hours equal to the welfare grant divided by the minimum wage. In addition, participants are required to engage in job search to ensure that they move quickly into gainful employment. In our state, we are committed to providing work experience participants with comprable health, safety, and anti-discrimination protections as to individuals working in paid employment.

However, with the application of current labor and tax laws to work experience, we estimate that welfare recipients' benefits could be reduced by 6.2% for FICA and 1.45% for Medicare per client per month and the state of Delaware would incur a cost of $145,000 per month. This results, for Delaware, in an additional annual welfare cost of $1.74 million for FICA and Medicare contributions alone. Additionally, there are significant administrative costs associated with implementing and maintaining a payroll system for welfare benefits.

I am concerned that the financial costs to the state and the administrative burden associated with the application of labor and tax laws to welfare work experience placements will hinder our ability to require workfare for all welfare recipients. As you consider the important issues on the application of labor and tax laws to work experience, I urge you to ensure that any final proposal will not jeopardize ABC's ability to successfully move welfare recipients into the workforce.

Your leadership in this area is very much appreciated, and I thank you once again for the opportunity to share my thoughts with you. Please feel free to contact me if you have any questions.

Sincerely,

Tom

Thomas R. Carper
Governor

cc: Senator Lott
Senator Moynihan
Senator Domenici
Senator Daschle
Representative Shaw
Representative Kasich
Representative Archer
Representative Gingrich
Representative Gephardt
Representative Spratt

Frank Cowan
Assistant to the President

7/10/97

John:

The attached letter was sent to the President today and sets forth our unions' major concerns in the reconcilation bills.

Frank

Attachment

CC: Elena Kagan
Ron Klain

AFSCME
in the public service

FCM

Bruce, Cynthia, Diana
+ me hum

July 10, 1997

Dear Mr. President:

We want to thank you for your strong opposition to congressional attempts to use the balanced budget bill to overturn your administration's policies on privatizing the Food Stamp and Medicaid programs and on applying the Fair Labor Standards Act and other worker protections laws to workfare workers.

As a result of our mutual efforts, the Senate now has clear record rejecting all privatization provisions. We believe that the Senate's action provides a solid basis from which to resist provisions in the House bill which would allow all states to privatize food stamps and Medicaid operations.

In addition, we are making important progress protecting working people on and off welfare. We have strongly defended your administration's ruling that workfare workers should have the same rights and protections as other workers. Moreover, we have been pleased at the progress made in moving the welfare-to-work program through the legislative process and are seeking to ensure that it will be used to create real jobs at livable wages rather than workfare. Finally, we have seen significant Congressional support for incorporating effective nondisplacement protections in the conference agreement so that working people do not end up paying for welfare reform with a loss in jobs and income.

We now are at a critical juncture in the deliberations on the conference agreement. We believe your continued strong leadership is essential to achieving a favorable outcome on all these critically important issues.

Sincerely,

Gerald W. McEntee
International President

Morton Bahr
President
Communications Workers of America

Andrew L. Stern
President
Service Employees International Union

American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000

Pamela/ Cynthia/ Diana (+ return)

July 15, 1997

Memorandum for: John Podesta
Assistant to the President
and Deputy Chief of Staff for Policy and Political Affairs

From: Gerry Shea
Assistant to the President for Government Affairs

Peggy Taylor
Director, Legislation Department

Subject: Worker Protections in the Reconciliation Bills

As more details of the Republican reconciliation bills come to light, the extent of their attempt to roll-back Federal worker protections becomes alarmingly clear. While this poses a clear danger that decades of Federal labor standards could be undone, it also provides a strong basis for arguing against the provisions.

The latest item to surface is the exemption of bakery drivers. As reported in the July 7th edition of *Time*, all bakery drivers would be classified as independent contractors under the tax bill.

The bakery exclusion is separate from the broad language in the tax bill that would make it much easier for employers to reclassify workers as independent contractors, thereby denying them the benefits of Federal worker protections laws. While committee staff assumed a relatively small number of workers would be reclassified as independent contractors, outside estimates range in the millions.

Coupled with the wholesale change in the classification of workfare participants in the House Budget Bill, i.e., from workers entitled to Federal labor protections to "work experience" participants entitled to dramatically reduced protections, these provisions, if enacted, would exclude millions of workers from Federal labor protections.

We strongly urge that the Administration argue, first and foremost, that the President

has no intention of creating a second tier of workers who are entitled to a lesser standard of protections. For a number of reasons, we think this is a stronger position for the coming days' debate than arguing the need for individual protections for workfare participants. While that argument should still be made -- we would particularly urge you to highlight the lack of enforcement in the CWEP-like provisions in the House Bill -- we think you are on strongest ground in refusing to create a second tier of Federal labor standards.

Please let us know if any further information of argumentation will be helpful. Thank you for all your good works.

WR - FL BA

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July 16, 1997

Mr. Bruce Reed
Assistant to the President for Domestic Policy Planning
Old Executive Office Building, Room 216
Washington, D.C. 20500

Dear Bruce:

I've attempted to call you, but unfortunately we have not been able to connect. I am dropping you a note expressing our appreciation for the firm position which the Administration is taking on the privatization and FLSA/employee status issues. I also want to call your attention to several matters related to the FLSA/workfare issue.

The first is whether workfare should be an allowable activity under the $3 billion welfare-to-work program. As you know, we regard this new program as an important complement to welfare reform and a way to respond to the needs of poor urban and rural areas with large welfare populations. We are strongly opposed to any policy which would allow these limited funds to be used for work experience or community service activities when there already is plenty of money to run these programs under the TANF block grant. These new funds should focus on creating real public and private sector jobs and helping welfare recipients qualify and secure them, We strongly urge the Administration to oppose any policies which would permit these funds to pay for running workfare programs.

Second, we have been giving very careful consideration to the consequences of the Nickles FLSA provision, and strongly urge you not to settle for anything less than the elimination of all provisions relating to the FLSA and employee status. We believe that substantial numbers of families will be sanctioned either correctly or mistakenly. Indeed, 20,000 families already have lost their benefits, and, according to LaDonna Pavetti at the Urban Institute, sanctions are a much bigger issue than the time limits.

Consequently, the Nickles amendment will have a far more pernicious effect than it might appear at first glance. It would open up the opportunity for very substantial numbers of individuals working at subminimum wages. Furthermore, it provides no guidance as to how low the hourly "compensation" rate could be. Carried to its logical extreme, states could apply a full family sanction but still require 20 or 30 hours of work. While admittedly this situation is unlikely, the point is that there is no compensation floor at all. The proper way to mesh the minimum wage standard with the sanctioning process would be to reduce the work hours to reflect the reduced welfare payment.

We very much appreciate your consideration of these important issues.

Sincerely,

Lee Saunders
Assistant to the President

cc John Hilley
Elena Kagan ✓

in the public service

FLSA

Cynthia A. Rice 07/14/97 08:57:55 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: Welfare Provisions and the Byrd Rule

At the Friday afternoon meeting, John Hilley proposed that leg affairs coordinate an effort to get at least 40 Senators to sign a letter saying they'd vote to uphold a Byrd rule challenge against the FLSA and privatization provisions.

I spoke to Joan Huffer of Senator Daschle's staff this weekend to see if the Senate Parliamentarian had ruled on these provisions already. She said he has not, but she would work with Budget and Finance Committee staff to get a ruling from the Parliamentarian as soon as possible. (The Parliamentarian had previously ruled on the Senate version of privatization (which applied only to the state of Texas), and had indicated that he was skeptical of FLSA, but had not actually ruled on the exact House-passed provisions.)

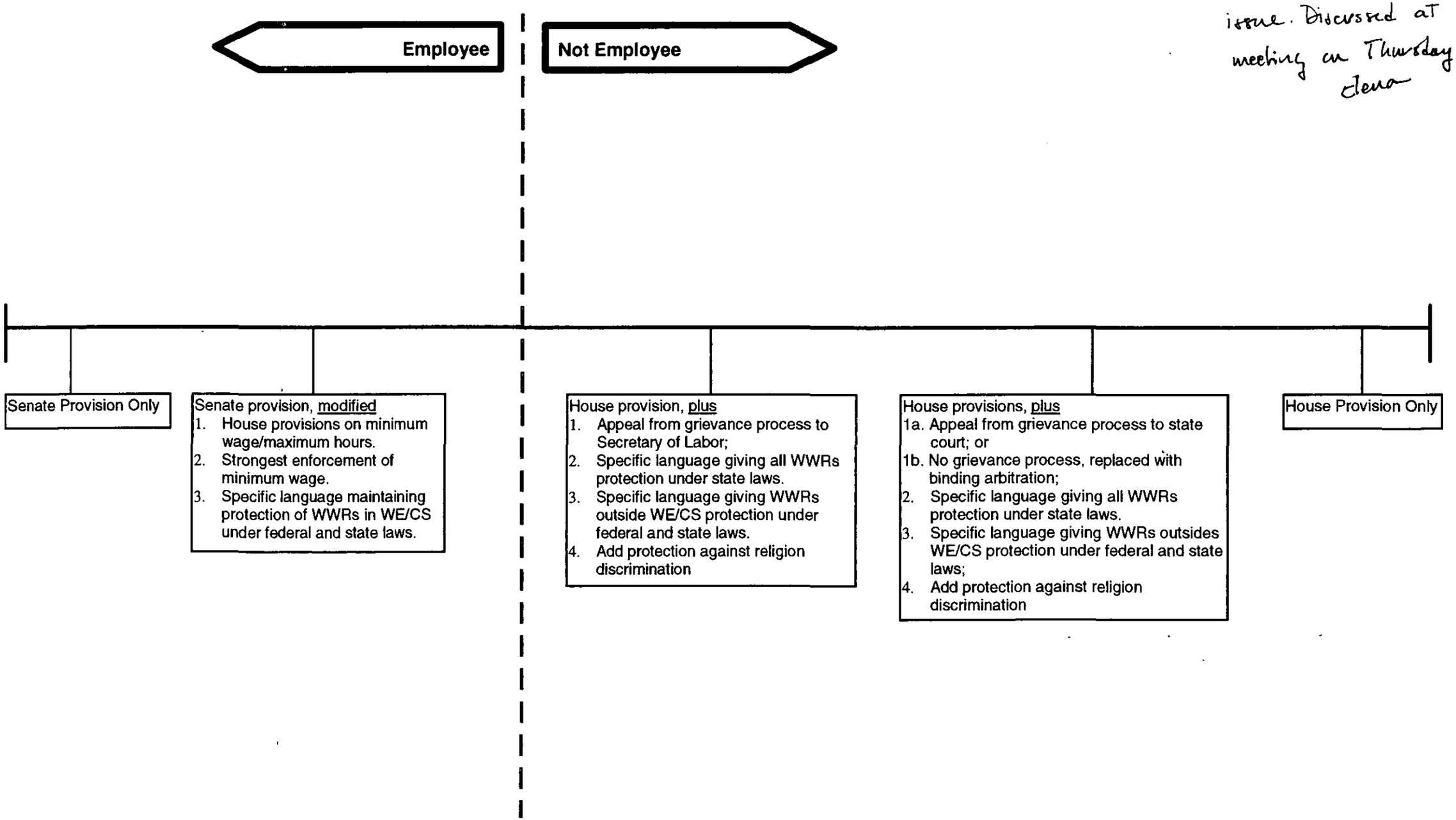
I did not tell Joan about the letter strategy -- Janet, I wasn't sure if we were ready, particularly since you didn't raise it at our Saturday meeting with House Dems. Janet and Susan, I assume you'll coordinate the strategy to get the signatures?

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Janet Murguia/WHO/EOP
FOLEY_M @ A1 @ CD @ LNGTWY
Susan A. Brophy/WHO/EOP
Kenneth S. Apfel/OMB/EOP
Barry White/OMB/EOP
Lisa M. Kountoupes/OMB/EOP
Charles Konigsberg/OMB/EOP

File: WR-FLSA

Bruce —
From DOL: Compromise positions on FLSA issue. Discussed at meeting on Thursday.
Elena



Spectrum of Employment Protections: Explanation

Senate Minimum Wage Provisions. The Senate bill does not modify current law with respect to applying the minimum wage and other worker protections to working welfare recipients. Under this option, the House would conform to the Senate's position on this issue. As a result, working welfare recipients would be treated like other workers with regard to employment status. The Fair Labor Standards Act and other employment laws would apply as described in DOL's May guidelines.

Limit Effect of House Provisions Regarding Community Service and Work Experience to FLSA Applicability. Treat welfare recipients in community service and work experience like other workers except with respect to coverage of the Fair Labor Standards Act. Instead, the House maximum hours (minimum wage) provision would apply. While welfare recipients in community service and work experience would not be treated as employees for FLSA purposes they would not be precluded from employment status for other laws. As employees, they would be covered by employment protections like OSHA, employment discrimination laws, workers compensation, and collective bargaining laws. This option requires the addition of an enforcement mechanism for the maximum hours (minimum wage) provision which is not provided in the House bill.

House Version with Senate Grievance Procedure (Appeal to Secretary of Labor) to Enforce Minimum Wage and Other Labor Protections. Welfare recipients in community work would not be considered employees for federal laws. (However, additional language is added to prevent them from being denied employee status for state laws like workers compensation.) Uses minimum wage and labor protections enforcement model similar to that used under prior welfare law and included in the Senate bill. The Senate grievance procedure which provides for an appeal to the Secretary of Labor would be substituted for the House procedure (which does not provide for any appeal) and would also be applied to the minimum wage requirement. This option also adds protection against religion discrimination, which is not available to working welfare recipients who are not employees under the current House bill.

House Version with Appeal to State Court. This option is the same as above except that the appeal from the grievance procedure would be to State Court rather than to Secretary of Labor.

House Version with Arbitration Instead of Grievance Procedure. This option is the same as above except that it replaces the grievance procedure (and proposed appeal) with arbitration system.

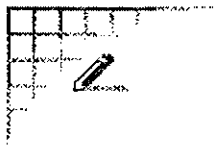
NONDISPLACEMENT RECOMMENDATIONS

Protections to be Added:

1. **General Prohibition Against Displacement:** The final House-passed language is seriously deficient in dropping the general prohibition against displacement (including partial displacement by reducing hours of work) of any individual who is an employee at the time the participant comes on board ("as of the date of employment"). At a minimum, the language from the Senate-passed version should be inserted in the conference agreement before the House-passed language allowing an adult recipient to fill a vacant employment position.
2. **Promotional Opportunities:** The conference agreement should include the Senate prohibition against creating a job in a promotional line infringing upon the promotional opportunities of regularly employed individuals. Welfare-to-work activities should not facilitate the creation of subsidized job positions at the expense of promotional opportunities for regular employees.
3. **Contracts for Services and Collective Bargaining Agreements:** The Senate language on existing contracts for services and collective bargaining agreements is preferable, because the terms "impair" and "inconsistent" connote situations where parties other than the direct parties to a contract or agreement may be trying to undertake an activity which modifies, whether directly or indirectly, the contract or agreement. Employer and labor consultation and concurrence in any such implicit modification should be required and will clearly be more conducive to better employer-employee relations.
4. **Comparable Wages:** The conference agreement should insert legislative language on comparable benefits, included in the workforce development legislation from the Education and Workforce Committee passed by the House. This language requires that individuals in on-the-job training or individuals employed in work activities shall be compensated at the same rates and provided benefits and working conditions, at the same level and to the same extent as other trainees or employees working a similar length of time and doing the same type of work, but in no event less than the higher of the Federal or State or local minimum wage.

SANCTION PROVISION IN THE SENATE BILL

ELIMINATE SECTION 5823 OF SENATE BILL. This language allows states to impose monetary sanctions on working welfare participants even if doing so would mean they receive less than the minimum wage for their work. It allows working welfare recipients to be paid a subminimum wage.. As a result, it undermines the minimum wage -- and the basic premise that people should get paid for work performed. Furthermore, the sanction can be imposed even if the sanction is for the behavior of another family member. We support both the sanctions provisions in welfare reform and the payment of the minimum wage to welfare recipients when they work -- but both must work in harmony if we are to achieve real and lasting welfare reform.



Record Type: Record

To:

cc:
Subject: welfare notes

1. I just looked over Eli's most recent memo to you. It looks great. I'd try to convince him, though, to combine the St. Louis event with the announcements on (a) 1,000 companies and (b) partnerships in other cities. There are only so many times in August that the Welfare-to-Work Partnership can expect to make the news.

2. Cynthia and Diana have modified their original views on whether the new minimum wage provision weakens work requirements between 20 and 30 hours. You recall that they initially told us that the new provision allows low-wage states like Mississippi to count below 20 hours the same activities that any state can count under the current law between 20 and 30 hours. But it seems as if that's not really right. While the welfare law allows states to count education and training directly related to employment in the gap between 20 and 30 hours, the law does NOT make it easier for states to count job search and voc ed in this gap. So the new minimum wage provision, which allows states to count ALL of these activities once the employee has worked off her benefit package, WILL give almost every state (low-wage or high-wage) new flexibility to resort to job search, etc. and still meet the work requirements.

3. I'm sending you materials from DOL on alternatives to the current FLSA provision in the budget bill. We had a meeting with them on Thursday which was quite useful. Give the materials a quick once-over when you have a chance and/or ask me to brief you.

Cynthia A. Rice 07/04/97 06:45:22 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP

cc:

Subject: McCurry on workfare and organizing workfare workers

From 7/3/97 briefing:

Q A domestic question, Mike. In New York, ACORN is trying to organize workfare participants that attempted to deliver petition signatures on Mayor Giuliani, who bumped the question to Washington, saying that's where the complaining should be done. Does the White House have a feeling about organizing former welfare recipients who are now working for --

MR. MCCURRY: We think they should be allowed to enjoy the protections of labor law and most particularly should be paid a minimum wage. That's why the President strongly objects to some of the discussion in Congress about not paying workfare participants the minimum wage to which they're entitled -- while we will continue to press the case that we need to honor those who are making that transition from welfare to work by ensuring that it pays them to go to work and assuring that they have a liveable wage that they can endure on.

Q But in terms of organizing for other benefits, which is what these folks are after? They're after health care benefits and other things.

MR. MCCURRY: We well understand the desire of people who are working to come together and try to advocate for the best benefits that they can get, and that's an acceptable part of our collective bargaining process under national labor law. We think that workers participating in workfare experiments should be able to negotiate for the kind of protections that other workers enjoy in the marketplace.

Mississippi < 20 hours, can count:

1) job search + readiness > 6 wks
2) VOC ed > 12 months
3) job skills training directly relted to emp.
4) education if not HS grad

Under old law, could use to get from 20→30 hours

WR - FLSA

DOL Mtg on FLSA - July 3

← EE | Not EEs →

not a mandate
instead: a non-preemptive clause

Senate	Senate mod position	House plus	House plus	House
	1. H on MW/max hrs	Appeal from gr. process to Secy of L (who gets to delegate)	Appeal to St Ct or	
	2. Subject enf of MW Laws - whistle parties	~~Specific laws~~ all Laws giving protection under state laws	No gr. process - binding arb	
	3. Protection under fed/st laws (all) except FLSA)	←	Laws - protection all in st laws	
	(no FLSA admin)	Laws giving non-welfare p. protection under fed + st laws (just to be sure) ←	Laws -	
		Add protection agt rel discrim	Add protection agt rel discrim	

enf provs
write in from FLSA
or
refer to enf provs of FLSA

not really needed

not other fed. emp laws
no other min wage enf
than w/ gr. proc.

(Discussion about Nickles)

State laws - gets
you some lbr
minimizing protection

St law - wkrs comp / often st safety + health / often hier m.w.
FMLA / UI / Pub EE coll. bargaining.

From AFL-CIO cc: Cynthia/Diana + others 6/27/97

Employment Protections for Workfare Workers -- Legislative Update

The House budget bill authorizes states to implement "work experience" programs in public and private, non-profit workplaces, under which welfare recipients would be assigned to work, but without employee status or full employment protections. The bill includes a minimum wage standard, meaning that workfare participants cannot be required to work more hours than their welfare grant plus Food Stamps divided by the minimum wage. Republicans clearly did not want to be caught in another minimum wage fight, and their inclusion of a minimum wage standard is an improvement over prior Republican proposals to exclude welfare recipients entirely from the minimum wage and other labor and employment laws. Still, the current proposal is fundamentally flawed because it permits the placement of up to two million welfare recipients into large-scale "work experience" programs without employee status or employment protections.

What does the House bill do?

The bill is based in general on the Community Work Experience Program (CWEP) in the former AFDC law. States are authorized to operate "work experience" programs in the public and private, non-profit sectors, and they may place welfare recipients in jobs serving a "useful public purpose." Welfare recipients cannot be required to work in these work experience jobs for more hours than their welfare grant plus Food Stamps divided by the minimum wage, for a maximum of 40 hours per week. Even so, the bill makes clear that the welfare grant is not "compensation" and that participants are not entitled to a salary by virtue of their participation in work experience. In other words, a minimum wage standard applies, but the Fair Labor Standards Act does not.

The bill also makes OSHA standards applicable to workfare participants, although it stops short of covering workfare participants under the Occupational Safety and Health Act. And the bill prohibits discrimination against workfare participants on grounds of gender (race and disability were addressed in TANF), although the recourse for violations is extremely weak.

What's wrong with the bill?

Most fundamentally, the bill clearly signals that workfare participants are not "workers" entitled to the full protection of the law -- rather, they are second-tier workers with second-rate protections. The House bill offers workfare workers very limited protections in the areas of minimum wage, health and safety, and discrimination, but does so in a way that avoids characterizing workfare participants as workers. But without employee status, workfare participants are not protected under the National Labor Relations Act, the Family and Medical Leave Act, Title VII, workers compensation, or other labor and employment laws.

The bill offers only weak protection against displacement of current employees. Even though the bill purports to track the old CWEP program, it retains the weak anti-displacement provisions from TANF, the new welfare law. Those provisions do not bar partial displacements such as reductions in hours or elimination of promotional opportunities, and they require proof of an employer's intent to displace current workers. CWEP prohibited partial displacements, and barred workfare placements which resulted in displacement, regardless of an employer's intent. The House bill does not include these stronger measures.

Even though the bill claims to track CWEP, it eliminates a number of important CWEP provisions, including CWEP's emphasis on training; workers compensation protections; prevailing wages after nine months; better grievance procedures; and stronger anti-displacement protections.

Finally, CWEP and the "work experience" programs authorized by the House bill differ because "work experience" under TANF is likely to be far broader in scope than CWEP. TANF requires states to meet strict work participation rates, in contrast to CWEP, which did not contain such requirements. States will place large numbers of TANF recipients in work experience in order to meet the rates, creating a second-class workforce of up to two million "work experience" workers without the protection of labor and employment laws.

cc: Cynthia/Diana/Bruce
+ return

Women's Legal Defense Fund

MEMORANDUM

To: Erskine Bowles,
Chief of Staff to the President
From: Judith L. Lichtman, Joan Entmacher, and Jocelyn Frye JLF
Date: June 27, 1997
Re: Comments on Budget Reconciliation Bill

The Women's Legal Defense Fund is seriously concerned that the budget reconciliation bill ("the bill" or "the House bill") passed by the House erodes basic employment protections for welfare recipients who participate in workfare programs. Although the final House provisions are better than earlier proposals, which would have denied *all* worker protections to workers in workfare jobs, they still fail to provide *effective* protection against unfair treatment.

1. INADEQUATE WORKER PROTECTIONS

a. Lack of Strong Enforcement Mechanisms

The bill's worker protection section includes some provisions concerning nondisplacement, health and safety, and nondiscrimination. These provisions, however, will provide few real protections if enforcement mechanisms fail to ensure that states comply with the law. Strong enforcement mechanisms encourage states to follow the law carefully and create programs that operate fairly. And, effective enforcement tools help to ensure that individuals and/or key federal agencies can challenge possible violations of the law through a fair process.

The only mechanism that appears to be available to enforce this section is a new grievance procedure to be created by each state. While workfare participants will be limited to an untested state grievance procedure to pursue valid complaints, other workers who perform the same work will be able to file complaints with the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, or the courts. Access to the same options available to other workers will help to ensure that workfare participants have a fair opportunity to raise problems. Moreover, while the bill states that the state grievance procedure "shall include an opportunity for a hearing," it does not make clear that the hearing must meet the standards for a "fair hearing" under *Goldberg v. Kelly*, 397 U.S. 254 (1970), or that benefits cannot be

1

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terminated prior to the hearing.[1] This is a particularly important issue for welfare recipients who might lose their benefits while they are in the process of pursuing a valid complaint.

Unlike the prior JOBS law, neither the Department of Labor nor the Department of Health and Human Services is specifically authorized to investigate complaints and take appropriate action at any point during the grievance process. It is critical that appropriate federal agencies, like the Department of Labor, have the ability to ensure that states receiving federal funds operate work programs fairly, and to take steps to remedy violations of the law when they occur.[2]

The bill provides only limited remedies for violations of the worker protection provisions. For example, states "shall" provide remedies; however, these remedies "may" -- but need not -- include payment of lost wages or benefits, or other appropriate equitable relief. When violations occur, however, workfare participants should have access to the same remedies as other workers, including damages where appropriate. Moreover, federal agencies should be authorized to suspend payments to states -- and in egregious cases impose sanctions -- when they fail or refuse to comply with the law.

b. <u>Lack of Comprehensive Prohibitions Against Discrimination, Especially Sex Discrimination</u>

One of the serious inadequacies of the Personal Responsibility and Work Opportunity Reconciliation Act ("the new welfare law") is its failure to specifically address sex discrimination. The House bill includes language (also included in the Education and the Workforce Committee's mark) that states, "In addition to the protections provided under the provisions law specified in section 408(c), an individual may not be discriminated against with respect to participation in work activities by reason of gender." While the bill now acknowledges the need to prohibit sex discrimination, this language alone may do little to provide women with real remedies for sex discrimination.

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[1] In *Goldberg*, the Supreme Court held that the procedural due process requirements of the 14th amendment required that welfare recipients have an opportunity for a fair hearing before their benefits could be terminated. The dispute resolution procedures in the prior JOBS law stated, in part, "in no event shall aid to families with dependent children be suspended, reduced, discontinued, or terminated as a result of a dispute involving an individual's participation in the program until such individual has an opportunity for a hearing that meets the standards set forth by the United States Supreme Court in Goldberg v. Kelly." 42 U.S.C. §682(f) (repealed by P.L. 104-193, 110 Stat. 2167).

[2] Indeed, even the Committee on Education and the Workforce's bill included an investigation section that specifically authorized the Secretary of Labor to investigate complaints if a party appealed.

The language in the bill is different from Title VII and Title IX[3] -- and also the prior JOBS law[4] -- and, as a result, it is unclear how it would be interpreted. There is ample case law and history on the types of discrimination covered by Title VII and Title IX, but there is no such history with this new language. For example, the Supreme Court has held that Title VII and Title IX cover sexual harassment even though that phrase is not included in the statutory language,[5] but it is unclear whether the language in the bill would be read in the same way. Some courts, seeking to reconcile the new provision with other laws, could conclude, for example, that the provision does not reach as far as Title VII would in prohibiting employment discrimination.

While the language in the bill extends the prohibition against sex discrimination to all work activities, it could be read to suggest that it is the *only* protection available to women in any work activity, including nonworkfare jobs and private sector employment. Thus, women who are clearly employees and who work in any work activity might be limited to the narrow remedies in the bill without the protection of other basic employment laws. Further, the provision does not mention other forms of employment discrimination, such as race- or age-based discrimination, that may limit opportunities for participants in work activities. Although the nondiscrimination provision in the new welfare law[6] might prohibit some forms of employment discrimination (*see, e.g.*, Title I of the Americans with Disabilities Act which prohibits discrimination in employment based on disability), the provision may not cover the full range of employment discrimination problems.[7] The bill should make clear that participants who perform the work of employees, regardless of the "label" ascribed to their job, have access to the full range of antidiscrimination protections -- such as the protections afforded by Title VII, the Equal Pay Act, and the Age Discrimination in Employment Act -- that other workers have.[8] The

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[3] Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on sex, race, color, religion, and national origin. Title IX of the Education Amendments of 1972 prohibits sex discrimination in education programs or activities receiving federal financial assistance.

[4] The JOBS antidiscrimination provision required states, in part, to ensure that "individuals are not discriminated against on the basis of race, sex, national origin, religion, age, or handicapping condition, and all participants will have such rights as are available under any applicable Federal, State, or local law prohibiting discrimination." 42 U.S.C. §684(a)(3) (repealed by P.L. 104-193, 110 Stat. 2167).

[5] *See Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (Title VII); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (Title IX).

[6] The new welfare law's nondiscrimination provision states that the Age Discrimination Act of 1975, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Title VI of the Civil Rights Act of 1964 shall apply to TANF-funded programs. §408(c).

[7] For example, in some cases, Title VI (which prohibits discrimination based on race and national origin in federally-funded programs or activities) has been found to have limited reach in the employment context, thus, race and national origin employment discrimination claims are often pursued under other laws like Title VII or §1981.

[8] This is even more important because the bill does include a provision that expressly prohibits preemption of state nondisplacement laws. The nonpreemption provision ensures that the new welfare law will not be

prior JOBS law, for example, made clear that participants had access to other antidiscrimination remedies by stating that "participants will have such rights as are available under any applicable Federal, State, or local law prohibiting discrimination." *Supra* note 4.

c. **Lack of Strong Nondisplacement Protections**

Neither the bill nor the new welfare law provide adequate protections against displacement of existing employees. The prior law's provision on displacement of current workers included prohibitions against partial displacement, such as reductions in hours of nonovertime work; infringement on promotional opportunities; and assisting or tampering with union organizing. These protections are not included in the bill. Further, the language that is included in the bill may make it more difficult for individuals to challenge displacement when it occurs. The bill states that participants shall not be employed or assigned to a job where, among other things, the employer "has terminated the employment of any regular employee or otherwise caused an involuntary reduction if [sic] its workforce with the *intention* of filling the vacancy so created with the participant" (emphasis added).[9] This new language differs significantly from the prior law which stated that participants would not be placed in jobs where the employer had terminated or "otherwise reduced its workforce with the *effect* of filling the vacancy so created with the participant."[10] Requiring individuals to gather evidence of an employer's intent may make it more difficult for them to challenge improper practices.

2. LIMITING THE "EMPLOYEE STATUS" OF PARTICIPANTS

A central issue in the discussion about worker protections has been the question of whether participants should be considered employees for purposes of various employment laws. Some argue that work experience and community service programs are "training" for employment in the private sector and, thus, participants should never be considered employees.[11]

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misinterpreted to preclude workers from using state laws that provide greater nondisplacement protections. The absence of a similar safeguard for antidiscrimination laws could lead to misinterpretations about the availability of important antidiscrimination protections.

[9] This language was also included in the worker protection amendment that modified the Welfare-to-Work Initiative adopted by the Ways and Means Committee.

[10] 42 U.S.C. §684(c)(2)(B) (repealed by P.L. 104-193, 110 Stat. 2167).

[11] Proponents of this view cite, in support, the community work experience program ("CWEP") provisions contained in the prior JOBS law. But, arguments suggesting that the House bill merely memorializes the CWEP provisions are misleading. While CWEP permitted states to help some participants gain actual work experience, the program also emphasized training and the need to build skills to move individuals into regular public or private jobs. *Compare* CWEP language, 42 U.S.C. §682(f)(1)(A) (repealed by P.L. 104-193, 110 Stat. 2167) ("[t]o the extent possible, the prior training, experience, and skills of a recipient shall be used in making appropriate work experience assignments,") *with* the House bill (omits CWEP language). And, CWEP was part of a JOBS law that,

Such a bright line rule, however, ignores the reality of the particular work assigned to each participant and the flexibility that states now have to craft their programs.

States may use the term "work experience" to encompass a broad range of programs. Some programs may be designed to build specific skills, or train participants for certain types of jobs. But other programs may assign participants to work in regular jobs doing the same work as other workers. Rather than rely on arbitrary labels like "work experience," the work performed by participants should be evaluated in accordance with existing legal standards that are already used to evaluate whether other workers are considered to be employees. These standards look at the type of the work being performed and the surrounding circumstances (e.g., whether the employer has the right to control and direct the employee's work) rather than focusing solely on the name of the job.

The simple fact that work is being performed by a welfare recipient does not change the type of work being performed. If participants are doing the same work as other employees, they should be given the same status. Summarily stripping participants of "employee status" means that workers who happen to be welfare recipients may be denied important employment law protections, such as those secured by the Fair Labor Standards Act, Title VII, OSHA, the Age Discrimination in Employment Act, and the Family and Medical Leave Act.[12] These protections are critical for all workers to ensure that their workplaces are safe, free of discrimination, and paying fair wages. But, these protections are particularly important for welfare recipients, who are especially vulnerable because they risk losing vital benefits if they lose their jobs. Ensuring that welfare recipients are protected by basic employment laws will help to maximize their chances to leave the welfare system permanently and move to better jobs.

Please feel free to contact us if you have any questions about the concerns discussed in this memorandum.

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as discussed throughout this memorandum, provided greater worker protections (such as better minimum wage, nondisplacement, and antidiscrimination protections) than the House bill. Even though the House bill now incorporates some of the CWEP language, that language cannot be read in isolation. Simply extracting segments of the old law -- some with significant modifications -- in a piecemeal fashion and incorporating them into the new welfare law does not duplicate CWEP. Nor does it ensure that participants have adequate worker protections when they go to work. Rather, the language in the bill must be understood in the context of the new welfare law which creates new rules -- and new pressures -- for states and individuals to satisfy strict work participation requirements. The incentives created by the new work requirements may drive states to place participants in any job -- including regular jobs currently being performed by other employees -- regardless of the specific needs or skills of the participant, and create a need for *stronger* worker protections. Thus, the bill, read together with the new welfare law, may encourage states to create programs different from CWEP where states can avoid providing comprehensive worker protections simply by characterizing jobs as "training," and require participants to work without protection against unfair treatment.

[12] In addition, it sets a dangerous precedent. The House just passed, as part of the tax bill, a measure that would redefine many employees as "independent contractors" -- and impair their protections under federal labor laws.

cc: Maria Echaveste
John Hilley
Bruce Reed
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Janet Murguia

WR-FL8A

MANAGER'S AMENDMENT TO BE SELF-EXECUTED IN THE RULE ON RECONCILIATION

24 June 1997

This manager's amendment consists of *changes* from reconciliation legislation reported to the Committee on the Budget that will be self-executed in the rule on reconciliation at the request of the Chairman of the Committee on the Budget. The manager's amendment makes the following changes from the reported legislation:

- **LOW-INCOME MEDICARE PREMIUM PROTECTIONS.** Provides an additional $1 billion for low-income Medicare premium protections, bringing the total to $1.5 billion over 5 years. The provision covers the full Medicare Part B premium for seniors with incomes up to 135 percent of poverty. For seniors with incomes between 135 percent and 175 percent of poverty, the assistance covers that portion of the Medicare Part B premium increase attributable to the home health spending transfer.

- **MINIMUM WAGE/WELFARE-TO-WORK PARTICIPANT PROTECTIONS.** Contains the following changes from the reported legislation:

  - Limits to no more than 40 hours per week the number of hours participants in public sector or nonprofit workfare activities can be required to work.

  - Counts only Temporary Assistance for Needy Families [TANF] and food stamp benefits as compensation under the minimum wage for workfare participants.

  - Adopts the AFDC JOBS criteria for defining work experience and community service jobs when States use workfare in the public or nonprofit sector to meet State work participation requirements, and uses the same criteria for determining whether participants are "employees" under the terms of the Fair Labor Standards Act.

  - Adopts worker protection and nondiscrimination provisions (preventing discrimination based on age, race, gender, and disability), but provides for an independent nonFederal grievance resolution procedure.

  - Incorporates worker displacement language, which applies to all workfare participants and which does not preempt stronger State displacement laws.

- **FOOD STAMP WORK SLOTS.** Eliminates "job search" as a qualified activity for additional food stamp work slot funds, and raises to 80 percent (from 75 percent) the earmarked funds for people between 18 and 50 years old who may lose food stamp benefits due to new work requirements.

- **MEDICAID.** Drops language in Medicaid section that allows only physicians to decide appropriate hospital stays. This language was added to bring the Committee on Commerce closer to compliance with its reconciliation directives.

- **CHILDREN'S HEALTH CARE.** Modifies the children's health care block grant to ensure that it complies with the Bipartisan Budget Agreement's proposed spending $16 billion over the next 5 years.

- **MEDICAID COVERAGE FOR SSI CHILDREN.** Provides $100 million to allow States the option of maintaining Medicaid benefits for children currently on the Medicaid rolls who would otherwise lose Medicaid eligibility because of stricter SSI eligibility standards.

- **SPECTRUM AUCTIONS.** Increases from $9.7 billion to $20.3 billion over 5 years the receipts due to spectrum auctions. Drops or relaxes numerous conditions specified in the Commerce Committee's reported legislation that restricted the Federal Communication Commission's ability to auction spectrum. Also specifies additional spectrum to be made available for auction.

- **WELFARE TO WORK.** Requires that all of $3 billion in welfare-to-work funds be obligated by fiscal year 1999.

- **MULTIPLE EMPLOYER WELFARE ARRANGEMENTS.** Modifies language on Multiple Employer Welfare Arrangements to overcome jurisdictional issue between the Committees on Education and the Workforce and Ways and Means.

- **VETERANS' MEDICAL CARE.** Allow veterans hospitals to retain, subject to appropriations, medical care cost recovery receipts, so that veterans' medical care remains a discretionary program.

- **BUDGET ENFORCEMENT.** Budget process changes that are consistent with the Bipartisan Budget Agreement (see attached summary).

Prepared by ..... THE HOUSE COMMITTEE ON THE BUDGET
MAJORITY STAFF

Budget Enforcement Provisions

The manager's amendment self-executed in the rule also adds the following budget enforcement provisions to the base reconciliation bill:

SUBTITLE A — AMENDMENTS TO THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974

- Permanently extends the requirement that a budget resolution cover a 5-year period.
- Extends indefinitely the enforcement, through points of order, of the 5-year spending and revenue levels set forth in budget resolutions.
- Simplifies and updates points of order that are used to enforce the spending and revenue levels in budget resolutions.
- Provides for adjustments in the budget resolution levels for legislation appropriating funds for designated emergencies, arrearages, and the International Monetary Fund .
- Eliminates the need to waive the Budget Act for a reported bill that violates the Act but is cured by a self-executing rule. In such cases, the point of order no longer lies against the bill.

SUBTITLE B — AMENDMENTS TO THE BALANCED BUDGET AND EMERGENCY DEFICIT CONTROL ACT OF 1985

- Adjusts and extends statutory discretionary spending limits, which are enforced through sequestration, through fiscal year 2002.
- Provides for adjustments in the discretionary spending limits for appropriations for emergencies, arrearages, and the International Monetary Fund.
- Extends pay-as-you-go [PAYGO] requirements, which provide that entitlement and tax legislation must be fully offset, through fiscal year 2002.
- Modifies the baseline that is used to "score" legislation so that committees get credit for eliminating entitlement programs.
- Eliminates accrued PAYGO balances and savings from reconciliation to ensure that all savings are used for deficit reduction.

Manager's Amend (Kasich)

SEC. 5004. RULES GOVERNING EXPENDITURE OF FUNDS FOR WORK EXPERIENCE AND COMMUNITY SERVICE PROGRAMS.

(a) IN GENERAL.—Section 407 of the Social Security Act (42 U.S.C. 607) is amended by adding at the end the following:

"(j) RULES GOVERNING EXPENDITURE OF FUNDS FOR WORK EXPERIENCE AND COMMUNITY SERVICE PROGRAMS.—

"(1) IN GENERAL.—To the extent that a State to which a grant is made under section 403(a)(5) or any other provision of section 403 uses the grant to establish or operate a work experience or community service program, the State may establish and operate the program in accordance with this subsection.

"(2) PURPOSE.—The purpose of a work experience or community experience program is to provide experience or training for individuals not able to obtain employment in order to assist them to move to regular employment. Such a program shall be designed to improve the employability of participants through actual work experience to enable individuals participating in the program to move promptly into regular public or private employment. Such a program shall not place individuals in private, for-profit entities.

"(3) LIMITATION ON PROJECTS THAT MAY BE UNDERTAKEN.—A work experience or community service program shall be limited to projects which serve a useful public purpose in fields such as health, social service, environmental protection, education, urban and rural development and redevelopment, welfare, recreation, public facilities, public safety, and day care, and other purposes identified by the State.

"(4) MAXIMUM HOURS OF PARTICIPATION PER MONTH.—A State that elects to establish a work experience or community service program shall operate the program so that each participant participates in the program with the maximum number of hours that any such individual may be required to participate in any month being a number equal to—

"(A)(i) the amount of assistance provided during the month to the family of which the individual is a member under the State program funded under this part; plus

"(ii) the dollar value equivalent of any benefits provided during the month to the household of which the individual is a member under the food stamp program under the Food Stamp Act of 1977; minus

why should it subtract this?

"(iii) any amount collected by the State as child support with respect to the family that is retained by the State; divided by

"(B) the greater of the Federal minimum wage or the applicable State minimum wage.

"(5) MAXIMUM HOURS OF PARTICIPATION PER WEEK.—A State that elects to establish a work experience or community service program may not require any participant in any such program to participate in any such program for a combined total of more than 40 hours per week.

Takes care of taxes?

"(6) RULE OF INTERPRETATION.—This subsection shall not be construed as authorizing the provision of assistance under a State program funded under this part as compensation for work performed, nor shall a participant be entitled to a salary or to any other work or training expense provided under any other provision of law by reason of participation in a work experience or community service program described in this subsection.''.

(b) RETROACTIVITY.—The amendment made by subsection (a) of this section shall take effect as if included in the enactment of section 103(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

SEC. 5005. STATE OPTION TO TAKE ACCOUNT OF CERTAIN WORK ACTIVITIES OF RECIPIENTS WITH SUFFICIENT PARTICIPATION IN WORK EXPERIENCE OR COMMUNITY SERVICE PROGRAMS.

(a) IN GENERAL.—Section 407(c) of the Social Security Act (42 U.S.C. 607(c)) is amended by adding at the end the following:

"(3) STATE OPTION TO TAKE ACCOUNT OF CERTAIN WORK ACTIVITIES OF RECIPIENTS WITH SUFFICIENT PARTICIPATION IN WORK EXPERIENCE OR COMMUNITY SERVICE PROGRAMS.—Notwithstanding paragraphs (1) and (2) of this subsection and subsection (d)(8), for purposes of determining monthly participation rates under paragraphs (1)(B)(i) and (2)(B) of subsection (b), an individual who, during a month, has participated in a work experience or community service program operated in accordance with subsection (j), for the maximum number of hours that the individual may be required to participate in such a program during the month shall be treated as engaged in work for the month if, during the month, the individual has participated in any other work activity for a number of hours that is not less than the number of hours required by subsection (c)(1) for the month minus such maximum number of hours.".

(b) RETROACTIVITY.—The amendment made by subsection (a) of this section shall take effect as if included in the enactment of section 103(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

SEC. 5006. WORKER PROTECTIONS.

Section 407(f) of the Social Security Act (42 U.S.C. 607(f)) is amended to read as follows:

"(f) WORKER PROTECTIONS.—

"(1) NONDISPLACEMENT IN WORK ACTIVITIES.—

"(A) GENERAL PROHIBITION.—Subject to this paragraph, an adult in a family receiving assistance under a State program funded under this part attributable to funds provided by the Federal Government may fill a vacant employment position in order to engage in a work activity.

"(B) PROHIBITION AGAINST VIOLATION OF CONTRACTS.—A work activity shall not violate an existing contract for services or collective bargaining agreement.

"(C) OTHER PROHIBITIONS.—An adult participant in a work activity shall not be employed or assigned—

"(i) when any other individual is on layoff from the same or any substantially equivalent job; or

"(ii) if the employer has terminated the employment of any regular employee or otherwise caused an involuntary reduction if its workforce with the intention of filling the vacancy so created with the participant.

"(2) HEALTH AND SAFETY.—Health and safety standards established under Federal and State law otherwise applicable to working conditions of employees shall be equally applicable to working conditions of participants engaged in a work activity.

"(3) NONDISCRIMINATION.—In addition to the protections provided under the provisions of law specified in section 408(c), an individual may not be discriminated against with respect to participation in work activities by reason of gender.

"(4) GRIEVANCE PROCEDURE.—

"(A) IN GENERAL.—Each State to which a grant is made under section 403 shall establish and maintain a procedure for grievances or complaints from employees alleging violations of paragraph (1) and participants in work activi-

ties alleging violations of paragraph (1), (2), or (3).

"(B) HEARING.—The procedure shall include an opportunity for a hearing.

"(C) REMEDIES.—The procedure shall include remedies for violation of paragraph (1), (2), or (3), which may include—

"(i) prohibition against placement of a participant with an employer that has violated paragraph (1), (2), or (3);

"(ii) where applicable, reinstatement of an employee, payment of lost wages and benefits, and reestablishment of other relevant terms, conditions and privileges of employment; and

"(iii) where appropriate, other equitable relief.

"(5) NONPREEMPTION OF STATE NONDISPLACEMENT LAWS.—The provisions of this subsection relating to nondisplacement of employees shall not be construed to preempt any provision of State law relating to nondisplacement of employees that affords greater protections to employees than is afforded by such provisions of this subsection.".

WR-
FLSA

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

LABOR BRANCH FAX SHEET

DATE: 6/25

TO: Diana Fortuna / Elena Kagen
6-7431 6-2878

FROM: Janet Himler

COMMENTS: DOL's revised version — even more
Per Diana's e-mail.
Based on last night's mgrs amendment.
incase Hilley gives the go ahead.

Comments?

NUMBER OF PAGES 4
(INCLUDING COVER)

CONFIRMATION: (202) 395-3262
FAX NUMBER: (202) 395-1596

DRAFT: June 25, 1997: 11:15 AM

House Reconciliation Bill: Majority Staff Discussion Proposal

Employment Status: This draft eliminates the language that specifically states that welfare recipients in work experience and community service are not employees. However, the "Purpose" section and language throughout the proposal (particularly the Rule of Interpretation section[1]) suggest that these welfare recipients are in these activities to gain experience or training and are not in "regular employment." Although this may be subject to interpretation by the courts (and any legislative history on this report could be critical), the result would likely be that participants in these activities would not be considered employees for purposes of employment protection laws.

Noncash Benefits: Provides that the maximum hours that a welfare recipient can participate in community service or work experience be determined by the sum of the TANF benefit and food stamps minus child support divided by the minimum wage. It does not allow states to require welfare recipients to "work off" other benefits such as Medicaid, child care or housing.

Work Activities and Minimum Wage Equivalency: Limits the number of hours that a welfare recipient can work in community service or work experience to the sum of the cash welfare benefit and food stamps minus child support divided by the minimum wage and creates a cap of 40 hours. This is similar to the calculation used for CWEP under the JOBS program.[2] (It is also the first welfare reform proposal that addresses the child support issue with regard to the payment of the minimum wage.) If this calculation falls short of the hours required to count towards participation rates (e.g., 20 hours per week in 1997), any other work activity (including training) can be used for the remaining hours -- notwithstanding the limits on training in the TANF law.

Enforcement of Minimum Wage Equivalency and Hours Limitation: This proposal does not provide for coverage of welfare recipients in community service or work experience by the Fair Labor Standards Act. Nor does it provide any other mechanism for enforcing the minimum wage requirement for these recipients. In addition, there is no provision for overtime or the other protections provided by the FLSA.

Compensation: This proposal does not include language that was included in the Education and Workforce bill that required welfare recipients working in unsubsidized employment, subsidized

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[1] This language, which states that cash assistance is not to be considered a salary or compensation for the purpose of other laws, may also clarify issues regarding the tax treatment of the cash welfare benefit.

what about FICA?

[2] There are two principal differences from CWEP. First, CWEP only used the AFDC cash benefit in its calculation of hours. Second, it divided the AFDC benefit by the higher of the state or federal minimum wage or the wage rates for similarly situated workers.

private sector employment or subsidized public sector employment to be compensated "at the same rates, including periodic increases, as trainees or employees who are similarly situated in similar occupations by the same employer and who have similar training, experience and skills."

Workers' Compensation: This proposal does not include the language that was contained in both committees' reconciliation bills that applied state workers' compensation laws to welfare recipients on the same basis as the protection is provided to other individuals in the State in similar employment. As a result, welfare recipients in community service and work experience who are not considered employees may lose workers' compensation coverage. The absence of workers' compensation coverage could expose states to tort liability.

This proposal would apply the following worker protections to all welfare recipients in work activities under TANF -- not just those under the Welfare-to-Work program.

Health and Safety: This is the same language that was used in H.R. 1385, the House-passed job training reform bill and in JTPA.

Discrimination: Welfare recipients in work experience or community service will only be covered by employment based anti-discrimination laws (like Title VII) if they are considered employees. However, as stated above, they may not be found to have employment status under this proposal.

In addition, the gender discrimination prohibition in the proposal does not provide for a neutral third-party remedy. Only the state grievance procedure in the proposal would be available for welfare recipients in community service or work experience subjected to gender discrimination or sexual harassment.

Nondisplacement: This proposal retains most of the current TANF provisions. However, it is narrower than the provisions contained in the Education and Workforce Committee bill.

- It drops the general prohibition against displacing (including partial displacement) a current employee and replaces the provision with the current TANF provision that specifically permits a participant to fill a vacant employment position.
- It narrows the prohibition relating to collective bargaining agreements and contracts for services. The Education and Workforce provision prohibits "impairment" of such agreements and prohibits work activities that are inconsistent with such agreements. This proposal simply prohibits the violation of such agreements.
- It drops the prohibition against placing the participant in a job that infringes upon the promotional opportunities of current employees.

Grievance Procedure: The proposal only provides for filing of grievances with the state. It does not allow for a neutral third party appeal. Consequently, a welfare recipient with a discrimination, displacement or health and safety complaint against the state would have to file a grievance with the state. (If, however, they were considered employees, they could file a discrimination complaint with the EEOC under Title VII.)

(2) Following the initial assessment and review and the development of the employability plan with respect to any participant in the program, the State agency may require the participant (or the adult caretaker in the family of which the participant is a member) to negotiate and enter into an agreement with the State agency that specifies such matters as the participant's obligations under the program, the duration of participation in the program, and the activities to be conducted and the services to be provided in the course of such participation. If the State agency exercises the option under the preceding sentence, the State agency must give the participant such assistance as he or she may require in reviewing and understanding the agreement.

(3) The State agency may assign a case manager to each participant and the participant's family. The case manager so assigned must be responsible for assisting the family to obtain any services which may be needed to assure effective participation in the program.

(c) PROVISION OF PROGRAM AND EMPLOYMENT INFORMATION.—(1) The State agency must ensure that all applicants for and recipients of aid to families with dependent children are encouraged, assisted, and required to fulfill their responsibilities to support their children by preparing for, accepting, and retaining such employment as they are capable of performing.

(2) The State agency must inform all applicants for and recipients of aid to families with dependent children of the education, employment, and training opportunities, and the support services (including child care and health coverage transition options), for which they are eligible, the obligations of the State agency, and the rights, responsibilities, and obligations of participants in the program.

(3) The State agency must—

(A) provide (directly or through arrangements with others) information on the types and locations of child care services reasonably accessible to participants in the program,

(B) inform participants that assistance is available to help them select appropriate child care services, and

(C) on request, provide assistance to participants in obtaining child care services.

(4) The State agency must inform applicants for and recipients of aid to families with dependent children of the grounds for exemption from participation in the program and the consequences of refusal to participate if not exempt, and provide other appropriate information with respect to such participation.

(5) Within one month after the State agency gives a recipient of aid to families with dependent children the information described in the preceding provisions of this paragraph, the State agency must notify such recipient of the opportunity to indicate his or her desire to participate in the program, including a clear description of how to enter the program.

(d) SERVICES AND ACTIVITIES UNDER THE PROGRAM.—(1)(A) In carrying out the program, each State shall make available a broad range of services and activities to aid in carrying out the purpose of this part. Such services and activities—

(i) shall include—

(I) educational activities (as appropriate), including high school or equivalent education (combined with training as needed), basic and remedial education to achieve a basic literacy level, and education for individuals with limited English proficiency;

(II) job skills training;

(III) job readiness activities to help prepare participants for work; and

((IV) job development and job placement; and

(ii) must also include at least 2 of the following:

(I) group and individual job search as described in subsection (g);

(II) on-the-job training;

(III) work supplementation programs as described in subsection (e); and

(IV) community work experience programs as described in subsection (f) or any other work experience program approved by the Secretary.

(B) The State may also offer to participants under the program (i) postsecondary education in appropriate cases, and (ii) such other education, training, and employment activities as may be determined by the State and allowed by regulations of the Secretary.

(2) If the State requires an individual who has attained the age of 20 years and has not earned a high school diploma (or equivalent) to participate in the program, the State agency shall include educational activities consistent with his or her employment goals as a component of the individual's participation in the program, unless the individual demonstrates a basic literacy level, or the employability plan for the individual identifies a long-term employment goal that does not require a high school diploma (or equivalent). Any other services or activities to which such a participant is assigned may not be permitted to interfere with his or her participation in an appropriate educational activity under this subparagraph.

(3) Notwithstanding any other provision of this section, the Secretary shall permit up to 5 States to provide services under the program, on a voluntary or mandatory basis, to non-custodial parents who are unemployed and unable to meet their child support obligations. Any State providing services to non-custodial parents pursuant to this paragraph shall evaluate the provision of such services, giving particular attention to the extent to which the provision of such services to those parents is contributing to the achievement of the purpose of this part, and shall report the results of such evaluation to the Secretary.

(e) WORK SUPPLEMENTATION PROGRAM.—(1) Any State may institute a work supplementation program under which such State, to the extent it considers appropriate, may reserve the sums that would otherwise be payable to participants in the program as aid to families with dependent children and use such sums instead for the purpose of providing and subsidizing jobs for such participants (as described in paragraph (3)(C)(i) and (ii)), as an alternative to the aid to families with dependent children that would otherwise be so payable to them.

(2)(A) Notwithstanding section 406 or any other provision of law, Federal funds may be paid to a State under part A, subject to this subsection, with respect to expenditures incurred in operating a work

(B) Nothing in this part, or in any State plan approved under part A, shall be construed to prevent a State from operating (on such terms and conditions and in such cases as the State may find to be necessary or appropriate) a work supplementation program in accordance with this subsection and section 484.

(C) Notwithstanding section 402(a)(23) or any other provision of law, a State may adjust the levels of the standards of need under the State plan as the State determines to be necessary and appropriate for carrying out a work supplementation program under this subsection.

(D) Notwithstanding section 402(a)(1) or any other provision of law, a State operating a work supplementation program under this subsection may provide that the need standards in effect in those areas of the State in which such program is in operation may be different from the need standards in effect in the areas in which such program is not in operation, and such State may provide that the need standards for categories of recipients may vary among such categories to the extent the State determines to be appropriate on the basis of ability to participate in the work supplementation program.

(E) Notwithstanding any other provision of law, a State may make such further adjustments in the amounts of the aid to families with dependent children paid under the plan to different categories of recipients (as determined under subparagraph (D)) in order to offset increases in benefits from needs-related programs (other than the State plan approved under part A) as the State determines to be necessary and appropriate to further the purposes of the work supplementation program.

(F) In determining the amounts to be reserved and used for providing and subsidizing jobs under this subsection as described in paragraph (1), the State may use a sampling methodology.

(G) Notwithstanding section 402(a)(8) or any other provision of law, a State operating a work supplementation program under this subsection (i) may reduce or eliminate the amount of earned income to be disregarded under the State plan as the State determines to be necessary and appropriate to further the purposes of the work supplementation program, and (ii) during one or more of the first 9 months of an individual's employment pursuant to a program under this section, may apply to the wages of the individual the provisions of subparagraph (A)(iv) of section 402(a)(8) without regard to the provisions of subparagraph (B)(ii)(II) of such section.

(3)(A) A work supplementation program operated by a State under this subsection may provide that any individual who is an eligible individual (as determined under subparagraph (B)) shall take a supplemented job (as defined in subparagraph (C)) to the extent that supplemented jobs are available under the program. Payments by the State to individuals or to employers under the work supplementation program shall be treated as expenditures incurred by the State for aid to families with dependent children except as limited by paragraph (4).

(B) For purposes of this subsection, an eligible individual is an individual who is in a category which the State determines should be eligible to participate in the work supplementation program, and who would, at the time of placement in the job involved, be eligible for aid to families with dependent children under an approved State plan if such State did not have a work supplementation program in effect.

(C) For purposes of this section, a supplemented job is—

(i) a job provided to an eligible individual by the State or local agency administering the State plan under part A; or

(ii) a job provided to an eligible individual by any other employer for which all or part of the wages are paid by such State or local agency.

A State may provide or subsidize under the program any job which such State determines to be appropriate.

(D) At the option of the State, individuals who hold supplemented jobs under a State's work supplementation program shall be exempt from the retrospective budgeting requirements imposed pursuant to section 402(a)(13)(A)(ii) (and the amount of the aid which is payable to the family of any such individual for any month, or which would be so payable but for the individual's participation in the work supplementation program, shall be determined on the basis of the income and other relevant circumstances in that month).

(4) The amount of the Federal payment to a State under section 403 for expenditures incurred in making payments to individuals and employers under a work supplementation program under this subsection shall not exceed an amount equal to the amount which would otherwise be payable under such section if the family of each individual employed in the program established in such State under this subsection had received the maximum amount of aid to families with dependent children payable under the State plan to such a family with no income (without regard to adjustments under paragraph (2)) for the lesser of (A) 9 months, or (B) the number of months in which such individual was employed in such program.

(5)(A) Nothing in this subsection shall be construed as requiring the State or local agency administering the State plan to provide employee status to an eligible individual to whom it provides a job under the work supplementation program (or with respect to whom it provides all or part of the wages paid to the individual by another entity under such program), or as requiring any State or local agency to provide that an eligible individual filling a job position provided by another entity under such program be provided employee status by such entity during the first 13 weeks such individual fills that position.

(B) Wages paid under a work supplementation program shall be considered to be earned income for purposes of any provision of law.

(6) Any State that chooses to operate a work supplementation program under this subsection shall provide that any individual who participates in such program, and any child or relative of such individual (or other individual living in the same household as such individual) who would be eligible for aid to families with dependent children under the State plan approved under part A if such State did not have a work supplementation program, shall be considered individuals receiving aid to families with dependent children under the State plan approved under part A for purposes of eligibility for medical assistance under the State plan approved under title XIX.

(7) No individual receiving aid to families with dependent children under a State plan shall be excused by reason of the fact that such

State has a work supplementation program from any requirement of this part relating to work requirements, except during periods in which such individual is employed under such work supplementation program.

(f) COMMUNITY WORK EXPERIENCE PROGRAM.—(1)(A) Any State may establish a community work experience program in accordance with this subsection. The purpose of the community work experience program is to provide experience and training for individuals not otherwise able to obtain employment, in order to assist them to move into regular employment. Community work experience programs shall be designed to improve the employability of participants through actual work experience and training and to enable individuals employed under community work experience programs to move promptly into regular public or private employment. The facilities of the State public employment offices may be utilized to find employment opportunities for recipients under this program. Community work experience programs shall be limited to projects which serve a useful public purpose in fields such as health, social service, environmental protection, education, urban and rural development and redevelopment, welfare, recreation, public facilities, public safety, and day care. To the extent possible, the prior training, experience, and skills of a recipient shall be used in making appropriate work experience assignments.

(B)(i) A State that elects to establish a community work experience program under this subsection shall operate such program so that each participant (as determined by the State) either works or undergoes training (or both) with the maximum number of hours that any such individual may be required to work in any month being a number equal to the amount of the aid to families with dependent children payable with respect to the family of which such individual is a member under the State plan approved under this part, divided by the greater of the Federal minimum wage or the applicable State minimum wage (and the portion of a recipient's aid for which the State is reimbursed by a child support collection shall not be taken into account in determining the number of hours that such individual may be required to work).

(ii) After an individual has been assigned to a position in a community work experience program under this subsection for 9 months, such individual may not be required to continue in that assignment unless the maximum number of hours of participation is no greater than (I) the amount of the aid to families with dependent children payable with respect to the family of which such individual is a member under the State plan approved under this part (excluding any portion of such aid for which the State is reimbursed by a child support payment), divided by (II) the higher of (a) the Federal minimum wage or the applicable State minimum wage, whichever is greater, or (b) the rate of pay for individuals employed in the same or similar occupations by the same employer at the same site.

(C) Nothing contained in this subsection shall be construed as authorizing the payment of aid to families with dependent children as compensation for work performed, nor shall a participant be entitled to a salary or to any other work or training expense provided under any other provision of law by reason of his participation in a program under this subsection.

(D) Nothing in this part or in any State plan approved under this part shall be construed to prevent a State from operating (on such terms and conditions and in such cases as the State may find to be necessary or appropriate) a community work experience program in accordance with this subsection and subsection (d).

(E) Participants in community work experience programs under this subsection may perform work in the public interest (which otherwise meets the requirements of this subsection) for a Federal office or agency with its consent, and, notwithstanding section 1342 of title 31, United States Code, or any other provision of law, such agency may accept such services, but such participants shall not be considered to be Federal employees for any purpose.

(2) After each 6 months of an individual's participation in a community work experience program under this subsection, and at the conclusion of each assignment of the individual under such program, the State agency must provide a reassessment and revision, as appropriate, of the individual's employability plan.

(3) The State agency shall provide coordination among a community work experience program operated pursuant to this subsection, any program of job search under subsection (g), and the other employment-related activities under the program established by this section so as to insure that job placement will have priority over participation in the community work experience program, and that individuals eligible to participate in more than one such program are not denied aid to families with dependent children on the grounds of failure to participate in one such program if they are actively and satisfactorily participating in another. The State agency may provide that part-time participation in more than one such program may be required where appropriate.

(4) In the case of any State that makes expenditures in the form described in paragraph (1) under its State plan approved under section 482(a)(1), expenditures for the operation and administration of the program under this section may not include, for purposes of section 403, the cost of making or acquiring materials or equipment in connection with the work performed under a program referred to in paragraph (1) or the cost of supervision of work under such program, and may include only such other costs attributable to such programs as are permitted by the Secretary.

(g) JOB SEARCH PROGRAM.—(1) The State agency may establish and carry out a program of job search for individuals participating in the program under this part.

(2) Notwithstanding section 402(a)(19)(B)(i), the State agency may require job search by an individual applying for or receiving aid to families with dependent children (other than an individual described in section 402(a)(19)(C) who is not an individual with respect to whom section 402(a)(19)(D) applies)—

(A) subject to the next to last sentence of this paragraph, beginning at the time such individual applies for aid to families with dependent children and continuing for a period (prescribed by the State) of not more than 8 weeks (but this requirement may not be used as a reason for any delay in making a determination of an individual's eligibility for such aid or in issuing a payment to or on behalf of any individual who is otherwise eligible for such aid); and

PROVISIONS GENERALLY APPLICABLE TO PROVISION OF SERVICES

SEC. 484. [42 U.S.C. 684] (a) In assigning participants in the program under this part to any program activity, the State agency shall assure that—

(1) each assignment takes into account the physical capacity, skills, experience, health and safety, family responsibilities, and place of residence of the participant;

(2) no participant will be required, without his or her consent, to travel an unreasonable distance from his or her home or remain away from such home overnight;

(3) individuals are not discriminated against on the basis of race, sex, national origin, religion, age, or handicapping condition, and all participants will have such rights as are available under any applicable Federal, State, or local law prohibiting discrimination;

(4) the conditions of participation are reasonable, taking into account in each case the proficiency of the participant and the child care and other supportive services needs of the participant; and

(5) each assignment is based on available resources, the participant's circumstances, and local employment opportunities.

(b) Appropriate workers' compensation and tort claims protection must be provided to participants on the same basis as they are provided to other individuals in the State in similar employment (as determined under regulations of the Secretary).

(c) No work assignment under the program shall result in—

(1) the displacement of any currently employed worker or position (including partial displacement such as a reduction in the hours of nonovertime work, wages, or employment benefits), or result in the impairment of existing contracts for services or collective bargaining agreements;

(2) the employment or assignment of a participant or the filling of a position when (A) any other individual is on layoff from the same or any equivalent position, or (B) the employer has terminated the employment of any regular employee or otherwise reduced its workforce with the effect of filling the vacancy so created with a participant subsidized under the program; or

(3) any infringement of the promotional opportunities of any currently employed individual.

Funds available to carry out the program under this part may not be used to assist, promote, or deter union organizing. No participant may be assigned under section 482(e) or (f) to fill any established unfilled position vacancy.

(d)(1) The State shall establish and maintain (pursuant to regulations jointly issued by the Secretary and the Secretary of Labor) a grievance procedure for resolving complaints by regular employees or their representatives that the work assignment of an individual under the program violates any of the prohibitions described in subsection (c). A decision of the State under such procedure may be appealed to the Secretary of Labor for investigation and such action as such Secretary may find necessary.

(2) The State shall hear complaints with respect to working conditions and workers' compensation, and wage rates in the case of

individuals participating in community work experience programs described in section 482(f), under the State's fair hearing process. A decision of the State under such process may be appealed to the Secretary of Labor under such conditions as the joint regulations issued under subsection (f) may provide.

(e) The provisions of this section apply to any work-related programs and activities under this part, and under any other work-related programs and activities authorized (in connection with the AFDC program) under section 1115.

(f) The Secretary of Health and Human Services and the Secretary of Labor shall jointly prescribe and issue regulations for the purpose of implementing and carrying out the provisions of this section, in accordance with the timetable established in section 203(a) of the Family Support Act of 1988[256].

CONTRACT AUTHORITY

SEC. 485. [42 U.S.C. 685] (a) The State agency that administers or supervises the administration of the State's plan approved under section 402 shall carry out the programs under this part directly or through arrangements or under contracts with administrative entities under section 4(2) of the Job Training Partnership Act[257], with State and local educational agencies, and with other public agencies or private organizations (including community-based organizations as defined in section 4(5) of such Act).

(b) Arrangements and contracts entered into under subsection (a) may cover any service or activity (including outreach) to be made available under the program to the extent that the service or activity is not otherwise available on a nonreimbursable basis.

(c) The State agency and private industry councils (as established under section 102 of the Job Training Partnership Act) shall consult on the development of arrangements and contracts under the program established under a plan approved under section 482(a)(1), and under programs established under such Act.

(d) In selecting service providers, the State agency shall take into account appropriate factors which may include past performance in providing similar services, demonstrated effectiveness, fiscal accountability, ability to meet performance standards, and such other factors as the State may determine to be appropriate.

(e) The State agency shall use the services of each private industry council to identify and provide advice on the types of jobs available or likely to become available in the service delivery area (as defined in the Job Training Partnership Act) of the council, and shall ensure that the State program provides training in any area for jobs of a type which are, or are likely to become, available in the area.

INITIAL STATE EVALUATIONS

SEC. 486. [42 U.S.C. 686] (a) With the objective of—

(1) providing an in-depth assessment of potential participants in the program under this part in each State, so as to furnish an accurate picture on which to base estimates of future demands

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[256] P.L. 100-485.
[257] P.L. 97-300.

"(c) NONDISCRIMINATION PROVISIONS.—The following provisions of law shall apply to any program or activity which receives funds provided under this part:

"(1) The Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.).

"(2) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).

"(3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

"(4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).

"(d) ALIENS.—For special rules relating to the treatment of aliens, see section 402 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

42 USC 609.

"SEC. 409. PENALTIES.

"(a) IN GENERAL.—Subject to this section:

"(1) USE OF GRANT IN VIOLATION OF THIS PART.—

"(A) GENERAL PENALTY.—If an audit conducted under chapter 75 of title 31, United States Code, finds that an amount paid to a State under section 403 for a fiscal year has been used in violation of this part, the Secretary shall reduce the grant payable to the State under section 403(a)(1) for the immediately succeeding fiscal year quarter by the amount so used.

"(B) ENHANCED PENALTY FOR INTENTIONAL VIOLATIONS.—If the State does not prove to the satisfaction of the Secretary that the State did not intend to use the amount in violation of this part, the Secretary shall further reduce the grant payable to the State under section 403(a)(1) for the immediately succeeding fiscal year quarter by an amount equal to 5 percent of the State family assistance grant.

"(2) FAILURE TO SUBMIT REQUIRED REPORT.—

"(A) IN GENERAL.—If the Secretary determines that a State has not, within 1 month after the end of a fiscal quarter, submitted the report required by section 411(a) for the quarter, the Secretary shall reduce the grant payable to the State under section 403(a)(1) for the immediately succeeding fiscal year by an amount equal to 4 percent of the State family assistance grant.

"(B) RESCISSION OF PENALTY.—The Secretary shall rescind a penalty imposed on a State under subparagraph (A) with respect to a report if the State submits the report before the end of the fiscal quarter that immediately succeeds the fiscal quarter for which the report was required.

"(3) FAILURE TO SATISFY MINIMUM PARTICIPATION RATES.—

"(A) IN GENERAL.—If the Secretary determines that a State to which a grant is made under section 403 for a fiscal year has failed to comply with section 407(a) for the fiscal year, the Secretary shall reduce the grant payable to the State under section 403(a)(1) for the immediately succeeding fiscal year by an amount equal to not more than the applicable percentage of the State family assistance grant.

"(B) APPLICABLE PERCENTAGE DEFINED.—As used in subparagraph (A), the term 'applicable percentage' means, with respect to a State—

"(i) if a penalty was not imposed on the State under subparagraph (A) for the immediately preceding fiscal year, 5 percent; or

"(ii) if a penalty was imposed on the State under subparagraph (A) for the immediately preceding fiscal year, the lesser of—

"(I) the percentage by which the grant payable to the State under section 403(a)(1) was reduced for such preceding fiscal year, increased by 2 percentage points; or

"(II) 21 percent.

"(C) PENALTY BASED ON SEVERITY OF FAILURE.—The Secretary shall impose reductions under subparagraph (A) with respect to a fiscal year based on the degree of noncompliance, and may reduce the penalty if the noncompliance is due to circumstances that caused the State to become a needy State (as defined in section 403(b)(6)) during the fiscal year.

"(4) FAILURE TO PARTICIPATE IN THE INCOME AND ELIGIBILITY VERIFICATION SYSTEM.—If the Secretary determines that a State program funded under this part is not participating during a fiscal year in the income and eligibility verification system required by section 1137, the Secretary shall reduce the grant payable to the State under section 403(a)(1) for the immediately succeeding fiscal year by an amount equal to not more than 2 percent of the State family assistance grant.

"(5) FAILURE TO COMPLY WITH PATERNITY ESTABLISHMENT AND CHILD SUPPORT ENFORCEMENT REQUIREMENTS UNDER PART D.—Notwithstanding any other provision of this Act, if the Secretary determines that the State agency that administers a program funded under this part does not enforce the penalties requested by the agency administering part D against recipients of assistance under the State program who fail to cooperate in establishing paternity or in establishing, modifying, or enforcing a child support order in accordance with such part and who do not qualify for any good cause or other exception established by the State under section 454(29), the Secretary shall reduce the grant payable to the State under section 403(a)(1) for the immediately succeeding fiscal year (without regard to this section) by not more than 5 percent.

"(6) FAILURE TO TIMELY REPAY A FEDERAL LOAN FUND FOR STATE WELFARE PROGRAMS.—If the Secretary determines that a State has failed to repay any amount borrowed from the Federal Loan Fund for State Welfare Programs established under section 406 within the period of maturity applicable to the loan, plus any interest owed on the loan, the Secretary shall reduce the grant payable to the State under section 403(a)(1) for the immediately succeeding fiscal year quarter (without regard to this section) by the outstanding loan amount, plus the interest owed on the outstanding amount. The Secretary shall not forgive any outstanding loan amount or interest owed on the outstanding amount.

"(7) FAILURE OF ANY STATE TO MAINTAIN CERTAIN LEVEL OF HISTORIC EFFORT.—

WR-FLSA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

June 19, 1997

TO: Dianna Fortuna

FROM: Ellen Vargyas
Legal Counsel

SUBJECT: Ramifications for Civil Rights Enforcement If Welfare Work Participants Are Not Considered To Be Employees

As we discussed yesterday, we are quite concerned about pending legislative proposals which would provide that welfare work participants are not "employees" if they are assigned to public agencies or non-profit organizations. This would effectively remove the protections of the laws enforced by the EEOC from these individuals, including Title VII, the Equal Pay Act, the Age Discrimination in Employment Act and the employment title of the Americans With Disabilities Act, since all of these laws are predicated on the existence of an employment relationship. These questions are by no means theoretical. We expect that numerous discrimination issues will be raised in connection with these programs including, for example:

- Harassment on the basis of sex, race and other prohibited bases.
- Discrimination in assignments between men and women and whites, blacks and Hispanics.
- Disability related issues including failure to provide reasonable accommodations and failure to provide any work opportunities to people with disabilities.

There are certainly important civil rights protections available through the federal funding civil rights statutes, including Title VI, Section 504, the Age Discrimination Act and Title IX, which would still be available. However, the coverage provided by these statutes is incomplete in important respects.

- Title VI prohibits discrimination on the basis of race and national origin by recipients of federal funds. However, since Title VI coverage follows the federal funds, there may not be coverage in programs funded exclusively through state or local and not

~~may not be coverage in programs funded exclusively through state or local and not~~ federal funds. Moreover, questions are raised regarding whether agencies or non-profit organizations to which welfare recipients are assigned would be covered under Title VI if the recipient continues to receive her grant, child care funds, etc. from the state agency and no actual funds go to the "employer."

- The same questions are raised regarding disability under Section 504 and age under the Age Discrimination Act.

- There would be no coverage of discrimination on the basis of religion since it is not addressed in any of the funding statutes.

- Coverage of sex discrimination would be extremely limited. Title IX only applies to educational programs and activities that receive federal funds. As a result, welfare participants in any other type of program or activity would receive no protection at all from sex discrimination, including harassment. The proposal to include gender in some sort of state administrative grievance procedure is totally inadequate since there are no standards, there is no meaningful enforcement mechanism and no remedies are specified. Under Title IX, the administrative remedy is defunding (of all federal funds) and judicial remedies, available through a private right of action, include uncapped damages for intentional discrimination. The bottom line is that sex discrimination would be treated completely differently -- and far less favorably than -- discrimination on the basis of race, national origin and disability.

Coverage by Title VII, the EPA, the ADEA, and the ADA would fill most of these gaps. Accordingly, it is our view that in order to adequately safeguard the civil rights of welfare recipients participating in work programs, it is essential to secure the coverage of both the federal funding civil rights statutes and the statutes enforced by the EEOC. I would be more than happy to be of any further assistance on any of these questions. Feel free to call me at 663-4637.

WR-
FLMA-

DRAFT LETTER TO HOUSE RULES COMMITTEE AND SENATE FINANCE COMMITTEE

We are writing to urge you not to include the provisions on the minimum wage and welfare work requirements reported out of the House Ways and Means and Education and the Workforce Committees in the reconciliation bill.

Because it demands responsibility and requires work, the welfare law that the President signed is the centerpiece of our efforts to transform welfare from a way of life to a second chance. The Administration's strong commitment to move people from welfare to work has already produced tremendous success: the welfare rolls have plummeted by over 20 percent since the President took office, with 2.9 million fewer people on welfare, largely because of our strong economy and the welfare waivers the Administration granted to 43 states.

Now the welfare law give us an unprecedented opportunity to work together to build on this success. We are pleased that we have maintained a good working relationship with the Congress as we have implemented the law, and that we have both adhered to an understanding that changes to the law must be considered on a bipartisan basis.

In order to succeed, however, our strategy must also reflect the reality that citizens confront when they try to leave the welfare rolls for work. Under the old system, welfare too often paid better than work. Turning this around has required us to move on many fronts. We insisted that the welfare law include an additional $4 billion for child care. We worked to increase child support collections, leading to dramatic growth of 50%. We expanded the earned income tax credit to help 40 million Americans. And we increased the minimum wage. Now we are working to make transportation more available and to expand health care coverage for the children of low-income working parents. Since the private sector must provide the bulk of the jobs for those leaving welfare, we have urged the corporate community to do its part, and a new Welfare to Work Partnership is now leading the business community's effort to extend job opportunities to those seeking to remake their lives. All of this is designed to ensure that those on welfare have the same incentive to work as the rest of our society -- because work is rewarded.

Now we face the minimum wage question. To be consistent with our goals in welfare reform, the Administration believes strongly that all those who can work should work, and that those who work should earn the minimum wage. By contrast, the House Ways and Means and Education and the Workforce Committees proposals would undermine our goals by effectively creating a subminimum wage for workfare participants. In addition, they would weaken the welfare law's work requirements -- requirements that were the subject of arduous negotiations and ultimately bipartisan agreement. It is not appropriate to propose

these changes in the context of a reconciliation bill to enact the bipartisan agreement to balance the budget.

Finally, it is important to note that neither Congress nor the President ever envisioned workfare as the primary tool to move people from welfare to work. While workfare has a limited, transitional role to play in many states, private sector jobs are the only way to ensure that those on welfare become truly independent. We are confident that states that are serious about welfare reform will be able to meet and exceed the work rates in the law, particularly if they emphasize private sector jobs where of course the minimum wage has always been a given.

We urge you to reject these proposals as we work together to create a fair and enduring system that requires and rewards work.

(FYI: I've asked for but don't yet have old NEC materials on why minimum wage is great)

"It was bad when I lost my check, but it just got real bad recently," said Ms. Holley, who initially declined to talk to a reporter, fearing he was a state worker who had come to take her children.

Convinced that she could no longer cope, Ms. Holley awoke on the morning of May 22 and decided to call the child welfare department herself, to place her children in foster care. At the last minute, her sister talked her out of it, emphasizing that Ms. Holley had hated her own years in foster care.

Instead, Ms. Holley persuaded her mother to care for the children, despite objections from her mother's boyfriend. But that plan too seems fragile. Within a week, her mother had become ill and returned the youngest of Ms. Holley's children, a 10-month-old boy named Kierre.

"I think we won't see the end result for a while," said Mary Allegretti, who supervises the program's child welfare reviews. She was speaking not only of Ms. Holley but also of the thousands of others who, exhausting benefits, enter the post-welfare world.

USA TODAY
June 18, 1997, Wednesday, FIRST EDITION

Welfare reform: Fine print could wipe out the whole book

BYLINE: Walter Shapiro

Let's begin with a modest psychological experiment. Gauge your reactions as you read the following sentence: Today's column will feature an in-depth look at some technical provisions in the $ 3 billion welfare-to-work bill being written this week by House and Senate committees.

As you completed the assignment, did you think:

A) I'm more likely to read Herodotus in the original Greek than finish the rest of this column.

B) I'm suddenly seized with an irresistible urge to check out the late box scores from the West Coast.

C) Now that Clinton and Congress have solved the welfare problem, please don't bother me with details.

D) Why can't Hype & Glory deal with the important issues, like adultery and Kelly Flinn's new book contract?

Our little experiment was designed to make a serious point: Eyes easily glaze over at the thought of examining the fine print of legislation. The problem is, when it comes to Congress, the devil is in the details. The welfare-to-work bill serves as a perfect case study of how maladroit legislative language can jeopardize a social experiment.

As long-time readers may recall, I offered loud lamentations last year when the president signed the Republican welfare bill. I still view the bill as heedlessly punitive. But now that the bill is law, I devoutly hope that my dire prophesies will prove unduly pessimistic. The ego-driven satisfaction of saying "I told you so" would be a paltry reward if it comes at the cost of welfare mothers begging in the streets.

That's why I am deeply concerned about government efforts to provide enough low-skill jobs to help welfare recipients meet the stiff work requirements in the law. Unless jobs are available in abundance, all the pious rhetoric about turning "welfare checks into paychecks" will be just more hollow promises. Clinton's $ 3 billion welfare-to-work bill is reform on the cheap, far too modest to help enough welfare mothers survive this wrenching transition.

But barring the discovery of oil on the White House lawn, the bill is as good as we are going to get in this era of austerity budgets. The White House deserves credit for grasping a truth that had long eluded right-wing firebrands: The private sector can't provide enough entry-level jobs, especially in the inner cities. The welfare-to-work bill would provide money to the states to create public-service jobs for welfare mothers and to offer subsidies to private employers to hire these high-risk workers.

As Congress writes the rules governing this money, most of the fireworks have been sparked by a House provision that would pay less than the minimum wage to participants in training and work programs. Supporters argue that if states were forced to pay minimum wage, there would not be enough money for job creation. At $ 5.15 an hour, a welfare mother working the required 30 hours a week would earn $ 618 a month, about $ 300 more than the average state welfare grant.

Republicans have always clung to the illusion that welfare reform was a way to save money. But amid shrinking welfare case loads, I believe that equity demands paying the minimum wage, even if it forces states to ante up more money. Senate Finance Committee Chairman William Roth abandoned the fight Thursday for a subminimum wage, but the issue is sure to return.

Far more alarming for those who care about job creation is the way that House Republicans caved in to the protect-our-jobs demands of public-service-employee unions like AFSCME. Two House committees have written bills brimming over with prohibitions on the kind of public-service jobs that can be created for welfare mothers. Exuding concern for the "displacement" of current state and local workers, the bills, in effect, would bar welfare workers from doing anything useful in the public sector.

By using union-sanctioned language from prior job-training legislation, the legislation also would bar welfare workers from activities that would "impair an existing contract for services or collective bargaining agreement." What that means is that new public-service jobs would be hamstrung by the same inflexible union rules that make city governments such pillars of efficiency.

Jason Turner, who designed Wisconsin's model welfare-to-work program, provides a vivid illustration of the way this sweeping legislative language would make a mockery of job-creation efforts. In Milwaukee, Turner explains, sanitation workers pick up garbage only from official curb-side containers. The plan was to employ welfare mothers to gather up trash in alleys and carry it to the authorized containers. "This bill would preclude it," Turner says, "because cleaning up the alleys would impinge on the regular activities of sanitation workers."

It's not too late to rescue the welfare-to-work bill. Wisconsin GOP Gov. Tommy Thompson complained in a letter to House Speaker Newt Gingrich this week that the current legislation "will gut welfare reform." In the struggle for social justice, count me on the side of the welfare mothers, not the unions.

U.S. Newswire
June 18, 1997 12:13 Eastern Time

DOL Wins Judgment for Job Shop Technical Services Inc., 401(k) Plan
BYLINE: Rita Ford of the Pension and Welfare Benefits Administration, 202-219-8921

The U.S. Department of Labor won a $2.7 million judgment against Job Shop Technical Services, Inc., in Farmingdale, N.Y., and Ralph Corace, the former trustee of the company's 401(k) plan, in the largest case brought by the department to date for 401(k) abuse.

"Millions of Americans depend on the department to protect their retirement benefits," said Secretary of Labor Alexis M. Herman. "Our actions are designed to stop the abuse and diversion of pension money so that workers can look forward to a secure retirement."

In a lawsuit filed by the department in October 1995, Corace was charged with failing for two years to forward employee contributions to the company's 401(k) plan. Job Shop Technical Services, Inc., which also operated under the name International Technical Services, was a national leasing company for engineers and consultants and maintained a 401(k) plan for 755 participants. At the time the abuses were alleged, the plan held approximately $4.3 million in assets.

Friday 6/27 - Interag mtg FLSA

I. Enforcement — i.e. St Dept of Labor

a. grievance proc now in bill

b. " " plus a fed appeal (Secy) → ALJ structure must be joined w/ gr. proc - bec poss people

c. priv. rt of actn < st ct / fed ct.

best, other than "employee" — just enf mech of FLSA — if viol occurs, then enf mech of FLSA applies.

TANF

Any sort of state penalty scheme? - → Don't have any real exper in this area.

enf mech

Obv: Should't be so burdensome

II. Other wkr protections

No mention of wkrs comp — 1 issue — HHS cases alt this too - without income guar, this becomes more imp.

Health & safety - OTR bill - basically OK / enf.

missing piece - only OSHA std - not clear whether OSHA process triggered - fallback is st gr. proc we're talked about

Discrimination - discrim - federally funded prog plus gender gr. procedure in bill

NO NLRB rts.

best to be "ee" otherwise - shortcut gr. proc.

Bue approach: If there are diffs, there are diffs - but have time limits - only x mos for placement / or have to reassess placement / or limit - then tip to prevailing wage

Displacement

Slightly less than in TANF;

no gen'l prohib on partial displacement

no priorities!

promotional issues

CBAs – overlaps w others? no cares really

impair/vitiate –

Who cares? no real diff?

Many – Use Wilson bill – work backwards.

Q's on FLSA 6-22-97

1. 1987 law rts + protections - which?
2. Not-for-profits - would have parties -
   not full rts + protections
3. Ed bill - prevailing wage - leave it in / fix in conf. ?

Under the new House minimum wage proposal, nearly 6 percent of those required to work could work less than 20 hours per week.

	Families whose TANF and Food Stamp Grant Won't Pay for 20 Hours a Week of Work at the Minimum Wage	Number of Families who could Potentially Work Less than 20 Hours a Week**
Mississippi	All families	38,411
West Virginia	Two person families*	13,000
Texas	Two person families*	87,877
Arkansas	Two person families*	7,881
South Carolina	Two person families*	12,655
Tennessee	Two person families*	26,329
Louisiana	Two person families*	28,294
Alabama	Two person families*	12,864
Total Number of Families with Benefits Too Low to Pay Minimum Wage for 20 Hours per Week		227,311
With 25% Participation Rate, Total Number of Families Who Could Potentially Work Less than 20 Hours per Week		56,827
U.S. Caseload Subject to 25% Participation Rate		1,004,250
Total who Could Potentially Work Less than 20 Hours Compared to Total Required to Work		5.6%

* Nationally, 40% of welfare families have two persons (i.e., one adult and one child). This analysis assumes that that 40% ratio applies to each of these states.

** Latest state data in hand (March 1997) is for recipients. These family numbers were derived from the state recipient numbers by assuming that each state follows national average of having 11.156/4.017 or 2.77 people per family.

When the work requirement rises to 30 hours per week, the benefits in all states except Alaska, HA, VT, CT, NY, NH, CA, RI, MA will fall below the minimum wage for a family of two. For families of three, benefits in 21 states will fall below the minimum wage.

KEY ELEMENTS OF HOUSE FLSA PLAN

I. Enforcement of the Minimum Wage

Current Law	House Proposal	Options (Weakest to strongest)
1. Wage & Hour Division can take action 2. Private right of action	No enforcement mechanism	1. State grievance procedure - w/hearing; no appeal (agency) 2. HHS/TANF/DOL penalty (how would Secy. determine?) - as acts agt ST. 3. CWEP: State hearing; can appeal to DOL - like Ed/Wkf. disp 4. Allow Wage and Hour to enforce and/or private right of action 5. Establish as employees

see displacement - hours provisions

weakest ↓ strongest

(for non-compliance not indiv grievance process)

- Indep. grievance board - (who would pick?)

- St ct priv rt of actic, w appeal?

II. Worker Protections

	Current Law	House Proposal	Options
Health and Safety	a. OSHA standard b. Duty clause, whistleblower protection c. Enforcement by OSHA inspectors	a. OSHA standard b. No c. Enforcement unclear – see (c) below - st hearing no appeal	1. CWEP standard that assignment must consider health and safety 2. Full OSHA protection
Discrimination	a. Employment-based rights enforced by EEOC and private right of action --Title VII --ADA b. Federal funding-based rights attached to TANF --Title VI – race/nat. --ADA – disabils --Section 504 – disabils --Age Disc Act c. Enforced by EEOC, private right of action, or withdrawal of Fed $	a. No, because presumably not employees b. Same as TANF, plus prohibits gender discrimination (Note no underlying law with enforcement mechanism attached) Would not apply to non-profits not receiving federal funds c. State process, hearing; Shall be remedies which may include: --no more placements --get job/wages back --equitable relief	1. CWEP standard: no discrimination and participants have such rights as are available under any applicable Federal, state, or local law 2. Pick among employment-based rights? 3. Coverage by employment-based rights even though not employees 4. Establish as employees 5. Establish that federal funding-based rights apply to non-profits Penalty to ST.

(better in worn than H?)

enforcement? as under

No penalty if ST doesn't have process at all.

Workers' Compensation	Full coverage?	Nothing	1. CWEP standard: protection on same basis as others in state in similar employment 2. Full coverage

III. Displacement

Can a participant in the program cause...	HR1385/ House Ed & Workforce	JTPA	TANF	House (applies to TANF)	Senate (applies to $3b)
the replacement of a worker who is fired or laid off?	No	No	No	No	No
reduced hours, wages, or benefits to a currently employed worker? (Partial displacement)	No	No	Yes	Yes	No
violation of a collective bargaining agreement?	No	No	Yes	No	No
impairment of a collective bargaining agreement or contracts for services?	No	No	Yes	Yes	No
inconsistency with a collective bargaining agreement?	No	Yes	Yes	Yes	No
infringement on promotional opportunities?	No	No	Yes	Yes	No

Options:

- o Partial displacement
- o Strengthen House to include "impair" collective bargaining agreement
- o Full HR 1385

Displacement Grievance Procedures

	TANF	HR1385, Ed/Wkforce, Senate	House	Options
Process	Undefined state process	a. Opportunity for a state hearing within 60 days b. Can appeal negative decision or inaction to DOL c. DOL action within 120 days	a. State process b. Hearing	1. Action by a time certain 2. Lose TANF $ 3. DOL appeal (like CWEP) 4. HR 1385
Remedies	None	a. Lose TANF $ b. No more placements c. get job/wages back d. equitable relief	Shall be remedies, which may include: a. no more placements b. get job/wages back c. equitable relief	

WR-FLSA

Diana Fortuna
06/25/97 10:43:42 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP
Subject: DOL FLSA document that's on hold

As you know, DOL's technical assistance document on the new House FLSA plan is still on hold and doesn't appear to be going anywhere. If it should suddenly spring free again, we have to decide whether to include a new section that DOL just added on the prevailing wage. It's purely descriptive.

My inclination is to drop it, since this prevailing wage thing is going to get dropped in all likelihood, just so that we aren't highlighting it ourselves. Not sure this is completely justifiable; but wondered if you had an opinion on this.

Bruce -
Diana prepared this memo late last week, on the basis of the agency meeting conducted a couple of weeks ago. It's now dated, but it might be useful for you to review it before we meet on this (+ other) subjects tomorrow. Elena

TO:

FROM:

SUBJECT: Options on Minimum Wage for Workfare Legislation

As you know, we have been steadfast in our position that welfare recipients engaged in workfare should receive the minimum wage. We oppose the current House proposal, arguing that it would undermine the fundamental goals of welfare reform. Since the House appears poised to pass a reconciliation bill contrary to our position, it is appropriate at this point for you/us to consider whether there are any modifications to current law that we would consider, or whether our opposition is so strong that you would veto any bill with a change to current law on this issue.

Background: In May, the Department of Labor issued a ruling that the Fair Labor Standards Act (FLSA) applies to welfare recipients in workfare programs, including payment of the minimum wage and labor protections such as occupational safety and anti-discrimination laws. There is an exclusion for trainees, but it is so narrowly drawn that states will probably find it difficult to meet its requirements and still count the activity toward the welfare law's work participation rates.

Initially, it should be comparatively easy for states to comply with the minimum wage requirement, particularly since we are allowing states to count food stamps as well. However, the requirement becomes more difficult over time as the work requirements increase from 20 to 30 hours a week. (Actually, the law allows states to keep the requirement at 20 hours indefinitely by using training to fill the hours from 20 to 30, but this is somewhat difficult from a practical standpoint, and some states have passed laws with tougher requirements.)

For example, only Mississippi's welfare grant is so low that it would have difficulty converting it into 20 hours of a minimum wage payment in 1998, in combination with food stamps, for the average family size of three. In that same year, eight states would fall short of this mark for families of only two. By the year 2000, the number of states with shortfalls grows to 21 for families of three, and to 41 states for families of two.

It is important to note that workfare is hardly the only tool available to states to move people from welfare to work. Workfare should have a limited, transitional role, since private sector jobs are the only way to ensure that those on welfare become truly independent.

Congressional Proposals: The House Republicans have language in their reconciliation bill that would exempt welfare recipients engaged in workfare from the Fair Labor Standards Act or any other federal law, except OSHA. It would

ostensibly require payment of the minimum wage, but would render this meaningless by permitting states to count child care, Medicaid, and housing benefits toward that payment. (The Department of Labor's ruling does allow states to count food stamps, since this is permitted under current law.) We have stated our view that this essentially creates a subminimum wage for workfare participants. Finally, it would also allow states to count additional hours of job search, education, and training toward the welfare law's work requirements. This would be the first weakening of the law's hard-won work requirements, and it would be a substantial weakening.

House Republicans and Democrats are now engaged in negotiations on this issue. They are considering dropping the Republican plan to count other benefits, relying instead on letting states count education and training as work where necessary. The Republicans also appear willing to compromise and extend anti-discrimination laws to those in workfare.

In contrast, the Senate has no FLSA language at this point, but they may simply be recognizing the likelihood that they would have difficulty with the issue on the floor, preferring to let it come up in conference.

If we decide to move from our current position, our alternatives would fall into four key areas.

Option 1: Count benefits other than food stamps toward the minimum wage: Counting Medicaid, child care, transportation, and/or housing benefits toward the payment of the minimum wage would make it far easier on states, but it would raise a number of other issues. First, since these benefits don't count toward the minimum wage for the working poor, it would effectively create a subminimum wage for those on welfare. Second, it could set a precedent for further erosion of the minimum wage by counting all kinds of other benefits for other low-wage workers. Third, it would make workers on workfare "cheaper" than those who are not, making displacement more likely. Finally, placing a value on these benefits is often very difficult to do, and requires recordkeeping and systems to keep them up-to-date that the states find burdensome.

Each agency offering a benefit feels strongly that that benefit should not count toward the minimum wage. HHS feels very strongly about Medicaid and, especially, child care. HUD argues vigorously against including housing benefits.

Option 2: Allow more activities to count toward the work requirements: This option is probably the one most attractive to the greatest number of parties, but it is a fundamental weakening of the hard-won work requirements in the law. Some may argue that we should embrace this proposal since the Republicans have given us political cover by proposing it themselves. However, to allow the states to

throw the work requirements overboard at the first sign of difficulty is not an auspicious start to implementing this law.

HHS and Labor would not oppose changes in this area.

Option 3: Exempt workfare participants from other labor protections: Although this option does not help states find the money to meet the minimum wage, apparently much of the states' anxiety on this issue is actually focused on labor protections. There seems to be general agreement, even from the Republicans, that OSHA protection and race/sex anti-discrimination statutes should apply. The hazier issues are enforcement of the minimum wage and other labor protections. These include whether individuals should have a private right of action; whether the Labor Department's Wage and Hour Division can bring an action; and whether workfare participants are eligible for unemployment insurance and benefits, overtime, and family and medical leave (what about ADA?). Obviously, it is possible to pick and choose from this list, either by starting with existing law and specifying which protections are excluded, or by saying that existing law does not apply and adding back certain protections.

The Department of Labor feels most strongly that we should not consider changes in this area, particularly in the area of enforcement.

Option 4: Exempt workfare recipients from FICA and the EITC: Treasury still has not ruled whether current law requires payment of FICA taxes and EITC for workfare recipients. These two issues are linked legally so that either both or neither will apply. The IRS is developing two scenarios for release. One outlines what type of state work program would require FICA and EITC payments, while the other explains the type of work program that would not trigger these payments. It seems probable that most states' programs would fall into the first category, making the states extremely unhappy. The IRS is still probably a few weeks away from completing this analysis.

We could agree to legislation specifying that workfare participants are not required to contribute to FICA and are not eligible for the EITC. This would be partially consistent with our 1994 welfare reform bill, which allowed the EITC but did not apply FICA. The logic of doing so is that it keeps private sector jobs more attractive than workfare for individuals, which is a crucial policy goal for us. And not allowing the EITC avoids increasing its identity as a "welfare" program.

Treasury strongly prefers to avoid amending the EITC, because they fear opening the program up to change on the Hill at this time.

WR - FLSA

Emily Bromberg
06/23/97 11:55:34 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: flsa

as you might expect, the republican governors are unhappy that the r's on the hill removed the language on minimum wage. fyi, republican govs may try to push nga to do a letter--and the chiles folks think he may sign on. i'll let you know how this proceeds...but if we go to the hill with a new position--one other than complete opposition to ways and means, we need to let chiles know asap.

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Diana Fortuna/OPD/EOP
Cynthia A. Rice/OPD/EOP
Janet Murguia/WHO/EOP
Craig T. Smith/WHO/EOP

WR-FLFA

Cynthia A. Rice 06/24/97 02:25:01 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP

cc:

Subject: Conversation on Workfare with Richard Schwartz

Bruce -- as you suggested, I had a long talk with Richard Schwartz who used to run NYC's workfare program and who is now a consultant for other local governments and some companies. Here are his views about what's important to make welfare reform work in the real world:

He thinks 20 hours of real work is enough -- that's what they did in New York (20 hpw for single parent families and 26 for two parent families). The remaining hours could be filled in w/job search and training. He says the value of workfare is it teaches people the "soft skills" like showing up every day on time and that companies like to hire people with an attendance track record. 20 hours a week is enough to accomplish this.

He thinks its fair to count Medicaid, child care, housing if necessary, although he doesn't oppose dropping them from the latest proposal.

He says lots of local governments want to contract out workfare to non-profits, have them operate and supervise workfare programs (Newark, which he's now advising, is doing this). He thinks non-profits operating workfare programs should operate under the same rules as government agencies. More important, he says, is to ensure that any exemptions are only for 'workfare' defined as a program having people do work which would otherwise not get done.] why?

He thinks strong anti-displacement language is needed, but he worries about opening up the possibility of lawsuits that could tie up welfare reform programs in the courts (he didn't have another enforcement mechanism to propose). He's more worried, by the way, about the possibilities of displacement and wage depression through the use of private sector wage subsidies than through workfare -- which is an argument for applying whatever new anti-displacement rules get through Congress to all of TANF, where more of this is likely to happen.]

He strongly dislikes the idea of time-limiting workfare -- i.e., saying someone can be put in workfare for only 9 months. He thinks that workfare should be used to give someone a track record of recent job experience, and that kicking them off of workfare will make employers less likely to want to hire them.

Whose edits? Leg Affr

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

LABOR BRANCH FAX SHEET

DATE: 6/23

TO: Elena Kagen 62878

FROM: Janet Himler

COMMENTS: ~~DOL Review of~~ FLSA + language

Elena - this is our first attempt at reviewing language from DOL. This has not been sent to anyone outside the Division (HRD)

NUMBER OF PAGES ~~3~~ 4
(INCLUDING COVER)

CONFIRMATION: (202) 395-3262
FAX NUMBER: (202) 395-1596

PRELIMINARY DRAFT FOR DISCUSSION ONLY: June 23, 1997: 8:45 PM

House Reconciliation Bill: Majority Staff Discussion Proposal

Employment Status: This draft eliminates the language that specifically states that welfare recipients in work experience and community service are not employees. However, the "Purpose" section and language throughout the proposal (particularly the Rule of Interpretation section) suggest that these welfare recipients are in these activities to gain experience or training and are not in "regular employment." Although this may be subject to interpretation by the courts (and any legislative history on this report could be critical), the result would likely be that participants in these activities would not be considered employees for purposes of employment protection laws -- regardless of the absence of an explicit statement that they are not employees.

Noncash Benefits: ~~Does not provide for the inclusion of noncash benefits other than food stamps in calculating the minimum wage. The current House proposals would also allow inclusion of Medicaid, child care, and housing.~~ Provides that the hours-of-work requirements be determined using the sum of the value of food stamps and TANF assistance, divided by the minimum wage

Work Activities and Minimum Wage Equivalency: Limits the number of hours that a welfare recipient can work in community service or workfare to the sum of the cash welfare benefit and food stamps minus child support divided by the minimum wage. (This is the first proposal that addresses the child support issue.) If this calculation falls short of the hours required to count towards participation rates (e.g., 20 hours per week in 1997), any other work activity (including training) can be used for the remaining hours -- notwithstanding the limits on training in the TANF law.

welfare-to-work

this proposal is the same as the calculation used in CWEP under the JOBS program.

Enforcement of Minimum Wage Equivalency and Hours Limitation: This proposal does not provide for coverage of welfare recipients in community service or work experience by the Fair Labor Standards Act. Nor does it provide any other mechanism for enforcing the minimum wage requirement for these recipients. ~~As a result, there is no means of ensuring that the minimum wage equivalency will be paid.~~ In addition, there is no provision for overtime or the other protections provided by the FLSA. (Note that there ~~are some~~ may be at least two states where the cash welfare grant plus food stamps would allow states to require more than 40 hours of work in a week.)

This proposal would apply the following worker protections to all welfare recipients in work activities under TANF -- not just those under the Welfare-to-Work program.

Health and Safety: This is the same language that was used in the ~~Job Consolidation~~ bill H.R. 1385, the House-passed training reform and in JTPA. ~~It~~ applies federal and state OSHA standards but ~~other provisions of the OSH Act arguably would not apply.~~ drop

Discrimination: Welfare recipients in work experience or community service will only be covered by employment based anti-discrimination laws (like Title VII) if they are considered employees. However, as stated above, they may not be found in have employment status under this proposal despite the fact that the language does not explicitly state that they are not employees.

In addition, the gender discrimination prohibition in the proposal does not provide for a ~~federal~~ remedy. Only the state grievance procedure in the proposal would be available for welfare recipients in community service or work experience subjected to gender discrimination or sexual harassment. ~~There is no provision for an appeal to the federal government or judicial system.~~

neutral third-party

Nondisplacement: This proposal retains most of the current TANF ~~prohibitions~~ provisions. However, it is narrower than the provisions contained in the Education and Workforce Committee bill.

- It drops the general prohibition against displacing (including partial displacement) a current employee and replaces the provision with the current TANF provision that specifically permits a participant to fill a vacant employment position.
- It narrows the prohibition relating to collective bargaining agreements in contracts for services. The Education and Workforce provision prohibits "impairment" of such agreements and prohibits work activities that are inconsistent with such agreements. This proposal simply prohibits the violation of such agreements.
- It drops the prohibition against placing the participant in a job that infringes upon the promotional opportunities of current employees.
- It drops the provision in the TANF statute which provides that these prohibitions do not preempt or supersede provisions of state or local law that provide greater protection for employees from displacement.

Grievance Procedure: The proposal only provides for filing of grievances with the state. It does not allow for ~~any federal~~ appeal. Consequently, a welfare recipient with a discrimination, displacement or health and safety complaint against the state would have to file a grievance with the state. (If, however, they were considered employees, they could file a health and safety complaint with OSHA or a discrimination complaint with the EEOC under Title VII.)

a neutral third-party

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

LABOR BRANCH FAX SHEET

DATE: 6/24

TO: Elena Kagen / Diana Fortuna

FROM: Janet Himler (5-7751)
Matt Hauk (5-3262)

COMMENTS:

Unedited version
Please look at the two new sections - "Compensation" and "Worker's Compensation"

NUMBER OF PAGES 3
(INCLUDING COVER)

CONFIRMATION: (202) 395-3262
FAX NUMBER: (202) 395-1596

PRELIMINARY DRAFT FOR DISCUSSION ONLY: June 24, 1997: 9:00 AM

House Reconciliation Bill: Majority Staff Discussion Proposal

Employment Status: This draft eliminates the language that specifically states that welfare recipients in work experience and community service are not employees. However, the "Purpose" section and language throughout the proposal (particularly the Rule of Interpretation section[1]) suggest that these welfare recipients are in these activities to gain experience or training and are not in "regular employment." Although this may be subject to interpretation by the courts (and any legislative history on this report could be critical), the result would likely be that participants in these activities would not be considered employees for purposes of employment protection laws.

Noncash Benefits: Does not provide for the inclusion of noncash benefits other than food stamps in calculating the minimum wage. The current House proposals would also allow inclusion of Medicaid, child care, and housing.

Work Activities and Minimum Wage Equivalency: Limits the number of hours that a welfare recipient can work in community service or workfare to the sum of the cash welfare benefit and food stamps minus child support divided by the minimum wage. (This is the first proposal that addresses the child support issue.) If this calculation falls short of the hours required to count towards participation rates (e.g., 20 hours per week in 1997), any other work activity (including training) can be used for the remaining hours -- notwithstanding the limits on training in the TANF law.

Enforcement of Minimum Wage Equivalency and Hours Limitation: This proposal does not provide for coverage of welfare recipients in community service or work experience by the Fair Labor Standards Act. Nor does it provide any other mechanism for enforcing the minimum wage requirement for these recipients. As a result, there is no means of ensuring that the minimum wage equivalency will be paid. In addition, there is no provision for overtime or the other protections provided by the FLSA. (Note that there are some states where the cash welfare grant plus food stamps would allow states to require more than 40 hours of work in a week.)

Compensation: This proposal does not include language that was included in the Education and Workforce bill that required welfare recipients working in unsubsidized employment, subsidized private sector employment or subsidized public sector employment to be compensated "at the same rates, including periodic increases, as trainees or employees who are similarly situated in similar occupations by the same employer and who have similar training, experience and skills."

---

[1] This language, which states that cash assistance is not to be considered a salary or compensation for the purpose of other laws, may also clarify issues regarding the tax treatment of the cash welfare benefit.

Workers' Compensation: This proposal does not include the language that was contained in both committees' reconciliation bills that applied state workers' compensation laws to welfare recipients on the same basis as the protection is provided to other individuals in the State in similar employment. As a result, welfare recipients in community service and work experience who are not considered employees may lose workers' compensation coverage.

This proposal would apply the following worker protections to all welfare recipients in work activities under TANF – not just those under the Welfare-to-Work program.

Health and Safety: This is the same language that was used in the Job Consolidation bill and in JTPA. It applies federal and state OSHA standards but other provisions of the OSH Act arguably would not apply.

Discrimination: Welfare recipients in work experience or community service will only be covered by employment based anti-discrimination laws (like Title VII) if they are considered employees. However, as stated above, they may not be found to have employment status under this proposal.

In addition, the gender discrimination prohibition in the proposal does not provide for a federal remedy. Only the state grievance procedure in the proposal would be available for welfare recipients in community service or work experience subjected to gender discrimination or sexual harassment. There is no provision for an appeal to the federal government or judicial system.

Nondisplacement: This proposal retains the current TANF prohibitions. However, it is narrower than the provisions contained in the Education and Workforce Committee bill.

- It drops the general prohibition against displacing (including partial displacement) a current employee and replaces the provision with the current TANF provision that specifically permits a participant to fill a vacant employment position.
- It narrows the prohibition relating to collective bargaining agreements and contracts for services. The Education and Workforce provision prohibits "impairment" of such agreements and prohibits work activities that are inconsistent with such agreements. This proposal simply prohibits the violation of such agreements.
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- It drops the provision in the TANF statute which provides that these prohibitions do not preempt or supersede provisions of state or local law that provide greater protection for employees from displacement.

Grievance Procedure: The proposal only provides for filing of grievances with the state. It does not allow for any federal appeal. Consequently, a welfare recipient with a discrimination, displacement or health and safety complaint against the state would have to file a grievance with the state. (If, however, they were considered employees, they could file a health and safety complaint with OSHA or a discrimination complaint with the EEOC under Title VII.)

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

LABOR BRANCH FAX SHEET

DATE: 6/23

TO: Elena Kagen 62870

FROM: Janet Himler

COMMENTS: DOL Review of FLSA + language

NUMBER OF PAGES 4
(INCLUDING COVER)

CONFIRMATION: (202) 395-3262
FAX NUMBER: (202) 395-1598

SPECIAL

UNITED STATES DEPARTMENT OF LABOR

FACSIMILE TRANSMISSION

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS

200 Constitution Avenue, N.W.
Room S-1325
Washington, DC 20210

Confirmation: 202/219-6141

6/23

TO: Janet Hemler
DEPARTMENT/COMPANY: OMB
FACSIMILE NUMBER: 395-1596
FROM: DARLA LETOURNEAU
NUMBER OF PAGES INCLUDING COVER:

FACSIMILE REPLIES:

CONGRESSIONAL AFFAIRS	202/219-5120
INTERGOVERNMENTAL AFFAIRS	202/219-5736
IMMEDIATE OFFICE OF THE ASSISTANT SECRETARY	202/219-5288

MESSAGE:

Here's draft FLSA language analysis. Need OMB blessing

PRELIMINARY DRAFT FOR DISCUSSION ONLY: June 23, 1997: 8:45 PM

House Reconciliation Bill: Majority Staff Discussion Proposal

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Noncash Benefits: Does not provide for the inclusion of noncash benefits other than food stamps in calculating the minimum wage. The current House proposals would also allow inclusion of Medicaid, child care, and housing.

Work Activities and Minimum Wage Equivalency: Limits the number of hours that a welfare recipient can work in community service or workfare to the sum of the cash welfare benefit and food stamps minus child support divided by the minimum wage. (This is the first proposal that addresses the child support issue.) If this calculation falls short of the hours required to count towards participation rates (e.g., 20 hours per week in 1997), any other work activity (including training) can be used for the remaining hours -- notwithstanding the limits on training in the TANF law.

Enforcement of Minimum Wage Equivalency and Hours Limitation: This proposal does not provide for coverage of welfare recipients in community service or work experience by the Fair Labor Standards Act. Nor does it provide any other mechanism for enforcing the minimum wage requirement for these recipients. As a result, there is no means of ensuring that the minimum wage equivalency will be paid. In addition, there is no provision for overtime or the other protections provided by the FLSA. (Note that there are some states where the cash welfare grant plus food stamps would allow states to require more than 40 hours of work in a week.)

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> **Health and Safety:** This is the same language that was used in the Job Consolidation bill and in JTPA. It applies federal and state OSHA standards but other provisions of the OSH Act arguably would not apply.
>
> **Discrimination:** Welfare recipients in work experience or community service will only be covered by employment based anti-discrimination laws (like Title VII) if they are considered employees. However, as stated above, they may not be found to have employment status under this proposal despite the fact that the language does not explicitly state that they are not employees.

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Hilley mtg on FLSA 6-22-97

1. Prevailing or minimum wage ?

Colton - where are Dems?
What's possible here?

1. Exempt certain laws
2. 1938 law - 1+3 only
(where's the enf?)
2 mechanisms?

need OSHA/enf on min wage.

Diana Fortuna
06/23/97 11:44:13 AM

Record Type: Record

To: Laura Emmett/WHO/EOP

cc:
Subject: Here it is

Could you please give to Elena and tell her it's a draft letter for Senate floor debate and we have to comment asap. I want to know if language in bold is OK with her.

Minimum Wage and Workfare

The reported bill appropriately refrains from modifying current law with respect to the application of the minimum wage and other worker protections for working welfare recipients under TANF. The Administration believes strongly that everyone who can work must work, and everyone who works should earn at least the minimum wage **and receive the protections of existing employment laws** -- whether or not they are coming off welfare.

WR - FLSA

Cynthia A. Rice 06/17/97 06:54:04 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc: Diana Fortuna/OPD/EOP, Elisabeth Stock/OVP @ OVP

Subject: Today's Welfare Strategy Meeting

A few important issues were discussed:

1)Strategy on Minimum Wage: Dept. of Labor wants to know what are the plans for the high profile White House media strategy on minimum wage. Elena -- were you going to talk to Podesta about this? Seth said Podesta told a large group of labor leaders 10 days ago that the White House would have a public and high profile message strategy. Geri says that the House Democratic leadership is gearing up and that they will define a message if we don't. Gephardt may do an event tomorrow and build up for a floor fight next week. In the House they want to tie minimum wage exemptions with other policies which hurt low wage workers, such as a tax provision on independent contractors which apparently makes it easier for employers to label someone an independent contractor instead of an employee.

Also, Labor wants to know how they can be better plugged into the conference negotiation strategy, which they expect to be a budget negotiators-driven process. I made a major mistake by mentioning we were writing a memo to the President on minimum wage and Labor wants to be plugged into that too but I did not give them hope.

2) Welfare to Work Funds: We brainstormed a bit on how to highlight our success in not only getting $3 billion but targetting it to cities and other high need areas. I'll send a note to Jonathan reminding him that it should be in the U.S. Conference of Mayors speech. Also, welfare to work will be the focus of Secretary Herman's speech to the mayors on Tuesday, and Slater will talk about NEXTEA welfare to work on Saturday.

3) Welfare to Work Regs: Olivia says they are meeting with the Secretary next week to discuss their proposed regs and will soon be ready to discuss them with us. She wants very much to establish a process and a timetable to work through these regs as quickly as possible this summer.

4) Child Care Regs. Melissa says HHS is okay with using the child care regs for an immunization event in early July.

5) HHS Reports. I yelled at Ann Rosewater today for not showing us a report on state welfare waivers that they are about to send to the world. It simply summarizes the waivers granted before the signing of the new welfare law, but they should have shared it with us sooner. So I gave Olivia and Melissa a bit of a hard time too (Melissa had seen it but saw no news so didn't mention it) and we agreed that they would alert us to things coming down the pipeline from ASPE and elsewhere at HHS. I also asked them to organize themselves to come give us a briefing on the whole research and evaluation plan, which this rogue report is part of.

Telecom –
Gerry Shea

WR-FCPA

Rinaldi – good start on this – this week.
Braun

Alexis/Bob Rubin – op ed.

Need President's voice.

NR-FLSA

Diana Fortuna
06/18/97 09:44:09 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP
Subject: Nickles amendment on minimum wage and sanctions

Nickles has an amendment to let states impose sanctions on people and not have it affect their proposed minimum wage calculation -- i.e., they wouldn't have to raise the hourly wage to compensate for a sanction. We assume we'd support, as would HHS, and DOL might want to oppose (we haven't asked them yet). Don't know if it's going anywhere.

BR-Yes

WR-FLSA

Emily Bromberg
06/16/97 03:39:31 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP

cc: Elena Kagan/OPD/EOP
Subject: Re: flsa

agreed. slightly more info--seems that the govs are under the impression that the secretary of hhs has the descretion to allow states to count those who are short some number of work participation hours. they got this from afsme. don't know if its true--and deans folks don't know if chiles will like this anyway. this is what the DGA talked to craig about. bottem line--nothing has changed, no clear consensus yet on a compromise from govs--but we know they'll want something related to work.

WR-FLPA

Emily Bromberg
06/16/97 03:07:21 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc:
Subject: flsa

here's what craig is talking about: he believes that all the democratic govs, with the exception of chiles, are ready to back off on flsa. they all say they are just carrying water for chiles and will be happy if he is happy. craig claims, from talking to the DGA, that chiles is willing to "compromise" on flsa by counting more stuff as work. this is no surprise--and where we always thought the govs would end up. craig's concern is that if we pick a fight on minimum wage, we want chiles with us--we all agree on that.

craig says he's bringing this up at weds pm meeting. so you may want to start to prepare options.

i will talk to the chiles and dean folks today. let me know if this is a compromise you can live with (i assume its not)

WR - FLSA

THE WHITE HOUSE

WASHINGTON

June 20, 1997

TO: GENE SPERLING

FROM: EMIL PARKER EP

SUBJECT: Nickles minimum wage amendment

Sen. Nickles proposed an amendment during the Finance mark-up that would allow States to impose sanctions on welfare recipients (e.g., for failure to comply with the work requirement) regardless of any minimum wage requirement. The amendment, which was adopted by a voice vote, is compatible with a range of approaches to the FLSA/minimum wage issue.

As you know, the House Ways and Means proposal would allow States to count the average value of Medicaid, child care and housing benefits for purposes of the minimum wage requirement. The combined average value of the TANF (cash welfare) grant, food stamps and these additional noncash benefits could be divided by the minimum wage to determine the maximum number of hours. For example, if a family's total benefit package were equal to $772.50 per month, an adult in the family could be required to work 150 hours during the month ($772.50 divided by the minimum wage of $5.15, effective September 1, 1997).

Under the Nickles amendment, if the State imposed a sanction that reduced the cash welfare payment, and consequently the entire benefits package, by $100, the recipient could still be required to work the full 150 hours a month (even though the effective wage would be only $4.48). In the absence of the Nickles amendment, the State could theoretically require a maximum of only 131 hours per month ($672.50 divided by $5.15).

It is necessary to separate the Nickles amendment from the House Ways and Means and Education and the Workforce FLSA provisions, which are problematic in a number of respects (see attached June 16 FLSA memo). ***The Nickles amendment itself is difficult to oppose on either policy or political grounds.*** The Administration has consistently favored provisions allowing States to impose stronger sanctions. Without a provision along the lines of the Nickles amendment, a State which imposed a sanction could, depending on the size of the benefit package, be forced to also reduce the required hours of participation. This would be even more likely if the State were only allowed, as under current law, to count the cash welfare payment and food stamp benefits for purposes of the minimum wage. Since the benefit package would invariably be smaller without the inclusion of the other noncash benefits, a reduction in the benefit would be more likely to result in a decrease in required hours of participation (i.e., it is less likely that the reduced benefit divided by the minimum wage would exceed the pre-sanction number of hours).

The Domestic Policy Council is apparently preparing a memo to the President on the FLSA issue. I will put in a request for NEC review of the memo before it is sent to the President.

THE WHITE HOUSE

WASHINGTON

June 16, 1997

TO: GENE SPERLING

FROM: EMIL PARKER EP

SUBJECT: FLSA and welfare-to-work review

FLSA

Both the Ways and Means and Education and the Workforce versions of the welfare reconciliation language include a provision, not contemplated in the budget agreement, that would deny the minimum wage to recipients participating in workfare activities in the public or not-for-profit sectors. Workfare participants are individuals required to work off their welfare grants. Under both versions, these recipients would not be considered employees of the State agency or non-profit, and as a result would be denied not only the minimum wage but also the child labor protections of the Fair Labor Standards Act.

Each bill substitutes a specious minimum wage requirement for FLSA coverage. Under current law, a State may count cash assistance and food stamps (pursuant to USDA guidance) to determine if a workfare participant is receiving the minimum wage. In other words, a State should divide the combined value of the TANF (cash welfare) payment and the food stamp benefit by the minimum wage to calculate the maximum hours of workfare participation that can be required.

Under the FLSA provisions in the Ways and Means and the Workforce legislation, a State could (but would not be required to) also include the value of following benefits, for purposes of the minimum wage calculation:

1) Medicaid
2) Child care assistance
3) Housing benefits

The combined value of the cash welfare grant, food stamps and these additional noncash benefits could be divided by the minimum wage to determine the maximum number of hours. Calculating the value of a family's food stamp benefit is relatively straightforward (since the stamps are used in lieu of cash to purchase food directly from grocery stores and supermarkets). On the other hand, estimating the insurance value of Medicaid, as Health and Human Services would be required to do under these FLSA provisions, would be an enormously difficult undertaking, given the differences in State Medicaid benefit packages, regional health care costs, and the health status of Medicaid recipients. Similarly, determining the value of a public

housing unit, for example, would be no simple matter.

The Ways and Means FLSA proposal differs from the Workforce version in one important respect. Rather than determining the actual value of the Medicaid, child care and/or housing benefits provided to a particular family, a State would be permitted to use the average for similar families. Consequently, the State could include in the "welfare package," for purposes of the minimum wage requirement, housing or child care benefits greater than the family actually received.

During the Ways and Means markup, a Stark amendment to strike the FLSA provision failed on a party-line vote (22-16). A similar amendment proposed by Clay in the Workforce Committee markup was also defeated on a 25-19 party-line vote.

The summary of the Senate Finance welfare legislation, circulated on Friday to prepare for the markup Tuesday, did not include an FLSA provision. Dennis Smith, the Senate Finance majority welfare staffer, has, however, apparently expressed considerable displeasure about the Administration's FLSA stance.

Privatization

The Senate Finance outline includes privatization language that would authorize the Secretary of HHS to approve 10 demonstration projects integrating enrollment and eligibility determination for TANF, Medicaid, WIC and Food Stamps (and possibly other programs). States would, under these demonstrations, be permitted to delegate eligibility determination to non-merit system (i.e., private sector) employees. Applications which met the demonstration criteria (e.g., the Texas "TIES" proposal) would be deemed approved. While neither the Ways and Means nor the Education and the Workforce legislation includes a comparable privatization provision, the House Agriculture and Commerce Committees approved amendments allowing States to contract out eligibility determinations for Food Stamps and Medicaid, respectively.

Welfare-to-Work

Of the three versions of the welfare-to-work legislation (Ways and Means, Education and the Workforce, Finance), the Ways and Means proposal comes closest to the Administration position in key areas, especially channeling dollars to large cities and placing the funds under the control of local officials.

WR-FL8A

5-20-97 Mtg w/ labor leaders

Q's to Thurm on this subject? Answers went up today?

HHS - good cause exception -
what would count as good cause?
how does the Reorg go?

Nanquist
Rentell

Workman - had on pri- letter.