NLWJC - Kagan
DPC - Box 060 - Folder-010

Welfare - FLSA etc [3]

WR-FL 8A

Cynthia A. Rice , 01/23/98 05:31:03 PM

Record Type: Record

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

cc: Diana Fortuna/OPD/EOP, Laura Emmett/WHO/EOP
Subject: Min wage and workfare sheet

Elena -- Diana did the work sheet you asked for, comparing how many states will have trouble paying for workfare under the current and increased minimum wage.

---------- Forwarded by Cynthia A. Rice/OPD/EOP on 01/23/98 05:31 PM ----------

[redacted] 05:03:23 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP

cc:
Subject: Min wage and workfare sheet

I couldn't do each year individually because there is a food stamp cost of living adjustment (which actually our previous analysis from HHS ignored). But I think this works pretty well. I got some numbers from Jeff Farkas to do it.


mwtanf.wp

States With Problems in 2001 (assumes 20 hours of work per week) -- Factors in rough food stamp cost of living increase in 2001			
	Families of 2	Families of 3 (average family size)	Families of 4
Current Minimum Wage -- $5.15	8 states	No states (Miss.'s problem disappears by 2001 because of increase in food stamp allotment	No states
Year 2001 minimum wage: $6.20	24 states	4 states	No states

Recall that the number of hours of work required per week increases from 20 hours in 1997 and 1998 to 25 hours in 1999, and 30 hours in 2000 and thereafter. However, the increase from 20 to 30 hours can be in the form of training directly related to employment, so it is possible to argue that 20 hours is the more useful reference point. But below is the 30 hour chart.

States With Problems in 2001 (assumes 30 hours of work per week) -- Factors in rough food stamp cost of living increase in 2001			
	Families of 2	Families of 3 (average family size)	Families of 4
Current Minimum Wage -- $5.15	38 states	14 states	2 states
Year 2001 minimum wage: $6.20	48 states	36 states	12 states

REV. RUL. 71-425 printed in FULL format.

Rev. Rul. 71-425

Section 61. - Gross Income Defined

26 CFR 1.61-1: Gross income.

(Also Sections 3306, 3401; 31.3306(b)-1, 31.3401(a)-1.)

1971-2 C.B. 76; 1971 IRB LEXIS 11; REV. RUL. 71-425

July, 1971

[*1]

Payments made by a State welfare agency to participants in work training programs under Title V of the Economic Opportunity Act of 1964 are not includible in gross income and are not wages for employment tax purposes; Revenue Ruling 67-144 modified.

Advice has been requested whether payments of amounts derived from funds supplied by a State welfare agency, made to participants in programs under Title V of the Economic Opportunity Act of 1964, Public Law 88-452, *42 U.S.C. 2701*, and similar programs are includible in the gross incomes of the recipients for Federal income tax purposes and are "wages" subject to the withholding of income tax and the taxes under the Federal Insurance Contributions Act.

The State welfare agency requires individuals on a welfare roll who are able to work to participate in work experience projects that it sponsors or administers under Title V of the Economic Opportunity Act of 1964. The agency makes the work assignments and makes the only payments the participants receive in connection with the work. A participant receives payments at a rate equal to the prevailing hourly rate for similar work in the community or the minimum rate established by the State [*2] law for such work, whichever is higher. The participant works only the number of hours that produce a payment equal to the relief allowance he and his family would receive in any one month period. If a participant incurs transportation expenses to and from work or other expenses, such as the cost of safety equipment required for the work, the additional cost is met by an increase in the number of hours worked by him.

The question is whether the payments received while the participant is engaged in the work related program are compensation for services {77} performed or are in the nature of welfare payments.

Section 61(a) (1) of the Internal Revenue Code of 1954 provides that, except as otherwise provided, gross income means all income from whatever source derived, including compensation for services. However, disbursements from a general welfare fund in the interest of the general welfare, which are not made for services rendered, are not includible in gross income. See *Rev. Rul. 63-136*, C.B. 1963-2, 19, which holds that benefit payments made under either the Area Redevelopment Act or the Manpower Development and Training Act of 1962 are not includible in the gross income of the [*3] recipients.

The Senate Committee report on the Economic Opportunity Act of 1964 (Report No. 1218, 88th Congress, 2nd Session) states on page 35 that Title V will stimulate the expansion of work experience and other needed training, including basic education, for needy individuals who are currently receiving some type of public assistance. This report points out that studies of unemployed persons aided under the public assistance programs indicate that in general these persons lack sufficient education and work skills to compete in the labor market. Many are either so lacking in knowledge and skills or in self-confidence because of prolonged unemployment they are not ready for training programs such as those offered by the Manpower and Development Training Act.

Some examples of constructive work experience in Title V projects are: simple maintenance in public roads, recreation areas and facilities; routine and general office clerical work; untrained aides and assistants in institutions, including such occupations as helpers, bus boys, and kitchen workers; trained practical nurses and nurses' aides, laboratory assistants and orderlies.

An assignment to work in an unskilled job may [*4] be a form of training to an individual who has never before held a job. Such a program may be designed to teach the participant work habits such as regular attendance, promptness, appearance, job discipline, etc. Thus, in most Title V programs the elements of work and training combine and overlap to such a degree that it is extremely difficult to characterize any program as being primarily work or primarily training. In most cases it would not be realistically feasible to dissect a program to determine the relative proportions of work and training contained therein.

However, in many cases the payments received under a work-training program are received in lieu of (and in amounts no greater than) payments that the participant was receiving based upon personal and family subsistence requirements from a public welfare agency prior to his participation in the work-training program. In such cases, the primary measure of the amount received is the personal or family need of the recipient rather than the value of any services performed and thus seems more in the nature of a welfare payment in connection with participation in a training program than a payment for services rendered.

Accordingly, [*5] amounts received by a participant in a work-training program, such as a program under Title V of the Economic Opportunity Act, are neither includable in gross income under section 61(a) (1) of the Code nor considered "wages"for purposes of the withholding of income tax at sources on wages or the taxes under the Federal Insurance Contributions Act, provided that:

(1) participation in such work-training program was arranged and financed by a public agency from which the participant was receiving public welfare benefits based upon personal or family subsistence requirements, and

(2) the payments received under the work-training program (exclusive of any extra allowance that may be provided for transportation or other costs related to participation) are not greater than the amount of such public welfare benefits that he would have been receiving. In the event that the amount received under the work-training program (exclusive of allowances, as described above) is greater than the amount that would have been received by the

participant had there been no work-training program, the entire amount received will be considered as taxable gross income and "wages", except to the extent that [*6] it can be demonstrated that the amount received exceeds the fair market value of the services performed under the program.

Revenue Ruling 67-144, C.B. 1967-1, 12, is hereby modified to the extent it holds that the payments received under the facts therein are includable in income.

WR-FLSA

Summary of Draft Notice (to be published in the IRB)

Introduction

- Topic of notice is tax consequences of payments to individuals under TANF; notice describes certain workfare payments that will not be considered income for tax purposes
- States intent of IRS to issue regs on this subject (why?); notice effective in meantime
- Only addresses tax laws; no inference intended for other laws, including FLSA

Background

- Describes PRWORA and lists TANF's 12 work activities (none are called "workfare")

How Workfare Payments are Treated "in General"

- Payments by government to an individual under a "social benefit program for the promotion of the general welfare, and that are not made basically for services rendered" are not taxable, "even if the recipient is required to perform certain activities to remain eligible for such payments."
- "If, however, taking into account all the facts and circumstances, such payments ... are basically compensation for services rendered," then they are taxable.
- Notes new section of law that "earned income for EITC purposes does not include amounts received for 'service performed in work activities as defined in paragraph (4) or (7)" (of TANF law -- work experience and community service), "but only to the extent such amount is subsidized" under TANF.

"Application of Facts and Circumstances Analysis to Certain Workfare Payments"

- Workfare is not taxable when the following three requirements are satisfied:
  - The individual receives payments only from the welfare agency or its contractor.
  - The individual's payments are funded entirely by TANF or food stamps.
  - The interaction of the "minimum wage or welfare laws and the size of the individual's grant limits the number of hours that the individual may engage in the qualifying activity."

Request for Comments

- Invites comments by 4/98, particularly on:
  - the notice's tests regarding tax treatment of workfare payments; and
  - "whether the regs should address government payments (other than workfare payments) made to individuals in the interest of the general welfare."] may be dropped

DRAFT

Draft Date: 12/18/97 Control Number: RR-109108-97

Part III - Administrative, Procedural, and Miscellaneous

Treatment of Certain Workfare Payments

Notice 98-

This notice addresses the federal income and employment tax consequences of payments received by individuals with respect to certain work activities performed in state programs under part A of title IV of the Social Security Act, as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (August 22, 1996) (workfare payments). The notice describes certain workfare payments that will not be considered income, earned income, or wages for federal income and employment tax purposes. The Treasury Department and the Internal Revenue Service (Service) intend to issue regulations that will address the federal income and employment tax consequences of the payments described in this notice. Pending the issuance of regulations, the provisions of this notice shall apply.

SCOPE

This notice addresses only issues under the federal income and employment tax laws. No inference is intended as to any other issue under any other provision of law, including the Fair Labor Standards Act and other federal and state employment laws.

BACKGROUND

Congress reformed the welfare system through the enactment of PRWORA, which replaced Aid to Families with Dependent Children (AFDC) with Temporary Assistance for Needy Families (TANF). AFDC required recipients to perform some work activities in order to continue to receive public assistance. TANF provides states with more flexibility than they had under AFDC to determine basic eligibility rules and benefit amounts. TANF also mandates specific work requirements and imposes penalties for non-compliance with those requirements.

Under TANF, the term "work activities" (qualifying work activities) is defined as:

(1) Unsubsidized employment;

(2) Subsidized private sector employment;

(3) Subsidized public sector employment;

(4) Work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available;

(5) On-the-job training;

(6) Job search and job readiness assistance;

(7) Community service programs;

(8) Vocational educational training (not to exceed 12 months with respect to any individual);

(9) Job skills training directly related to employment;

(10) Education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency;

(11) Satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate; and

(12) The provision of child care services to an individual who is participating in a community service program.

Section 407(d) of the Social Security Act, 42 U.S.C. § 607(d).

TREATMENT OF WORKFARE PAYMENTS -- IN GENERAL

Generally, the federal income and employment tax consequences of workfare payments are determined under the following analysis.

Disbursements by a governmental unit that are made to an individual under a legislatively provided social benefit program for the promotion of the general welfare, and that are not made basically for services rendered, are excludable from the individual's gross income and are not treated as wages for employment tax purposes, even if the recipient is required to perform certain activities to remain eligible for such payments. Similarly, payments made other than as employee compensation or as earnings from self-employment are not earned income for earned income tax credit (EIC) purposes. If, however, taking into account all the facts and circumstances, such payments by a governmental unit are basically compensation for services

rendered, then the payments are includible in the individual's gross income, generally are treated as earned income for EIC purposes (but see § 32(c)(2)(B)(v) of the Internal Revenue Code, discussed below), and are treated as wages for employment tax purposes.

Section 32(c)(2)(B)(v) (as added by § 1085(c) of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (August 5, 1997), and effective for taxable years beginning after December 31, 1997) provides that earned income for EIC purposes does not include amounts received for "service performed in work activities as defined in paragraph (4) or (7) of section 407(d) of the Social Security Act to which the taxpayer is assigned under any State program under part A of title IV of such Act, but only to the extent such amount is subsidized under such State program."

APPLICATION OF FACTS AND CIRCUMSTANCES ANALYSIS TO CERTAIN WORKFARE PAYMENTS

In cases where the following three requirements are satisfied, workfare payments will not be includible in an individual's gross income, will not treated as earned income for EIC purposes, and will not be treated as wages for employment tax purposes:

(1) The only payments received by the individual with respect to the qualifying work activity are received directly from the state or local welfare agency (for this purpose, an entity with which a state or local welfare agency contracts to

administer the state workfare program on behalf of the state will be treated as the state or local welfare agency);

(2) The only payments received by the individual with respect to the qualifying work activity are funded entirely under TANF (including any qualified state expenditures (as defined in § 409(a)(7)(B)(i) of the Social Security Act) used to maintain historic state expenditures (as defined in § 409(a)(7)(B)(iii) of the Social Security Act)) and the Food Stamp Act of 1977; and

(3) The interaction of the federal or state minimum wage or welfare laws and the size of the individual's grant limits the number of hours that the individual may engage in the qualifying activity.

REQUEST FOR COMMENTS

The Treasury Department and the Service invite comments on this notice and on the future regulations. Comments are particularly requested on: (1) the tests set forth in this notice regarding the federal income and employment tax treatment of workfare payments and (2) whether the regulations should address government payments (other than workfare payments) made to individuals in the interest of the general welfare. Written comments should be submitted by April 1, 1998. Send submissions to: Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:DOM:CORP:R, Room 5228, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (Notice 98-__), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW,

may drop

Washington, D.C. Alternatively, taxpayers may submit comments electronically via the IRS internet site at http://www.irs.ustreas.gov/prod/tax_regs/comments.html.

FURTHER INFORMATION

For further information, contact Mr. Edwin B. Cleverdon at (202) 622-4920 regarding the income tax issues in this notice and Ms. Jean Casey at (202) 622-6060 regarding the EIC and employment tax issues in this notice (not toll-free calls).

Department Of The Treasury
Office of Tax Legislative Counsel
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

February 13, 1998

To: Diana Fortuna

Fax: 456-7431

Number of pages (including this coversheet): 8

From: Paul Crispino

Tel: 202/622-0224
Fax: 202/622-9260

Comments: Attached is the latest draft of the workfare notice. If you have any questions, please call me. Thanks.

DRAFT

Draft Date: 02/13/98 Control Number: RR-109108-97

Part III - Administrative, Procedural, and Miscellaneous

Treatment of Certain Payments Received as Temporary Assistance for Needy Families (TANF)

Notice 98-

PURPOSE

This notice addresses the federal income and employment tax consequences of payments received by individuals with respect to certain work activities performed in state programs under part A of title IV of the Social Security Act, as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (August 22, 1996) (TANF payments). The notice sets forth certain conditions under which TANF payments will not be treated as income, earned income, or wages for federal income and employment tax purposes. The Treasury Department and the Internal Revenue Service intend to issue regulations that will address the federal income and employment tax consequences of TANF payments. The regulations to be issued will be effective as of the date of this notice. Pending issuance of these regulations, the provisions of this notice apply.

SCOPE

This notice addresses only the treatment of TANF payments under certain income and employment tax provisions of the

Internal Revenue Code. No implication is intended as to the treatment or effect of such payments or as to whether an employment relationship exists under any other provision of law, including the Fair Labor Standards Act and other federal and state employment laws.

BACKGROUND

Congress reformed the welfare system through the enactment of PRWORA, which replaced Aid to Families with Dependent Children (AFDC) with Temporary Assistance for Needy Families. AFDC required recipients to perform some work activities in order to continue to receive public assistance. TANF provides states with more flexibility than they had under AFDC to determine basic eligibility rules and benefit amounts. TANF also requires that specified percentages of recipients engaged in work activities and imposes penalties on the states for non-compliance with that requirement.

For purposes of TANF, the term "work activities" is defined under §407(d) of the Social Security Act as:

(1) unsubsidized employment;

(2) subsidized private sector employment;

(3) subsidized public sector employment;

(4) work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available;

(5) on-the-job training;

(6) job search and job readiness assistance;

(7) community service programs;

(8) vocational educational training (not to exceed 12 months with respect to any individual);

(9) job skills training directly related to employment;

(10) education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency;

(11) satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate; and

(12) the provision of child care services to an individual who is participating in a community service program.

42 U.S.C. § 607(d).

TREATMENT OF TANF PAYMENTS

A. In General.

Generally, the federal income and employment tax consequences of TANF payments are determined under the following analysis.

Disbursements by a governmental unit that are made to an individual under a legislatively provided social benefit program for the promotion of the general welfare, and that are not made basically for services rendered, are excludable from the individual's gross income and are not treated as wages for employment tax purposes, even if the recipient is required to perform certain activities to remain eligible for such payments.

Similarly, payments made other than as employee compensation or as earnings from self-employment are not earned income for Earned Income Tax Credit (EIC) purposes. If, however, taking into account all the facts and circumstances, such payments by a governmental unit are basically compensation for services rendered, then the payments are includible in the individual's gross income and are treated as wages for employment tax purposes. Similarly, payments made as employee compensation or as earnings from self-employment generally are treated as earned income for EIC purposes (but see § 32(c)(2)(B)(v) of the Internal Revenue Code, discussed below).

Section 32(c)(2)(B)(v) (as added by § 1085(c) of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (August 5, 1997), and effective for taxable years beginning after December 31, 1997) provides that earned income for EIC purposes does not include amounts received for "service performed in work activities as defined in paragraph (4) or (7) of section 407(d) of the Social Security Act to which the taxpayer is assigned under any State program under part A of title IV of such Act, but only to the extent such amount is subsidized under such State program."

B. Application of facts and circumstances analysis to certain TANF payments.

Due to the flexibility TANF affords states to determine basic eligibility rules and benefit amounts, TANF payments may be made both for the promotion of the general welfare and as compensation for services. In these cases, it is extremely

difficult to characterize the basic purpose of the payments. It is also not practically feasible to determine the relative proportion each purpose represents of the payment.

In many cases, however, TANF payments are received in lieu of (and generally in amounts no greater than) payments the individual formerly received or would have received under AFDC based upon the individual's personal and family subsistence requirements. In these cases, the primary measure of the amount received is the personal or family need of the individual recipient rather than the value of any services performed, and thus, the payments are more in the nature of a payment for the promotion of the general welfare than a payment for services rendered. These cases typically share, and can be identified by, common characteristics.

Accordingly, in cases where the following three conditions are satisfied, TANF payments will not be includible in an individual's gross income, treated as earned income for EIC purposes, or treated as wages for employment tax purposes (the federal income and employment tax treatment of TANF payment that do not satisfy each of the following three conditions is determined under the general analysis described in paragraph (A) above):

(1) The only payments received by the individual with respect to the work activity are received directly from the state or local welfare agency (for this purpose, an entity with which a state or local welfare agency contracts to administer the state

DRAFT

TANF program on behalf of the state will be treated as the state or local welfare agency);

(2) The only payments received by the individual with respect to the work activity are funded entirely under TANF (including any payments with respect to qualified state expenditures (as defined in § 409(a)(7)(B)(i) of the Social Security Act)) and the Food Stamp Act of 1977; and

(3) The number of hours the individual may engage in the work activity is limited by federal or state welfare laws or the size of the individual's payment divided by the federal or state minimum wage.

REQUEST FOR COMMENTS

The Treasury Department and the Service invite comments on this notice and on the future regulations. In particular, comments are requested on the three conditions set forth in the "Treatment of Workfare Payments" section of this notice. Written comments should be submitted by April 1, 1998. An original and eight copies of written comments should be sent to:

Internal Revenue Service
Attn: CC:DOM:CORP:R
Room 5228 (IT&A:Br2)
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044.

Alaska - Chose to set hours per fed/state welfare law (No grant/min wage → 40+ hours)

Alabama - Chose to set by either a) fed or state welf laws (would have to pay more) b) grant/min wage → wouldn't meet participation rate

or hand delivered between the hours of 8 a.m. and 5 p.m. to:

Courier's Desk

Internal Revenue Service

Attn: CC:DOM:CORP:R (Notice 98-__)

Room 5228 (IT&A:Br2)

1111 Constitution Avenue, NW

Washington, D.C.

Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to: http://www.irs.ustreas.gov/prod/tax_regs/comments.html (the IRS internet site). All comments will be available for public inspection and copying in their entirety.

FURTHER INFORMATION

For further information, contact Mr. Edwin B. Cleverdon at (202) 622-4920 regarding the income tax issues in this notice and Ms. Jean Casey at (202) 622-6060 regarding the EIC and employment tax issues in this notice (not toll-free calls).

Diana Fortuna 02/26/98 12:06:40 PM

Record Type: Record

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

cc: Laura Emmett/WHO/EOP
Subject: Update from Tramantano on FICA/workfare

Karen finally reported back to me on her and John's thinking on the FICA notice. It's a bit ominous. She said John wanted to hold off because it would seem too precipitous to go ahead now after the bad conference call on Monday. She said he was not prejudging what we will do. When I asked her how long they were picturing, she said she doesn't know, but John said we should sit with it.

She also said Shea thinks that his side had the better arguments in the call with Treasury, and she wants to check in with him to see what next steps he is expecting, but she doesn't want to raise his expectations in such a call.

Diana Fortuna 02/23/98 05:42:52 PM

Record Type: Record

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

cc: Laura Emmett/WHO/EOP
Subject: FICA/workfare conference call this morning

Treasury and the AFL had a conference call this morning that was not very satisfactory to either party. The AFL felt that Treasury didn't have very good answers to their questions/concerns. Treasury felt that there is no way to satisfy the AFL. Everyone wants to know what happens next. Treasury says they will be ready to issue the notice Wednesday if we want; I told them that was probably good but I would get back to them with a definite answer.

Diana Fortuna 02/18/98 04:10:13 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP

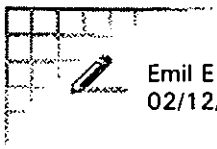
cc: Cynthia A. Rice/OPD/EOP
Subject: Latest on FICA/workfare

We are working to get this out before the NGA. Rob Weiner's recommendation is that we concur with DOL's recommendation to give the AFL a heads up on this, so I am working with Karen Tramantano to do that tomorrow.

Regarding whether this IRS ruling will do any damage to our FLSA position: According to DOL, it is a question of degrees of risk. Issuing this ruling will marginally increase the risk that a court wouldn't uphold employee rights for workfare recipients. Rob is working with DOL and Treasury on language to minimize the added risk, but DOL argues there is no way to do this ruling that doesn't add some risk. Rob doesn't disagree. So if no added risk is our standard, we would not issue this. (The risk is not zero even without this ruling.) Interestingly, DOL says the risk is less for FLSA than for the NLRA and other laws, I think because of the different laws' definition of employee.

I'll know more tomorrow.

WR-FLSA



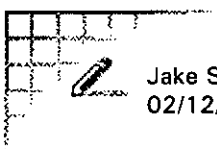
Emil E. Parker
02/12/98 02:26:02 PM

Record Type: Record

To: Jake Siewert/OPD/EOP
cc: Elena Kagan/OPD/EOP, Jonathan Orszag/OPD/EOP, Russell W. Horwitz/OPD/EOP
bcc:
Subject: Re: Minimum Wage and Workfare

We should probably drop the last sentence, which refers to the number of States that might have to make adjustments. That number is an internal estimate based on assumptions that are not unassailable. We do not want to get into an argument with NGA about the number of States that might have to raise benefits; we won't win.

Jake Siewert



Jake Siewert
02/12/98 01:31:30 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Jonathan Orszag/OPD/EOP, Russell W. Horwitz/OPD/EOP, Emil E. Parker/OPD/EOP

cc:
Subject: Minimum Wage and Workfare

Chris Georges is asking the following question. Please review the suggested response and let me know if you have any suggestions. Thanks.

Q: Won't raising the minimum wage hurt welfare-to-work efforts in the states?

A: No. An increase in the minimum wage will support the goals of welfare reform by ensuring that wages keep up with the cost of living and people leaving welfare for work can support their families and break the cycle of dependency.

This increase will not make it substantially more difficult for states to meet the welfare law's work participation rates (30 percent in FY 1998, rising to 40 percent in 2000 and 50 percent by 2002). While states that put welfare recipients in workfare programs will of course have to pay them the new minimum wage. Such workfare programs are only a small part of most states' welfare-to-work efforts. These efforts focus primarily on getting

welfare recipients private sector jobs, and can also include work-related activities like job search, vocational education, and high school (for teenagers).

For states that do chose to create workfare programs, we have helped them pay the minimum wage by allowing them to count not only cash assistance, but also food stamps, toward the wage. The dramatic drop in welfare caseloads further ensures that states will have adequate funding to pay workfare participants the minimum wage, because under the welfare law, states receive fixed block grants regardless of welfare caseloads. For example, for a family of three on workfare, only five states might have to make slight adjustments to meet the higher minimum wage when it takes effect.

WR-FL 8A

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP
Subject: CEA redid our minimum wage/ workfare analysis

FYI, you should know that CEA asked me for the backup to the analysis I did last week on the number of states that would have trouble funding workfare programs under various minimum wage increase scenarios, and then they redid the analysis. I don't know what they plan to do with it. Their version comes up worse than mine did.

I had simply updated the HHS analysis we have been using for months, but CEA went behind it and made more pessimistic food stamp assumptions. Also, they calculated the size of the problem for both 20 and 30 hours of work a week. You'll recall that we used 20 hours because, even though the work requirement grows from 20 to 30 hours over time, states can use "job training directly related to employment" for the hours over 20, and we made the somewhat aggressive assumption that they would do so to the maximum extent.

Here's the difference between my analysis and theirs (they only did families of 3):

States with Problems -- 20 hrs a week	My Analysis	CEA Analysis
Current Minimum Wage	No states	1 state
50 cent increase ($5.65)	1 state	2 states
$1 increase ($6.15)	2 states	7 states
$2 increase ($7.15)	9 states	13 states

For 30 hours of work a week, the numbers are pretty bad (I didn't do this calculation):

States with Problems -- 30 hours a week	
Current Minimum Wage	24 states
50 cent increase ($5.65)	37 states
$1 increase ($6.15)	42 states
$2 increase ($7.15)	50 states

WR-FLSA

Effect of Minimum Wage Increase on Cost of Workfare Programs

Talking Points

- There is one additional concern that we should be mindful of, as we consider what level of increase to propose in the minimum wage. As you know, Republicans made a concerted effort last year to roll back labor protections for those on workfare. Many Governors supported this effort, arguing they could not afford to pay the minimum wage for workfare jobs.

- A larger minimum wage increase will add to the pressure that Governors feel on this issue.

- So far, we have beaten back the Republicans' efforts, and persuaded Democratic Governors not to ally themselves with Republican Governors on this issue. However, some Democratic Governors remain very concerned about this issue. Their support of Republican proposals would give that effort new momentum.

Background

- In May, the Labor Department ruled that most workfare programs are subject to the Fair Labor Standards Act and other labor protections, including payment of the minimum wage.

- Governors have complained loudly that the DOL ruling severly hampers their ability to establish work programs for welfare recipients. The law requires states to put 50% of their welfare recipients to work by the year 2002, or face penalties. Welfare benefits are not high enough in some states to support payment of the minimum wage for 20 or 30 hours a week.

- DOL's ruling led the Republican leadership in Congress to seek to roll back current law labor protections for workfare jobs. We were able to hold the line and stop these efforts, but we can expect the issue to re-emerge this year.

- Any minimum wage increase will increase the number of states whose welfare benefits are not large enough to fund a minimum wage workfare job. As the size of the minimum wage increase goes up, so do the number of states with problems.

States Whose Welfare Benefits Can't Support a Minimum Wage Workfare Job		
Minimum Wage	**Families of 2**	**Families of 3**
Current Minimum Wage	8 states	No states
Increase of 50 cents ($5.65)	15 states	1 state

Increase of $1 ($6.15)	21 states	2 states
Increase of $2 ($7.15)	36 states	9 states

WR-FLPA

Cynthia A. Rice 12/04/97 06:27:23 PM

Record Type: Record

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

cc:

Subject: Bruce -- Emily needs some clarification re: the Thompson meeting

Mary Kay, Governor Thompson's helpful staffer, spent the day telling Democratic governors that you expressed an openness to considering counting additional activities as work as part of a FICA fix.

I thought you made very clear to Thompson that we endorse only the last Shaw offer, the straight FICA fix, and he said that was what he would circulate to his governors. At one point, you did say you might possibly have some openness to the work activities question, but you said so in a very general way (that we at the DPC know means you are willing to count more kinds of activities as work above 20 hours a week, but apparently Mary Kay took to mean something bigger).

Emily's question is -- besides telling Mary Kay that we are only discussing a straight FICA exemption, can she/should she try to explain to her and to the Dem governors what you mean by possibly some openness?

WR — FLSA

Cynthia A. Rice 12/04/97 12:27:55 PM

Record Type: Record

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

cc:

Subject: Shaw FICA proposal

The Shaw FICA proposal that we endorsed was the one Shaw offered (or tried to offer) on October 9th at the tax technicals markup. It does not include any change to what can count as work for the purposes of the work participation rates, as I said this morning -- despite what Governor Thompson's staffer thought. It is a straight FICA/FUTA exemption. It was also endorsed by Governors Carper and Chiles in an October 9th letter to Congressman Rangel, who opposed it.

Emily and I will make sure Thompson's folks have the right copy.

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Emily Bromberg/WHO/EOP
Diana Fortuna/OPD/EOP
Andrea Kane/OPD/EOP

WR - FMLA

Record Type: Record

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

cc: Cynthia A. Rice/OPD/EOP
Subject: FICA/workfare

We now have a draft ruling from Treasury saying that workfare isn't subject to FICA. It defines workfare as payments coming from the welfare office or its contractor, funded entirely by TANF and/or food stamps. That's the good news.

The bad news is that (1) it's not out of Treasury/IRS yet, and (2) I am nervous that DOL may be working against it (they have a copy). A guy at Treasury who doesn't understand this issue politically just told me they are considering a number of things that could water it down -- making it a proposed ruling instead of final, or narrowing it in various ways, including focusing more on training. They have a big meeting with the IRS general counsel tomorrow. We are depending a lot on Karl Scholz, who is trying to do the right thing here, to shepherd it through. I am trying to reach Karl to see what's happening.

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP
Subject: FICA

I talked to counsel's office, and here's the story: we are free to talk to Treasury's Office of Tax Policy about this matter, but not to the IRS.

I am trying to clarify whether the document the IRS plans to issue (a notice) is technically a rulemaking. If it is NOT rulemaking, there are no restrictions on us (other than not talking to the IRS). If it IS rulemaking, we are still free to talk to Tax Policy, but if I am trying to influence this substantively, I need your or Bruce's permission to do so and I need to involve OIRA.

In any case, it means we are free to weigh in on this. So now we have to figure out what to do substantively. We should talk on Wednesday.

Record Type: Record

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

cc: Cynthia A. Rice/OPD/EOP, Andrea Kane/OPD/EOP
Subject: Treasury decision on FICA/FUTA?

Cynthia heard a rumor from Levin's staff that Treasury is getting close to a decision on workfare and FICA/FUTA, so I checked with Karl Scholz. He said it is probably true. IRS is now reviewing an interpretation would treat FICA/FUTA in the same way as the EITC -- i.e., workfare would be exempt from these taxes.

If the IRS clears it (not a given), it would be ready sometime after December 15, but perhaps before the New Year. It will go through a normal OMB clearance process here.

It will include a limited definition of work experience/community service that is similar to what Wendell was pushing a while back, and that we were comfortable with. The goal of the definition is to prevent states from shoe-horning all kinds of work into those 2 categories in order to avoid FICA taxes. He couldn't recall all of this, and we have to double-check that it's OK, but it includes things like stipulating that the check has to come from the welfare office. Karl said that DOL may not think this is strong enough and may raise concerns about the whole thing (!).

In the meantime, we have to decide how to respond to Levin's rumor. I think we can say that they may be getting close but it's not over till it's over. But it may be hard to control how this becomes public, given all the agencies that will know, and the Treasury-Wendell-Levin link.

But it could be good news!

DRAFT 9/9 8:00 p.m.

House Ways and Means Welfare Proposal
(based on 9/8 verbal reports)

Talking Points

- The proposal would undermine welfare reform by weaking the welfare law's work requirements.

- Welfare recipients could be required to work just a few hours a week, instead of the 20 hours now required and 30 hour required by the year 2000.

- The proposal would create a loophole making publicly-run workfare programs more attractive than private jobs. Welfare recipients in workfare wouldn't have to do real work for 20 or 30 hours a week -- many of those hours could be filled with non-work activities such as job search, job readiness, and vocational education.

- Welfare recipients receiving child support payments would be able to work even fewer hours, because those support payments retained by the state to repay taxpayers for welfare costs could not be used for salaries for workfare participants. A $100 child support payment retained by the state could lower the work requirement by nearly 20 hours per month.

- States say they need flexibility to make welfare reform work. We say they already have it. Because they receive a welfare block grant with few restrictions, states can shift the $3 to $4 billion a year savings from falling welfare caseloads into workfare programs and still come out ahead. At the same time, states can count both TANF and food stamp benefits as wages. With this flexibility, states that choose to put people in workfare rather than private sector jobs will be able pay the minimum wage for 20 to 30 hours a week.

Options

Option #1: Retain the tough but fair work rates in current law.

Option #2: Retain the tough but fair work rates in current law, but do not allow states to use child support they retain as payment for wages (states would have to fill the gap with other funds).

Option #3: Retain current law for work up to 20 hours a week (only a minimum of 20 hours of work as now defined would count); allow additional

job search, etc., for hours of work above 20 hours per week. States could count child support payments to pay wages for up to 20 hours per week.

Current Law

What Counts as Work

The following are the work activities always permitted under the welfare law:

1. Unsubsidized employment
2. Subsidized private sector employment
3. Subsidized public sector employment
4. Work experience
5. On-the-job training
6. The first 6 weeks of job search and job readiness assistance
7. Community service programs
8. The first 12 months of vocational educational training
9. Providing child care for someone in a community service program

The following are additional work activities that can be counted from 20 to 30 hours a week:

1. Job skills training directly related to employment;
2. For those with no high school diploma, high school attendance, GED study, or education directly related to employment

Questions

1. What is the practical difference between a subsidized public sector job and work experience? Between these and community service programs? Is there a grey area between them? What are some examples of subsidized public sector jobs?

2. Are any states creating "private sector work experience," or private workfare? We have heard reports that Ohio is doing so. How does money flow in such a situation? Who pays the worker? Whom does the state pay? Whom does the company pay?

   How does this differ from subsidized private employment? Subsidized public employment?

   If workfare is exempted from FICA, would that create an incentive for business to shift to private workfare instead of subsidized/unsubsidized jobs?

3. What is the difference between work experience and community service programs? What are real life examples of the differences?

4. Do some of these shifting realities make it advisable that we define some of these terms in the regulation? Does HHS's draft reg address these questions in any way?

Child Support Enforcement

The proposed child support provision coupled with the proposal's "maximium hours" provision would weaken the welfare law's work rates even further. For example, let's consider a welfare recipient receiving $300 a month in TANF, $100 a month in food stamps, and $50 a month in child support which the state "retains" to offset welfare costs.

Under current law that welfare recipient would have to work the minimum 80 hours a month. If the state put that person in workfare slot at the minimum wage, the state would have to contribute an additional $12 a month in welfare funds to pay the minimum wage for those 80 hours. Under the proposed provision requiring only as much work as the benefit level divided by the minimum wage (the so-called "maximum hours" policy), the person would have to work only 78 hours a month. And if, in addition, the state was required to subtract retained child support payments, the welfare recipient would have to work only 68 hours a month (see chart A below).

Advocates say that custodial parents shouldn't have to "work off their child support." This argument assumes that a parent on welfare is entitled to all her child support; in fact, there's a long history of the government requiring families to give up that right in order to receive welfare. It is true that if the "maximum hours" policy were put into effect but the child support change was not made, a woman getting the same amount of child support would have to work more hours if the state retained the payment than if it passed through the payment but reduced the welfare grant to compensate (compare columns 1 and 3 of Chart C to the same columns on Chart D). However, that "inequity" can be solved by sticking to current 20 hour a week work rates. Another valid but rarely heard argument is that allowing states to count child support as wages would undermine the principle of the minimum wage.

Chart A: Work Effects of Child Support Policies

If state retains $50 child support payments	Current Law	Maximum Hours Policy but no Child Support Change	Maximum Hours Policy and Child Support Change
Monthly TANF benefit	$300	$300	$300
Adjustment for Child Support	$0	$0	$(50)
Net Benefit Counted for Work	$300	$300	$250
Food Stamps	$100	$100	$100
Total	$400	$400	$350

Hours per month of work	80 hours (State must pay $5.15 x 80 or $412)	78 hours ($400/ $5.15)	68 hours ($350/ $5.15)

Chart B: Work Required Under Current Law--20 hours Per Week Requirement in Workfare for parents receiving $50/ month in child support payments

	State Retains Child Support Payments	State Retains, adds to Benefit	State Passes through Child Support Payments but reduces benefit	State Passes Through
Monthly TANF benefit	$300	$300	$300	$300
Adjustment for Child Support	$0	$50	$(50)	$50
Net Benefit Counted for Work	$300	$350	$250	$300
Food Stamps	$100	$100	$100	$100
Total	$400	$450	$350	$400
Amount Needed to Pay $5.15/hour for 80 hours/month	$412	$412	$412	$412
Excess amount (Shortfall)	(12)	38	(62)	(12)
Hours per month of work required	80	80	80	80

Chart C: Work Required if "Maximum Hours" of Work Required in Workfare Depends on Benefit/Minimum Wage and No Child Support Change for parents receiving $50/month in child support payments

	State Retains Child Support Payments	State Retains, adds to Benefit	State Passes through Child Support Payments but reduces benefit	State Passes Through
Monthly TANF benefit	$300	$300	$300	$300
Adjustment for Child Support	$0	$50	($50)	$50
Net Benefit Counted for Work	$300	$350	$250	$300
Food Stamps	$100	$100	$100	$100
Total	$400	$450	$350	$400
Divided by Minimum Wage	$5.15	$5.15	$5.15	$5.15
Maximum number of hours per month of work required	78 hours	87 hours	68 hours	78 hours

Chart D: Work Required if "Maximum Hours" of Work Required in Workfare Depends on Benefit/Minimum Wage and Child Support Change for parents receiving $50/ month in child support payments

	State Retains Child Support Payments	State Retains, adds to Benefit	State Passes through Child Support Payments but reduces benefit	State Passes Through
Monthly TANF benefit	$300	$300	$300	$300
Adjustment for Child Support	($50)	$50	($50)	$50
Net Benefit Counted for Work	$250	$350	$250	$300
Food Stamps	$100	$100	$100	$100
Total	$350	$450	$350	$400
Divided by Minimum Wage	$5.15	$5.15	$5.15	$5.15
Maximum number of hours per month required of work required	68 hours	87 hours	68 hours	78 hours

WR-FLPA

EK/CR/DF -
I don't think this is enough to do the trick.
- BR

Record Type: Record

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

cc: Cynthia A. Rice/OPD/EOP
Subject: New approach to FICA/workfare issue

Courtesy of the unions, a little known part of Social Security and tax law has come to light, along with SSA's interpretation of it. Two questions have emerged: First, should we give up on Treasury and ask SSA for its opinion on whether this law exempts workfare participants from FICA coverage? Second, is SSA's existing guidance on this question already so helpful and clear that essentially we already have in our possession a document we could just hand to the Governors and tell them that workfare participants are already exempt from FICA under certain circumstances?

Background: The Social Security and tax law both state that FICA coverage and taxes don't apply to a state employee "who is employed to relieve such individual from unemployment." It dates from 1950, when state government employees first began to join the FICA system. There is some legislative history from that time that suggests it applies to people on "work relief."

Social Security has interpreted this language in its handbook, but it appears that the IRS has never issued an interpretation. According to SSA's handbook, a program's intent determines whether it is designed to relieve someone from unemployment. SSA offers two interesting examples: First, a welfare recipient who performs a service in return for assistance payments is **not** covered (not earning credit toward Social Security). Second, however, a participant in a state program "designed to provide work experience and training to increase the employability of the individual" **is** covered by FICA benefits.

] Not reassuring

The difficulty here is that all of this relates to FICA **coverage** (i.e., eligibility for benefits), not to FICA **taxes**. No one at Treasury or SSA can think of a reason that someone would be eligible for one and not the other, but nevertheless everyone says it is the IRS that must make the tax interpretation. Apparently SSA and IRS try to work in tandem on such questions, but legally I can't determine whether one must defer to the other. In any case, if we did hand out the SSA guidance to Governors, they could rightly respond that this doesn't answer the question of whether they must pay FICA taxes.

One plausible possibility is that the unearthing of this language will spur the IRS to make a decision. It might even affect the content of their decision, since apparently they were not aware of SSA's handbook guidance.

Our decision is whether to (1) ask SSA for a more fulsome interpretation and see what they come up with in the next few days/weeks/months; or (2) circulate the existing SSA guidance to Governors at an appropriate point in the process, arguing that this does the trick. We could do both. (If we choose the first option, SSA would run its interpretation by the IRS.)

FL8A

Cynthia A. Rice 11/03/97 12:17:21 PM

Record Type: Record

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

cc:

Subject: Rep. Levin may call Bruce today re: FICA/FUTA

wants to know what's next...Levin's been hearing from Carper and Chiles pushing him to do something -- they are being very persistent -- Levin wants to check in with Bruce to see what we think the legislative possibilities are for the rest of the session and what we can do administratively. All this per Eric Gould.

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Diana Fortuna/OPD/EOP
Emily Bromberg/WHO/EOP
Janet Murguia/WHO/EOP

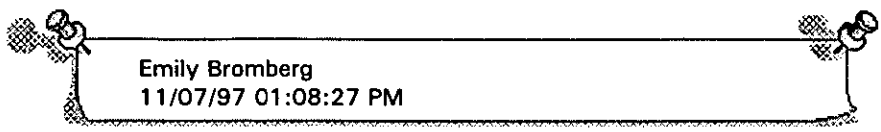
Tell him to introduce
The ~~bill~~ FICA/FUTA
bill that we like1

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: fyi

---------- Forwarded by Diana Fortuna/OPD/EOP on 11/07/97 01:17 PM ----------



Record Type: Record

To: Karen Tramontano/WHO/EOP, Bruce N. Reed/OPD/EOP, Cynthia A. Rice/OPD/EOP, Diana Fortuna/OPD/EOP

cc:
Subject: ncsl

This morning NCSL passed a resolution calling for an FLSA exemption that goes way beyond and FICA/FUDA fix. Although we had 9 states who said they'd oppose the resolution (and we only needed 3), none of them actually spoke up, so the resolution passed. I doubt this will matter much, but you should know that we lobbied hard.

Cynthia A. Rice 11/07/97 11:25:59 AM

Record Type: Record

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

cc:

Subject: Govenors/ FICA/ CR

Governors Carper and Chiles staff just called me. Their bosses are in town, asked them to call ASAP to ask the possibility of getting a limited FICA exemption added to the Continuing Resolution. I checked in with Barry White, who said that the firm agreement with the leaderships is that the CRs will only have those things necessary to keep the programs running, and that we may have a series of one-day CRs this week as negotiations continued. I relayed this to Martha and Karen.

FYI -- they suggested a new way of doing a FICA exemption -- a clause that would say "no FICA/FUTA liability until the IRS rules." Kind of an interesting idea.

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Diana Fortuna/OPD/EOP
Emily Bromberg/WHO/EOP
Sky Gallegos/WHO/EOP
Emil E. Parker/OPD/EOP

Cynthia A. Rice 11/07/97 10:58:15 AM

Record Type: Record

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

cc: Diana Fortuna/OPD/EOP
Subject: NCSL resolution

NCSL is today voting on a resolution re: FLSA and have asked us for our views (intergovernmental affairs is there). It is clearly counter to our FLSA position and we are telling them we oppose it.

The resolution opposes using the FLSA to define what is work and what is training, and instead proposes a different standard ("welfare to work programs of duration of 12 months or less that are providing a real benefit to recipients should be exempt from FLSA").

It also, incidentally, "urges the federal government to exempt states from the requirement to pay FICA and FUTA to welfare recipients in community work experience."

WR-FLSA

Wimping Out

WELFARE REFORM COULD BE UNDERMINED BY NEW REGULATIONS THAT FORCE EMPLOYERS TO TREAT WORKFARE PARTICIPANTS AS REGULAR EMPLOYEES.

BY MARILYN WERBER SERAFINI ■

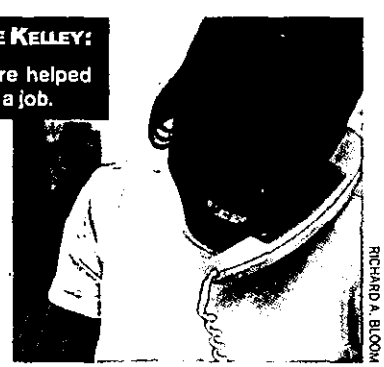
Robbie Kelley, a 37-year-old single mother in Arlington, Va., is preparing to get off welfare and enter the workforce. But the workfare program that gave her the boost she needed may soon disappear. If it does, congressional Republicans and many governors warn, last year's landmark welfare reform law could be in jeopardy.

Kelley received welfare checks for years while she stayed home with her kids. But that was before the 1996 Welfare Reform Act required states to push their welfare recipients off the dole and into jobs or training programs. If the states flunked the test, they would lose plenty of federal money.

Despite some training as a word processor, Kelley could find only temporary work. So she was automatically enrolled in Virginia's Community Work Experience Program—or workfare. The program provided her with a 32-hour-a-week position at the Virginia Human Services Department. Kelley collected only her usual $410-a-month welfare check plus food stamps. "It was hard to do it," she said. "I was getting paid, but it still wasn't like getting a paycheck."

Nevertheless, her duties as a receptionist and clerk enhanced her computer skills, Kelley said, and taught her how to better interact with people. She could leave early for job interviews, and Kelley's counselor helped her find job leads and write cover letters.

After two and a half months at the department, Kelley landed a part-time job at Arlington Community Residences, a nonprofit organization in northern Virginia that sets up group homes and finds shelter for the mentally ill. She earns $800 a month, almost twice what she got on welfare. Kelley will no longer qualify for food stamps, but the state will temporarily provide welfare checks to help her move into the workforce.



ROBBIE KELLEY: Workfare helped her get a job.

RICHARD A. BLOOM

Workfare has become a popular way for states to get people such as Kelley off welfare and to deter others from seeking public assistance. Only nonprofits and government organizations can hire workfare participants. But workfare may soon be a thing of the past, warn governors of both parties and key Republican Members of Congress. The Labor Department recently issued guidelines for the states that could effectively gut the landmark welfare reform law, these critics contend.

Under pressure from organized labor generally, and public employee unions particularly, Labor interpreted the welfare law in such a way that people on workfare must be treated exactly like regular employees. "We didn't change the law. We just read the law," said Seth D. Harris, the Labor Department's acting assistant secretary for policy. Many Republicans disagree.

Under the guidelines, workfare participants will be paid the minimum wage of $5.15 and be covered by federal health and safety laws. They also will be able to join unions, sue their new bosses and file discrimination suits. And the nonprofit agencies or government agencies that hire them may have to make special accomodations in the workplace for people with a myriad of disabilities.

Moreover, the governors say the Labor Department guidelines could cause them huge problems, especially if the state governments or the nonprofits have to pay the payroll taxes of workfare participants.

The minimum-wage requirements

could create another problem for states, which now must have 25 per cent of their welfare recipients working 20 hours a week to receive their full federal block grants. If welfare recipients are covered by the minimum-wage laws, it will be more difficult to get a quarter of them to work the needed 20 hours a week, and states will lose some of their federal money.

"Once you impose minimum-wage provisions, we feel you're embarking on a slippery slope that will make it more difficult to get people back to work," said Rep. E. Clay Shaw Jr., R-Fla., chairman of the Ways and Means Subcommittee on Human Resources.

Workfare was not meant to act as regular employment, but simply as a training tool to move people such as Kelley into the workforce, Capitol Hill Republicans and governors argue. Rep. James M. Talent, R-Mo., who sits on the Education and the Workforce Committee, wants Shaw to take a more conservative approach.

"We can't let the President get away with turning back the clock on welfare reform," a Talent aide said. "We need to make people understand that this isn't employment. It's a bridge to employment."

Given the Labor Department requirements, states will shut down their workfare programs, warned Karen L. Hogan, federal liaison in Florida Democratic Gov. Lawton Chiles's Washington office. "The [employer] commitments are going to fall by the wayside if tax liability is attached to it," she said. While employers pay the workers nothing, they take on the responsibility of training mostly uneducated individuals with little or no work experience. Hogan estimates that the payroll taxes would cost Florida nonprofits and the state government $14 million in the first year.

JACK ORTON/MILWAUKEE JOURNAL SENTINEL © 1997 JOURNAL SENTINEL INC. REPRODUCED WITH PERMISSION

WISCONSIN CRACKED DOWN: Caseloads were halved as welfare-to-work rules were strictly enforced.

"To give people work experience, the cost of that exceeds the benefits the employer receives," Shaw said. "They're actually performing a service by giving these people a job that trains them."

Shaw is determined to change the Administration's guidelines. Even before the guidelines were issued, Shaw wanted to insert a provision into the Balanced Budget Act stating that people on workfare are not subject to most labor laws. But President Clinton threatened a veto if the budget law contained Shaw's workfare language, and it was dropped during the House-Senate conference. Shaw, however, is not giving up. He's planning to introduce a new bill to "let people shoot at." Then he'll see where the proposal stands and "decide how best to proceed next year."

GUTTING WELFARE?

The Labor Department regulations threaten the very mission of the Welfare Reform Act, which has already helped reduce welfare rolls, says Robert Rector, a senior policy analyst at the conservative Heritage Foundation who helped Shaw write part of the law. The application of labor laws to workfare participants would make work activity under the new welfare reform law "impractical on any scale," Rector added.

Clinton recently bragged that the tough welfare-to-work approach of the Welfare Reform Act has "given us the biggest drop in welfare rolls in history and the lowest percentage of Americans on welfare since 1970. . . . So it worked."

Vice President Al Gore announced on Oct. 8 that the welfare rolls in the United States had dropped 250,000 names since the welfare law was enacted in August 1996.

But the Administration doesn't realize that workfare is an important component of the welfare programs in many states that have succeeded in moving people off welfare, Rector said.

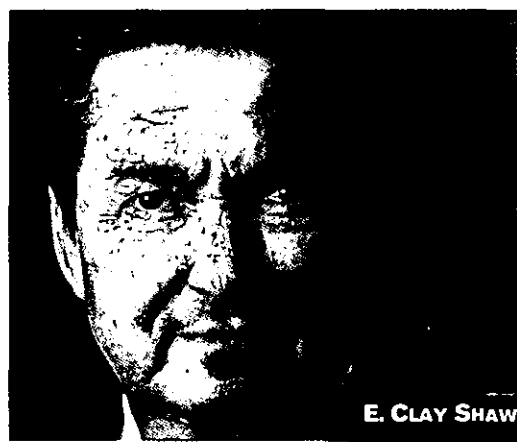
Take Wisconsin. Over the past 10 years, as welfare rolls grew in other states, the caseload in Wisconsin dropped by half. Wisconsin's goal has been to push welfare recipients quickly into the labor market; those who fail to find employment within a few weeks are required to enter workfare until they can find private-sector jobs.

"For decades, politicians have talked about making welfare recipients work while creating regulatory loopholes

that made the requirement easy to avoid," Rector said. "Wisconsin closed the loopholes, creating a first for the nation—a real work requirement." Under a program called Pay for Performance, the more a welfare recipient works, the more of his welfare check and his food stamps he gets.

"We've learned that any state that's serious about putting people into workfare jobs, their welfare caseloads plummet, because people won't [take] those jobs," Rector added. "If you say, 'Find a job or clean parks,' they find a job. In Oregon, seven out of eight did."

It's the threat of workfare that drives welfare caseloads down, Rector said. "Oregon has been successful in getting people off of welfare, because it has tough rules that require work or dumping people off of the welfare rolls. We don't want to have zillions of people in workfare."



JOHN EISELE

E. CLAY SHAW: Fixing the guidelines will take careful political balance.

For many others, workfare has helped break the welfare cycle. "This program gets people moving in the direction of self-sufficiency," said Hogan of Florida's Washington office. "Putting them in workfare positions helps. It helps them learn how an office works."

Workfare is supposed to turn into full-time employment, said Andrea Kane, program director for welfare reform at the National Governors' Association. The NGA has used a workfare participant who will soon become a full-time association employee.

Workfare provides a friendly work environment, said Ron King, director of the Virginia Office of Employment Training, which has placed 970 participants in workfare since April. "They have to come to work on time, they must call if something prevents them from coming. When they're at work, they have to take instruction and not be angry about that. People who haven't worked, don't understand you have a person in charge, a boss, and that you have to follow instructions."

In Virginia, welfare recipients get 90 days to try to find a regular job. After that, they're automatically signed up for community work experience. Counselors track each individual's progress. The person stays in an assignment for six months, then caseworkers decide whether to extend the job, find the person another job or eliminate it along with the individual's welfare benefits.

"The reality is that everyone wants welfare reform to work," Hogan said. "But workfare is a vital component of this," she added, noting that Florida wants to have 40,000 of its 140,000 welfare recipients in workfare by the end of this year. "If you take it [workfare] off the table, it's a serious problem here for the part of the population that needs the most help."

FAIR LABOR

It's not that Rep. Sander M. Levin of Michigan, the ranking Democrat on Shaw's Human Resources Subcommittee, dislikes workfare. In fact, he boasts that Michigan, under Republican Gov. John M. Engler no less, has a very successful program. Still, he argues, applying labor laws to workfare is not only what the law demands, but also the responsible thing to do. Why should a workfare participant not have the same protections or earn the same wages as a regular employee sitting next to him, doing the same job?

"It's a very serious mistake to tell people that, moving from welfare to work, they'll be treated differently [from other workers], when the thrust is to get them to be in the mainstream," Levin said.

One Administration official said there's no reason to

NO SHORTAGE OF LABOR LAWS

The application of labor laws to workfare participants would make work activity under the new welfare reform law "impractical on any scale," says Robert Rector, senior policy analyst at the conservative Heritage Foundation. Administration officials counter that federal labor laws *should* apply to all workers, including workfare participants.

Here are some examples of labor laws that could apply to workfare situations.

- **FAIR LABOR STANDARDS ACT** (1938) requires employers to pay minimum wage and overtime to their workers.
- **AGE DISCRIMINATION IN EMPLOYMENT ACT** (1967) prohibits the consideration of age in hiring or firing of workers.
- **OCCUPATIONAL SAFETY AND HEALTH ACT** (1984) requires employers to provide a safe work environment for employees.
- **FICA** (1935) requires the deduction of Social Security and Medicare payroll taxes.
- **UNEMPLOYMENT COMPENSATION** (1935) requires employers to pay taxes toward the distribution of unemployment pay.
- **AMERICANS WITH DISABILITIES ACT** (1990) requires employers to make reasonable employment accommodations for workers with disabilities.

believe that minimum-wage laws will cause states to fall short of their employment requirements under the 1996 welfare law. States have windfalls in their block grants anyway, the official said, because block grant amounts were based on 1994 caseloads, when there were significantly more welfare recipients. "At best, this is a very, very small issue for most states. We need to see folks come forward to show this is a real problem," the official added.

"Some," are motivated by the feeling that if the public sector can't place a large number of people below minimum wage, they won't be able to meet the federal government's work participation requirements" or to get people off welfare. He continued: "Others think that the key is to get someone to work, and it doesn't matter under what conditions. Others look upon a large number of welfare recipients as people who have been loafing, and the only thing to do is get them to work regardless of the conditions. 'If you treat them as second-class citizens, so what?' "

LIZ LYNCH

ROBERT RECTOR: When states are serious about workfare, welfare drops.

But workfare will be successful only if participants think of themselves as regular employees, Levin said. Kelley, who just went from workfare to work in Virginia, strongly agrees. She says she was treated exactly like an employee. Her co-workers even threw her a going-away party when she found a regular job.

Sure, Levin said, governors need to meet federal work requirements to keep their block grants flowing. "If there's a problem with state resources, let's improve state resources. We did that through the $3 billion program in the Balanced Budget Act. That will help states move people from welfare to work."

More should be done if necessary, he added. "I'm in favor of facing up to this issue and taking whatever steps are necessary to fix it. But the answer is not the broad characterization of people moving from welfare to work as different kinds of workers. A worker is a worker, basically."

A Shaky Start

But Shaw's not done. After his language was dropped from the Balanced Budget Act, Shaw got a commitment from Speaker Newt Gingrich, R-Ga., that he could bring it up again on the House floor with the Speaker's support. Shaw admits this will be a difficult task, though. He'll have to get enough support in both the House and Senate to ensure he'll be able to override a likely veto. Or, he'll have to work with the Clinton Administration on a compromise and risk losing the support of conservative House Republicans.

Shaw could wait until next year, although that strategy poses some problems. "People get really goofy around election," he said. He acknowledged, however, "we have to get some support and momentum, and there aren't many days left" in this congressional session.

Shaw blames his Republican colleagues in Congress for refusing to address the Clinton Administration's interpretations of the welfare law. "I felt [the welfare clarifications] were important. We got hammered during the Balanced Budget Act debate by the Senate and by the Administration."

In fact, the Administration blocked Shaw's efforts and saved "their own bacon" at the same time, Florida's Hogan complained. A provision in the budget law says that a tax break for the working poor, the earned-income tax credit (EITC), won't be available for workfare participants. The provision saves the federal government millions of dollars, she added.

Shaw says he'll be more careful not to get burned in the next round. He has sent a message to Senate GOP leaders saying he'll need some assurance that the Senate will bring up a workfare bill. "We don't want to go through the exercise, then not have them bring it up," he said. "It's very frustrating to negotiate these things with the Senate. They worry about every single Senator and how he might react." A Senate GOP leadership aide said he believed that Senate leaders will be willing to talk about the issues, but offered no firm commitment.

"We view this as doing what the governors need us to do," Shaw said. "This is not changing welfare so much, but making it more affordable and workable for governors so they can run their programs."

To get the job done, Shaw says, he'll need more support of Democratic governors. Republican governors are already on board, but only a few Democratic governors have become active. Chiles and Delaware Gov. Thomas R. Carper are trying to rally the support of their Democratic colleagues.

One major problem is that House Republicans don't even agree among themselves about the need for a legislative fix. Republicans on the Ways and Means Committee demonstrated this year that they could work with the Administration and congressional Democrats on some workfare-related issues, such as payroll taxes, and that they would discuss complications surrounding minimum-wage requirements.

But by talking compromise on the core issue of classifying workfare participants as nonworkers, Shaw lost the support of more-conservative Republicans, especially some on the Education and the Workforce Committee.

"It took a lot of effort by us to get him to [compromise]," Rep. Levin said. "But then Republicans on the Education Committee insisted on stricter distinctions between workers. We never said that people had to be paid the same" as other employees, but they should get paid the minimum wage and be covered by federal health and safety standards. "[Republicans] keep trying to work something out among their own ranks and they get pulled to more extreme positions," he added.

But others say the Clinton Administration must change its tune. Or, as Republican Members and many governors warn, workfare will disappear and the promise of the landmark Welfare Reform Act will remain unfulfilled. ■

WR-FL8A

New Shaw Draft on FLSA and Workfare

Background: Rep. Shaw is trying to forge an alliance between Governors and Congressional Republicans on workfare and Fair Labor Standards Act requirements. Governors of both parties are concerned about the cost of compliance with FLSA and other labor laws, including payment of the minimum wage, and the cost of FICA taxes for workfare participants. Shaw is trying to get Governors to endorse a new draft bill.

- Shaw's new draft tries to reclassify people in workfare programs as "trainees." This would deprive them of the protections of the FLSA, including the minimum wage, and other labor laws, including full health and safety protections and protection against discrimination.

- It would also significantly weaken the welfare law's tough work requirements for people on welfare who perform "community service." Instead of being required to work for 20 hours a week in 1998, someone doing community service would only have to work as many hours as the state could afford at the minimum wage. The balance of a recipients' time could be spent on job search and education activities.

  We are also concerned that the definition of community service is so broad that it could include nearly all subsidized work, allowing low benefit states to require less than 20 hours of work from nearly all their "working" recipients. DOL is also concerned that it would weaken labor protections for those performing community service.

- The bill would also exempt community service positions from FICA and unemployment taxes, which we indicated during the balanced budget negotiations that we were willing to do. In fact, we agreed to such an exemption as part of a last-minute compromise on the Balanced Budget Act that fell apart for other reasons.

Talking Points:

- Worker protection laws, such as the Fair Labor Standards Act, should apply to workfare participants in the same way they apply to other workers. No one doing real work should be paid a subminimum wage or should be subject to health and safety hazards.

- Rep. Shaw's latest proposal would deprive workfare participants of those protections, including payment of the minimum wage.

- It would also weaken the welfare law's tough work requirements -- requirements that were part of last year's bipartisan agreement to reform

welfare, and which states have only just begun to implement.

- Paying working welfare recipients the minimum wage and giving them other worker protections will promote the goals of welfare reform, because it will give them the ability to support their families and break the cycle of dependency.

- The Administration is prepared to work with states to ensure that they can comply with the law, without undue financial burden, and meet the welfare law's work requirements, and would be supportive of proposals to exempt workfare participants from FICA and unemployment (FUTA) taxes.

WR-FLHA

Record Type: Record

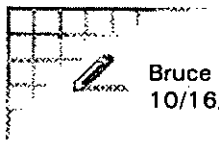
To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP
Subject: Conversation on FICA

I talked to Karl. He says that the EITC exemption in the balanced budget makes him predict very, very strongly that the Service will rule workfare is not subject to FICA. But he does not believe they are in any kind of rush to rule. He believes that, if he wrote some kind of internal tome on the subject, he could make it enough of a priority in his own office that that would shake it loose and get a ruling issued. (I'm not sure why, but he was very definite on this point.) But he says he just hasn't had time to get to it, since he is swamped on a million other high priority matters. So maybe we need to let someone know at higher levels that Karl's work on this is as high a priority as whatever else he is working on.

By the way, he is also talking a lot to Center on Budget, which is apparently urging them to act, and trying to figure out how the Service would define work experience and community service.

WR - FLSA



Bruce N. Reed
10/16/97 10:53:50 AM

Record Type: Record

To: Diana Fortuna/OPD/EOP

cc: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP
Subject: Re: Conversation on FICA

We have to let Treasury and IRS work it out on their own.

Cynthia A. Rice 10/15/97 10:13:24 AM

Record Type: Record

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

cc:

Subject: FICA update from Haskins

Mary Bourdette spoke to Ron Haskins, who said he has no plans to push his FICA exemption further and he doesn't see any vehicles. He said the unions went all out to kill Shaw's effort last week.

FC&A

Record Type: Record

To: Bruce N. Reed/OPD/EOP

cc: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP
Subject: Update on Shaw proposal for FICA exemption

The proposal Shaw plans to offer at a 2pm markup today appears to be a narrow fix of FICA and FUTA. We got together with DOL, HHS, and Treasury and reached agreement that we will say we support it. Treasury and Emily are doing so. They will also say that we would like to work with the committee to ensure that this applies only to workfare/community service jobs, and we don't create improper incentives to put more types of work in these categories.

DOL wanted us to go further to say we support the concept but not necessarily this specific fix, because it doesn't include language to limit it to traditional workfare. But we won out when we learned that Wendell thinks Shaw's language is fine. His (and our) logic is that HHS (or Treasury) can clarify this in the regs, and it's dangerous to have Congress define workfare because they may define it very broadly. Cynthia talked to Levin. He is ticked off about the process, but began to see our logic as the conversation went on. Rangel is trying to have the fix struck on procedural grounds.

FLRA

Emily Bromberg
09/29/97 02:43:38 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP, Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP
Subject: Re: govs

My initial info came from Fred. I just spoke to Mickey, who says he told Carper's staff (NOT the Gov) that we are fine with FICA/FUDA. He then told Carper's staff that if they had NGA policy that could move the bill to the center, we'd be interested in that. Carper's staff sees this as White House saying its OK to develop NGA policy. I explained to him that Carper would want to go much further that we would ever go--and that the republican Govs would take it futher. Mickey told me he didn't think this was a big deal either way. I explained why it was a really big deal, and he agreed to talk to the staff again, reiterating that the only policy we can live with is FICA/FUDA.

I think two things are happening based on my conversation with Mickey: he and Caper's staff talked passed each other and Mickey has an entirely different view of the politics of this issue. He thinks he did a good thing. I will talk to Carper's staff myself.

FLSA

Emily Bromberg
09/29/97 01:41:32 PM

Record Type: Record

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

cc:
Subject: govs

For some unknown reason, Mickey told Carper that it was OK with the White House for the NGA to adopt policy on FLSA. Not sure why he did this, since he knows what I had to do to keep Carper/Voinivich from bringing it up for a vote in NGA Executive Committee last week.

How bad is this? We of course will disagree with their policy. Should I try to get Mickey to pull back?

WR-FLSA

Emily Bromberg
09/22/97 02:21:04 PM

Record Type: Record

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

cc: Mickey Ibarra/WHO/EOP, Fred DuVal/WHO/EOP
Subject: flsa

Carper and Chiles staff met with Haskins Friday afternon. Haskins did not have a bill to share with them, or paper of any kind. It was clear from the meeting that he's having real problems with his caucus, especially Talent. The Govs' staff reiterated that they supported the original proposal only, and opposed all the conservative add-ons. The meeting ended without any resolution.

NGA Executive Committee meeting is tomorrow. The Govs say they will not have a press conference on this or vote on policy. We shall see...

WJC-FLSA

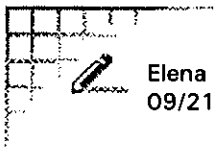
Diana Fortuna
09/22/97 11:44:07 AM

Record Type: Record

To: Elena Kagan/OPD/EOP
cc: Cynthia A. Rice/OPD/EOP
bcc:
Subject: Re: Question for you on FLSA strategy

Bruce did answer this question at the staff meeting. His concern was that, in our zeal to keep the Governors from jumping overboard, we should not spread panic on the labor defects of Shaw's proposal prematurely. And recent events suggest that our strategy of hanging back and watching seems wise for the moment -- Shaw's process is imploding on its own, and recent conversations with the Democratic Governors suggest that they are still thinking about it. And DOL has at least alerted Dem Govs that there are labor problems with the draft bill, so that we can at least say "I told you so" if suddenly things heat up, Democratic Governors endorse it, and we have to blast it. Does this seem right to you, Cynthia?

Elena Kagan



Elena Kagan
09/21/97 04:53:38 PM

Record Type: Record

To: Diana Fortuna/OPD/EOP

cc:
Subject: Re: Question for you on FLSA strategy

i think you're right. did bruce answer? have we done this?

Record Type: Record

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

cc:
Subject: Feedback from DOL on Democratic Governors

Here's a bit of feedback from DOL on the calls they've made to Democratic Governors staffs. Chiles and O'Bannon agreed that the new draft goes in the wrong direction, and they were more comfortable with the original Shaw draft. They expressed extreme frustration that the Administration was not being more helpful on this in general, and specifically that we were not offering any alternative.

Message Sent To:

Elena Kagan/OPD/EOP
Cynthia A. Rice/OPD/EOP
Emily Bromberg/WHO/EOP
Fred DuVal/WHO/EOP
Sky Gallegos/WHO/EOP

Elena
Barry
Fax to Keith
Maureen
Lauren
Diana

Summary of Compromise Welfare-to-Work Transition Bill
September 1997

1. The compromise bill does not determine the employee status of workfare participants; however, it does specify that if workfare participants are determined to be "employees" and otherwise covered by these laws, then FICA (requiring Social Security taxes) and FUTA (requiring unemployment insurance taxes) do not apply to them. In addition, if workfare participants are determined to be employees otherwise covered by FLSA, the obligations of that Act may be met by benefit checks and determination of maximum hours of work in keeping with the minimum wage as described in #1. These terms apply to workfare positions in the public, nonprofit, and private sectors.

2. The bill does not address other labor laws. If workfare participants are determined to be employees then these laws[1] apply to the same extent as they do to any other employee. Workers' compensation would remain a State issue.

3. All workfare participants are guaranteed the minimum wage. In calculating the number of hours a participant may spend in workfare activities:

- Food stamps and cash benefits are considered wages;
- Child support collections are to be subtracted, and States may anticipate future child support collections based on any reasonable methods (subject to the approval of the Secretary, if necessary), such as recent collections (but not arrearages); and
- The federal minimum wage is to be used.

$$\frac{\text{(food stamps + cash) - expected child support}}{\text{federal minimum wage}} = \text{maximum hours in workfare activity}$$

4. If the above formula does not yield enough hours to allow States to count workfare participants towards work participation rates, participants can complete remaining hours in education activities and job search.

5. Grievance procedures and nondisplacement provisions included in the 1996 welfare reform law and the 1997 Balanced Budget Act would apply to workfare participants and those affected by workfare placements, depending on how the position was funded.

---

[1] Including the Davis-Bacon and Service Contract Acts requiring prevailing wages, Employee Retirement Income Security Act (affecting employee benefits including health, retirement, and vacation), group health plan continuation coverage under COBRA, Family and Medical Leave Act, Title VII of the Civil Rights Act (including compensatory and punitive damages), Executive Order 11246 (affirmative action for all government contractors), Age Discrimination in Employment Act, Americans with Disabilities Act (including compensatory and punitive damages), Occupational Safety and Health Act, Drug-Free Workplace Act, National Labor Relations Act (providing for collective bargaining and other union activities), Worker Adjustment and Retraining Notification Act, Child Support Enforcement Reporting, Wage Garnishment Requirements, and many State laws, including common laws regarding wrongful discharge and payment of State payroll and income taxes.

WR-FL8A

Briefing Materials for the Chief of Staff
Erskine B. Bowles

Event:	**Meeting with Labor Representatives re: Welfare Reform**	
Date:	Tuesday, September 16, 1997	
Time:	5:00 p.m.	
Participants:	Erskine Bowles	
	John Podesta	
	Bruce Reed	
	Elena Kagen	
	John Hilley	
	Gene Sperling	
	Kitty Higgins	DOL
	John Sweeney	AFL-CI)
	Andrew Stern	SEIU
	Morton Bahr	Communication Workers
	Gerry McEntee	AFSCME
Background:	**Briefing memo from Karen Tramontano**	

MEMORANDUM FOR ERSKINE BOWLES, CHIEF OF STAFF
JOHN PODESTA, DEPUTY CHIEF OF STAFF

FROM: KAREN TRAMONTANO

RE: WELFARE REFORM MEETING WITH
AFL-CIO PRESIDENT JOHN J. SWEENEY
CWA PRESIDENT, MORTON BAHR
AFSCME PRESIDENT, GERALD MCENTEE
SEIU PRESIDENT, ANDREW STERN

Background

The Administration made a commitment to support the application of the minimum wage and the fair labor standards act, as well as other labor protections, to work fare recipients. As a result of activities by the governors and, as of late, some members of Congress, the Presidents, specifically President McEntee, wanted to have a strategy session. Attached is the list of attendees, Susan Brophy has also been invited to attend.

Issue

The issue the Presidents want to discuss is where is the Administration currently?

Status Report

After the President announced his position, the Governors (NGA) stated last week that were going to move publicly against the application of the minimum wage and the fair labor standards to work fare recipients. In preparing for the upcoming NGA meeting (9/22), NGA staff met to make policy recommendations regarding this issue. Since there was a split in the NGA--only a small majority agreed with the policy--staff decided not to move on the issue.

Following the staff recommendation, individual governors, led by Governor Thomas Carper (Del) began working with members of Congress, specifically Clay Shaw to draft a compromise. Last night we received a copy of the Shaw legislation. (Copy attached) It provides the following: 1. that work fare participants are paid by the welfare agency rather than the agency for which they are working; and 2. that the state is exempted from paying FICA/FUTA. The legislation may weaken the work requirements by allowing participants whose compensation exceeds the formula (hours divided by minimum wage) to use the remaining hours for job search and education. Finally, the worker protection limitations originally in the legislation appear to have been eliminated-

7

-but we do not know that with any certainty at this time.

The DPC is reviewing the legislation and has forwarded it to Department of Labor lawyers for their review. I have forwarded the legislation to the AFL-CIO general counsel for his review. After DOL's review, DPC may meet with Dem staff on Monday to discuss any issues surrounding the legislation. Diana Fortuna and Cynthia Rice are aware of the Tuesday meeting. Their report on this issue is attached.

Based on conversations with John (Podesta) I understand we are not going to fight the FICA/FUTA exemption. I have signaled the likelihood of that position to the AFL-CIO. They appear to have no problem with that position.

I will continue to monitor developments and let you know if this situation changes in any significant way before the Tuesday meeting. At this time, the proponents of the Shaw legislation are talking about having a press conference to announce this compromise on Thursday. I do not have firm numbers on how many votes such a compromise would garner. We should have a recommended position from DPC by Tuesday.

Discussion

With this as a backdrop, the International Presidents want to have a strategy discussion that results in the continued application of the minimum wage and FLSA to work fare. Accordingly, they want to raise the following issues:

What are the options that will bring closure to this issue and retain minimum wage and FLSA applications?

How should the governors be addressed?

How should Congressional conservations be approached?

Congressional supporters?

What is the press/message mood around the country on this issue?

How do we stop the continued privatization discussions so Texas does not happen again?

(On this issue, Kitty Higgins learned a couple of days ago that Governor John Engler(Mich) is planning to contract out all employment services. She also got a copy of a letter from Engler's consultants that advised the governor not to contact the Labor Department and just to move to contract out because they (the consultants) talked to the Labor Department re:Texas and that (in their opinion) was what stopped privatization.)

There are three preliminary points to resolve: 1. what is our position on Shaw?; 2. will the Shaw legislation pass regardless of our positions?; and 3. what is the AFL-CIO's position on Shaw. We should know the answers to these questions before Tuesday's meeting. I will update you.

Weekly Report -- Rice/Fortuna
September 12, 1997

New Republican Proposal on Workfare and Minimum Wage -- House Ways and Means Human Resources Subcommittee Chairman Clay Shaw is trying to garner bipartisan support among Governors and House members for a bill that addresses state concerns about the cost of workfare programs. Unfortunately it does so by significantly weakening the welfare law's work requirements. The draft legislation requires states to pay the minimum wage for work experience and community service programs, but it limits the number of work hours to what states can afford to pay, based on the amount of their welfare grant plus food stamps. The balance of a recipients' time could be spent on job search and education activities. Thus, a welfare recipient could work 10 hours a week and do 10 hours of job search. There is a concern that the legislation's definition of "work experience" and "community service" may be so broad that nearly all subsidized work could be defined as such, allowing low benefit states to require less than 20 hours of work from nearly all their "working" recipients. The bill would also exempt workfare positions from FICA and unemployment taxes, something that we indicated during the balanced budget negotiations that we were willing to do.

Department of Labor lawyers are currently reviewing the legislative language to determine if the bill weakens worker protections or minimum wage enforcement. If it does not, then our grounds for opposition will rest solely on the weakening of the work requirements, an issue on which we may not have many allies. We hear Chairman Shaw may unveil this legislation at a press conference on Thursday, with a hearing and markup soon to follow. He apparently plans to move the measure as a separate piece of legislation. As you may recall, Speaker Gingrich told the Republican gathering in Indianapolis on August 22nd that enacting legislation in this area would be a key priority for the fall "because the Clinton Administration, working with the unions and the bureaucrats, is trying to undermine and destroy welfare reform."

Summary of Compromise Welfare-to-Work Transition Bill
September 1997

1. The compromise bill does not determine the employee status of workfare participants; however, it does specify that if workfare participants are determined to be "employees" and otherwise covered by these laws, then FICA (requiring Social Security taxes) and FUTA (requiring unemployment insurance taxes) do not apply to them. In addition, if workfare participants are determined to be employees otherwise covered by FLSA, the obligations of that Act may be met by benefit checks and determination of maximum hours of work in keeping with the minimum wage as described in #3. These terms apply to workfare positions in the public, nonprofit, and private sectors.

2. The bill does not address other labor laws. If workfare participants are determined to be employees then these laws[1] apply to the same extent as they do to any other employee. Workers' compensation would remain a State issue.

3. All workfare participants are guaranteed the minimum wage. In calculating the number of hours a participant may spend in workfare activities:

- Food stamps and cash benefits are considered wages;
- Child support collections are to be subtracted, and States may anticipate future child support collections based on any reasonable methods (subject to the approval of the Secretary, if necessary), such as recent collections (but not arrearages); and
- The federal minimum wage is to be used.

$$\frac{\text{(food stamps + cash) - expected child support}}{\text{federal minimum wage}} = \text{maximum hours in workfare activity}$$

4. If the above formula does not yield enough hours to allow States to count workfare participants towards work participation rates, participants can complete remaining hours in education activities and job search.

5. Grievance procedures and nondisplacement provisions included in the 1996 welfare reform law and the 1997 Balanced Budget Act would apply to workfare participants and those affected by workfare placements, depending on how the position was funded.

---

[1] Including the Davis-Bacon and Service Contract Acts requiring prevailing wages, Employee Retirement Income Security Act (affecting employee benefits including health, retirement, and vacation); group health plan continuation coverage under COBRA, Family and Medical Leave Act, Title VII of the Civil Rights Act (including compensatory and punitive damages), Executive Order 11246 (affirmative action for all government contractors), Age Discrimination in Employment Act, Americans with Disabilities Act (including compensatory and punitive damages), Occupational Safety and Health Act, Drug-Free Workplace Act, National Labor Relations Act (providing for collective bargaining and other union activities), Worker Adjustment and Retraining Notification Act, Child Support Enforcement Reporting, Wage Garnishment Requirements, and many State laws, including common laws regarding wrongful discharge and payment of State payroll and income taxes.

[DISCUSSION DRAFT]

105TH CONGRESS
1ST SESSION

H. R. ____

IN THE HOUSE OF REPRESENTATIVES

Mr. SHAW introduced the following bill; which was referred to the Committee on _____

A BILL

To provide rules governing the implementation of work experience and community service programs under the program of block grants to States for temporary assistance for needy families.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Workfare Implementation Act of 1997".

SEC. 2. RULES GOVERNING 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 WORK EXPERIENCE AND COMMUNITY SERVICE PROGRAMS.—

"(1) DEFINITIONS.—As used in this section:

"(A) WORK EXPERIENCE PROGRAM.—The term 'work experience program' means a program which is designed to—

"(i) provide experience or training for individuals not able to obtain employment in order to assist them to move to employment; and

"(ii) improve the employability of program participants through actual work experience to enable such individuals to move promptly to employment.

"(B) COMMUNITY SERVICE PROGRAM.—The term 'community service program' means a program which is 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 facili-

ties, public safety, and day care, and other purposes identified by the State.

"(2) MAXIMUM HOURS OF PARTICIPATION.—

"(A) MONTHLY LIMIT.—A State that elects to establish a work experience or community service program may not require any individual to participate in any such program for a combined total number of hours per month that exceeds—

"(i)(I) the amount of assistance provided during the month to the family of which the individual is a member under the State programs 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

"(III) any amount that is collected (or reasonably expected to be collected, as determined in accordance with methods approved by the Secretary, which may take account of recent collections but not arrearages) by the State as child support on

behalf of the family of which the individual is a member that is not paid to the family; divided by

"(ii) the minimum wage rate in effect during the month under section 6 of the Fair Labor Standards Act of 1938.

"(B) WEEKLY LIMIT.—A State that elects to establish a work experience or community service program may not require any individual to participate in any such program for a combined total of more than 40 hours per week.

"(C) PROCEDURE FOR ADDRESSING ERRORS.—A State that elects to establish a work experience or community service program shall establish procedures to address errors in the application of this paragraph.

"(3) SPECIAL RULES.—

"(A) EXEMPTIONS FROM FICA AND FUTA.—Amounts paid by reason of participation in a work experience or community service program—

"(i) shall not be taken into account—

"(I) as wages (as defined in section 3121(a) of the Internal Revenue Code of 1986 (relating to Federal In-

surance Contributions Act)) for purposes of chapter 21 of such Code;

"(II) as compensation (as defined in section 3231(e) of such Code for purposes of sections 3201(a) and 3221(a) of such Code (relating to tier 1 railroad retirement taxes); or

"(III) as wages (as defined in section 3306(b) of such Code (relating to Federal Unemployment Tax Act)) for purposes of chapter 23 of such Code; and

"(ii) shall not be taken into account in determining any benefit under Federal law to which the individual would otherwise be entitled on account of the payment of such amounts (other than a tier 2 railrod retirement benefit).

"(B) RULES RELATING TO MINIMUM WAGES AND MANNER OF PAYMENT OF WAGES.—

"(i) SATISFACTION OF MINIMUM WAGE RULES.—Compliance with paragraph (2) with respect to a participant in a work experience or community service

program shall be treated as compliance with any requirement of the Fair Labor Standards Act or any other Federal law relating to the amount or payment of minimum wages that applies to the participant in respect of participation in the program.

"(ii) SATISFACTION OF RULES AS TO MANNER OF PAYMENT OF WAGES.—The provision of a benefit check to a participant in a work experience or community service program shall be treated as compliance with any requirement of the Fair Labor Standards Act or any other Federal law relating to manner of payment of wages that applies to the participant in respect of participation in the program.".

(b) CONFORMING AMENDMENT.—Section 403(a)(5)(C)(i)(I) of such Act (42 U.S.C. 603(a)(5)(C)(i)(I)) is amended by inserting "(as defined in section 407(j)(1))" before the period.

(c) RETROACTIVITY.—The amendments made by 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.

FICIENT 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 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.

SEIU
Leading the Way

FAX TRANSMITTAL SHEET

DATE: 16 Sept. 1997

NUMBER OF PAGES (including cover sheet): 6

TO: Elana Kagan	FROM: Carol R. Golubock, Esq. Assoc. General Counsel
ORG.:	DEPT.: Legal
FAX NO.: 202/456-2878	FAX NO.: 202/898-3323
TEL. NO.:	TEL. NO.: 202/898-3454

COMMENTS:

☐ URGENT ☐ FOR YOUR INFORMATION ☐ PLEASE CALL

SERVICE EMPLOYEES
INTERNATIONAL UNION
AFL-CIO, CLC

1313 L Street, N.W.
Washington, D.C. 20005
202.898.3200
http://www.seiu.org

8105-1000

Subsec. (a)(14)(A), (B), (15) to (17). Pub.L. 103–296, § 321(e)(4)(B)(iii)–(vi), substituted, wherever appearing, "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954", all previously translated for purposes of codification as "Title 26" and required no change in text.

Subsecs. (b), (f), (g), (i)(1), (j). Pub.L. 103–296, § 321(e)(4)(C), substituted, wherever appearing, "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954", all previously translated for purposes of codification as "Title 26", requiring no change in text, and conforming thereto "such Code" in para. (1) and (2) of subsec. (i) to read "Title 26".

Subsec. (k). Pub.L. 103–296, § 107(a)(4), substituted "Commissioner of Social Security" for "Secretary" wherever appearing in para. (1), (2), and (3)(C).

Subsec. (k)(1). Pub.L. 103–296, § 321(e)(1)(C), included references to sections 415(a)(1)(C)(ii), 415(a)(1)(D), 415(a)(1)(E), and 415(b)(2)(C)(ii) of this title and substituted definition of the term "national average wage index" for the definition of "deemed average total wages".

Subsec. (k)(2). Pub.L. 103–296, § 321(e)(1)(C), added par. (2). Former par. (2) was redesignated (3).

Subsec. (k)(3). Pub.L. 103–296, § 321(e)(1)(A), (B), redesignated par. (2) as (3), and substituted therein "this subsection" for "paragraph (1)".

Effective Dates

1996 Acts. Amendment by section 1421 of Pub.L. 104–188 applicable to taxable years beginning after Dec. 31, 1996, see section 1421(e) of Pub.L. 104–188, set out as a note under section 72 of Title 26, Internal Revenue Code.

Amendment by section 1458(b)(2) of Pub.L. 104–188 applicable to remuneration paid after Dec. 31, 1996, see section 1458(c)(2) of Pub.L. 104–188, set out as a note under section 3121 of Title 26, Internal Revenue Code.

1994 Acts. Amendment by Pub.L. 103–387 applicable to remuneration paid after December 31, 1993, see section 2(a)(3)(A) of Pub.L. 103–387, set out as a note under section 3102 of Title 26, Internal Revenue Code.

Amendment by section 107(a)(4) of Pub.L. 103–296 effective Mar. 31, 1995, see section 110 of Pub.L. 103–296, set out as a note under section 401 of this title.

Plan Amendments Not Required Until January 1, 1998

For provisions directing that if any amendments made by sections 1401 to 1465 of Pub.L. 104–188 require an amendment to any plan or annuity contract, such amendment shall not be required to be made before the first day of the first plan year beginning on or after Jan. 1, 1998, see section 1465 of Pub.L. 104–188, set out as a note under section 401 of Title 26, Internal Revenue Code.

NOTES OF DECISIONS

23. —— Miscellaneous wages

Government service of social security disability claimant who elected not to become subject to Federal Employment Retirement System (FERS) did not fall within Social Security Act's definition of "employment" and therefore, claimant's civil service earnings were noncovered and did not constitute "wages" for purpose of Act's disability benefit offset provision and were properly excluded from average current earnings calculation. Smith v. Sullivan, C.A.8 (Ark.) 1992, 982 F.2d 308.

Term "wages" for calculating average current earnings in statute reducing social security disability benefits if they exceed 80% of that amount excluded noncovered wages earned outside Social Security system. Prather v. Shalala, D.Md.1993, 844 F.Supp. 289, affirmed 14 F.3d 595.

§ 410. Definitions relating to employment

For the purposes of this subchapter—

(a) Employment

The term "employment" means any service performed after 1936 and prior to 1951 which was employment for the purposes of this subchapter under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1950 (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee (i) of an American employer (as defined in subsection (e) of this section), or (ii) of a foreign affiliate (as defined in section 3121(*l*)(6) of Title 26) of an American employer during any period for which there is in effect an agreement, entered into pursuant to section 3121(*l*) of Title 26, with respect to such affiliate, or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement

entered into under section 433 of this title; except that, in the case of service performed after 1950, such term shall not include—

(1) Service performed by foreign agricultural workers lawfully admitted to the United States from the Bahamas, Jamaica, and the other British West Indies, or from any other foreign country or possession thereof, on a temporary basis to perform agricultural labor;

(2) Domestic service performed in a local college club, or local chapter of a college fraternity or sorority, by a student who is enrolled and is regularly attending classes at a school, college, or university;

(3)(A) Service performed by a child under the age of 18 in the employ of his father or mother;

(B) Service not in the course of the employer's trade or business, or domestic service in a private home of the employer, performed by an individual under the age of 21 in the employ of his father or mother, or performed by an individual in the employ of his spouse or son or daughter; except that the provisions of this subparagraph shall not be applicable to such domestic service performed by an individual in the employ of his son or daughter if—

(i) the employer is a surviving spouse or a divorced individual and has not remarried, or has a spouse living in the home who has a mental or physical condition which results in such spouse's being incapable of caring for a son, daughter, stepson, or stepdaughter (referred to in clause (ii)) for at least 4 continuous weeks in the calendar quarter in which the service is rendered, and

(ii) a son, daughter, stepson, or stepdaughter of such employer is living in the home, and

(iii) the son, daughter, stepson, or stepdaughter (referred to in clause (ii)) has not attained age 18 or has a mental or physical condition which requires the personal care and supervision of an adult for at least 4 continuous weeks in the calendar quarter in which the service is rendered;

(4) Service performed by an individual on or in connection with a vessel not an American vessel, or on or in connection with an aircraft not an American aircraft, if (A) the individual is employed on and in connection with such vessel or aircraft when outside the United States and (B)(i) such individual is not a citizen of the United States or (ii) the employer is not an American employer;

(5) Service performed in the employ of the United States or any instrumentality of the United States, if such service—

(A) would be excluded from the term "employment" for purposes of this subchapter if the provisions of paragraphs (5) and (6) of this subsection as in effect in January 1983 had remained in effect, and

(B) is performed by an individual who—

(i) has been continuously performing service described in subparagraph (A) since December 31, 1983, and for purposes of this clause—

(I) if an individual performing service described in subparagraph (A) returns to the performance of such service after being separated therefrom for a period of less than 366 consecutive days, regardless of whether the period began before, on, or after December 31, 1983, then such service shall be considered continuous,

(II) if an individual performing service described in subparagraph (A) returns to the performance of such service after being detailed or transferred to an international organization as described under section 3343 of subchapter III of chapter 33 of Title 5 or under section 3581 of chapter 35 of such Title, then the service performed for that organization shall be considered service described in subparagraph (A),

(III) if an individual performing service described in subparagraph (A) is reemployed or reinstated after being separated from such service for the purpose of accepting employment with the American Institute of Taiwan as provided under section 3310 of Title 22, then the service performed for that Institute shall be considered service described in subparagraph (A),

(IV) if an individual performing service described in subparagraph (A) returns to the performance of such service after performing service as a member of a uniformed service (including, for purposes of this clause, service in the National Guard and temporary service in the Coast Guard Reserve) and after exercising restoration or reemployment rights as provided under chapter 43 of Title 38, then the service so performed as a member of a uniformed service shall be considered service described in subparagraph (A), and

(V) if an individual performing service described in subparagraph (A) returns to the performance of such service after employment (by a tribal organization) to which section 450i(e)(2) of Title 25 applies, then the service performed for that tribal organization shall be considered service described in subparagraph (A); or

(ii) is receiving an annuity from the Civil Service Retirement and Disability Fund, or benefits (for service as an employee) under another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed services);

except that this paragraph shall not apply with respect to any such service performed on or after any date on which such individual performs—

(C) service performed as the President or Vice President of the United States,

(D) service performed—

(i) in a position placed in the Executive Schedule under sections 5312 through 5317 of Title 5,

(ii) as a noncareer appointee in the Senior Executive Service or a noncareer member of the Senior Foreign Service, or

(iii) in a position to which the individual is appointed by the President (or his designee) or the Vice President under section 105(a)(1), 106(a)(1), or 107(a)(1) or (b)(1) of Title 3, if the maximum rate of basic pay for such position is at or above the rate for level V of the Executive Schedule,

(E) service performed as the Chief Justice of the United States, an Associate Justice of the Supreme Court, a judge of a United States court of appeals, a judge of a United States district court (including the district court of a territory), a judge of the United States Court of Federal Claims, a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States magistrate, or a referee in bankruptcy or United States bankruptcy judge,

(F) service performed as a Member, Delegate, or Resident Commissioner of or to the Congress,

(G) any other service in the legislative branch of the Federal Government if such service—

(i) is performed by an individual who was not subject to subchapter III of chapter 83 of Title 5, or to another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed services), on December 31, 1983, or

(ii) is performed by an individual who has, at any time after December 31, 1983, received a lump-sum payment under section 8342(a) of Title 5, or under the corresponding provision of the law establishing the other retirement system described in clause (i), or

(iii) is performed by an individual after such individual has otherwise ceased to be subject to subchapter III of chapter 83 of Title 5 (without having an application pending for coverage under such subchapter), while performing service in the legislative branch (determined without regard to the provisions of subparagraph (B) relating to continuity of employment), for any period of time after December 31, 1983,

and for purposes of this subparagraph (G) an individual is subject to such subchapter III or to any such other retirement system at any time only if (a) such individual's pay is subject to deductions, contributions, or similar payments (concurrent with the service being performed at that time) under section 8334(a) of such Title 5 or the corresponding provision of the law establishing such other system, or (in a case to which section 8332(k)(1) of such Title 5 applies) such individual is making payments of amounts equivalent to such deductions, contributions, or similar payments while on leave without pay, or (b) such individual is receiving an annuity from the Civil Service Retirement and Disability Fund, or is receiving benefits (for service as an employee) under another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed services), or

(H) service performed by an individual—

(i) on or after the effective date of an election by such individual, under section 301 of the Federal Employees' Retirement System Act of 1986 or section 2157 of Title 50, to become subject to the Federal Employees's Retirement System provided in chapter 84 of Title 5, or

(ii) on or after the effective date of an election by such individual, under regulations issued under section 860 of the Foreign Service Act of 1980 [22 U.S.C.A. § 4071l], to become subject to the Foreign Service Pension System provided in subchapter II of chapter 8 of title I of such Act [22 U.S.C.A. § 4071 et seq.];

(6) Service performed in the employ of the United States or any instrumentality of the United States if such service is performed—

(A) in a penal institution of the United States by an inmate thereof;

(B) by any individual as an employee included under section 5351(2) of Title 5 (relating to certain interns, student nurses, and other student employees of hospitals of the Federal Government) other than as a medical or dental intern or a medical or dental resident in training; or

(C) by any individual as an employee serving on a temporary basis in case of fire, storm, earthquake, flood, or other similar emergency;

(7) Service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned thereby, except that this paragraph shall not apply in the case of—

(A) service included under an agreement under section 418 of this title,

(B) service which, under subsection (k) of this section, constitutes covered transportation service,

(C) service in the employ of the Government of Guam or the Government of American Samoa or any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, performed by an officer or employee thereof (including a member of the legislature of any such Government or political subdivision), and, for purposes of this subchapter—

(i) any person whose service as such an officer or employee is not covered by a retirement system established by a law of the United States shall not, with respect to such service, be regarded as an officer or employee of the United States or any agency or instrumentality thereof, and

(ii) the remuneration for service described in clause (i) (including fees paid to a public official) shall be deemed to have been paid by the Government of Guam or the Government of American Samoa or by a political subdivision thereof or an instrumentality of any one or more of the foregoing which is wholly owned thereby, whichever is appropriate,

(D) service performed in the employ of the District of Columbia or any instrumentality which is wholly owned thereby, if such service is not covered by a retirement system established by a law of the United States; except that the provisions of this subparagraph shall not be applicable to service performed—

(i) in a hospital or penal institution by a patient or inmate thereof;

(ii) by any individual as an employee included under section 5351(2) of Title 5 (relating to certain interns, student nurses, and other student employees of hospitals of the District of Columbia Government), other than as a medical or dental intern or as a medical or dental resident in training;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency; or

(iv) by a member of a board, committee, or council of the District of Columbia, paid on a per diem, meeting, or other fee basis,

(E) service performed in the employ of the Government of Guam (or any instrumentality which is wholly owned by such Government) by an employee properly classified as a temporary or intermittent employee, if such service is not covered by a retirement system established by a law of Guam; except that (i) the provisions of this subparagraph shall not be applicable to services performed by an elected official or a member of the legislature or in a hospital or penal institution by a patient or inmate thereof, and (ii) for purposes of this subparagraph, clauses (I) and (II) of subparagraph (C) shall apply, or

(F) service in the employ of a State (other than the District of Columbia, Guam, or American Samoa), of any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, by an individual who is not a member of a retirement system of such State, political subdivision, or instrumentality, except that the provisions of this subparagraph shall not be applicable to service performed—

(i) by an individual who is employed to relieve such individual from unemployment;

(ii) in a hospital, home, or other institution by a patient or inmate thereof;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency;

(iv) by an election official or election worker if the remuneration paid in a calendar year for such service is less than $1,000 with respect to service performed during any calendar year commencing on or after January 1, 1995, ending on or before December 31, 1999, and the adjusted amount determined under section 418(c)(8)(B) of this title for any calendar year commencing on or after January 1, 2000, with respect to service performed during such calendar year; or

(v) by an employee in a position compensated solely on a fee basis which is treated pursuant to section 411(c)(2)(E) of this title as a trade or business for purposes of inclusion of such fees in net earnings from self employment;

for purposes of this subparagraph, except as provided in regulations prescribed by the Secretary of the Treasury, the term "retirement system" has the meaning given such term by section 418(b)(4) of this title;

(8)(A) Service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order, except that this subparagraph shall not apply to service performed by a member of such an order in the exercise of such duties, if an election of coverage under section 3121(r) of Title 26 is in effect with respect to such order, or with respect to the autonomous subdivision thereof to which such member belongs;

(B) Service performed in the employ of a church or qualified church-controlled organization if such church or organization has in effect an election under section 3121(w) of Title 26, other than service in an unrelated trade or business (within the meaning of section 513(a) of Title 26);

(9) Service performed by an individual as an employee or employee representative as defined in section 3231 of Title 26;

American Federation of Labor and Congress of Industrial Organizations

WR-FL8A

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

Date: _____

TO: Elena Kagan (apologies for any misspelling)

FAX Number: 456-2878

FROM: Lynn Kleinhaut

COMMENTS: Here are materials on the "work relief" exemption from the Social Security Admen. I also faxed this to Diana.

There is/are ____ page(s) following this cover sheet.

Our FAX Number is: 202-637-5323.

Current § 210(a)(7)(F)(i) of the Social Security Act

42 USC 410(a)(7)(F)(i)

ployees of hospitals of the District of Columbia Government), other than as a medical or dental intern or as a medical or dental resident in training;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency; or

(iv) by a member of a board, committee, or council of the District of Columbia, paid on a per diem, meeting, or other fee basis,

(E) service performed in the employ of the Government of Guam (or any instrumentality which is wholly owned by such Government) by an employee properly classified as a temporary or intermittent employee, if such service is not covered by a retirement system established by a law of Guam; except that (i) the provisions of this subparagraph shall not be applicable to services performed by an elected official or a member of the legislature or in a hospital or penal institution by a patient or inmate thereof, and (ii) for purposes of this subparagraph, clauses (i) and (ii) of subparagraph (C) shall apply, or

(F) service in the employ of a State (other than the District of Columbia, Guam, or American Samoa), of any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, by an individual who is not a member of a retirement system of such State, political subdivision, or instrumentality, except that the provisions of this subparagraph shall not be applicable to service performed—

(i) by an individual who is employed to relieve such individual from unemployment;

(ii) in a hospital, home, or other institution by a patient or inmate thereof;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency;

(iv) by an election official or election worker if the remuneration paid in a calendar year for such service is less than $1,000 with respect to service performed during any calendar year commencing on or after January 1, 1995, ending on or before December 31, 1999, and the adjusted amount determined under section 218(c)(8)(B) for any calendar year commencing on or after January 1, 2000, with respect to service performed during such calendar year[*1]; or

(v) by an employee in a position compensated solely on a fee basis which is treated pursuant to section 211(c)(2)(E) as a trade or business for purposes of inclusion of such fees in net earnings from self employment;

for purposes of this subparagraph, except as provided in regulations prescribed by the Secretary of the Treasury, the

[*1] P.L. 103-296, §309(a)(1), struck out "$100" and substituted "$1,000 with respect to service performed during any calendar year commencing on or after January 1, 1995, ending on or before December 31, 1999, and the adjusted amount determined under section 218(c)(8)(B) for any calendar year commencing on or after January 1, 2000, with respect to service performed during such calendar year", applicable to service performed on or after January 1, 1996.

Current § 218(c)(6)(A) of the Social Security Act
42 USC 418(c)(6)(A)

(4) The Commissioner of Social Security[47] shall, at the request of any State, modify the agreement with such State so as to (A) include any coverage group to which the agreement did not previously apply, or (B) include, in the case of any coverage group to which the agreement applies, services previously excluded from the agreement; but the agreement as so modified may not be inconsistent with the provisions of this section applicable in the case of an original agreement with a State. A modification of an agreement pursuant to clause (B) of the preceding sentence may apply to individuals to whom paragraph (3)(B) is applicable (whether or not the previous exclusion of the service of such individuals was pursuant to such paragraph), but only if such individuals are, on the effective date specified in such modification, ineligible to be members of any retirement system or if the modification with respect to such individuals is pursuant to subsection (d)(3).

(5) Such agreement shall, if the State requests it, exclude (in the case of any coverage group) any agricultural labor, or service performed by a student, designated by the State. This paragraph shall apply only with respect to service which is excluded from employment by any provision of section 210(a) other than paragraph (7) of such section and service the remuneration for which is excluded from wages by subparagraph (B) of section 209(a)(7).

(6) Such agreement shall exclude—

(A) service performed by an individual who is employed to relieve him from unemployment,

(B) service performed in a hospital, home, or other institution by a patient or inmate thereof,

(C) covered transportation service (as determined under section 210(k)),

(D) service (other than agricultural labor or service performed by a student) which is excluded from employment by any provision of section 210(a) other than paragraph (7) of such section,

(E) service performed by an individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency, and

(F) service described in section 210(a)(7)(F) which is included as "employment" under section 210(a).[48]

(7) No agreement may be made applicable (either in the original agreement or by any modification thereof) to service performed by any individual to whom paragraph (3)(B) is applicable unless such agreement provides (in the case of each coverage group involved) either that the service of any individual to whom such paragraph is applicable and who is a member of such coverage group shall continue to be covered by such agreement in case he thereafter becomes eligible to be a member of a retirement system, or that such service shall cease to be so covered when he becomes eligible to be a member of such a system (but only if the agreement is not already applicable to such system pursuant to subsection (d)(3)), whichever may be desired by the State.

---

[47] P.L. 103-296, §107(a)(1), struck out "Secretary" and substituted "Commissioner of Social Security" effective March 31, 1995.

[48] P.L. 103-296, §321(a)(18), adjusted the left-hand margination thereof so as to align with subparagraph (E). See Vol. II, P.L. 103-296, §321(a), for rules of construction.

STATE & LOCAL COVERAGE HANDBOOK

for the
Social Security Administration
& State Social Security
Administrators

SOCIAL SECURITY ADMINISTRATION
Office of Program Benefits Policy
Division of Coverage
SSA Pub. No. 16-055
I.C.N. Nonstock

1/5

Handbook 4/5

Exclusions--Mandatory and Optional

Social Security Act Sections 218(c)(3), 218(c)(5), 218(c)(6), 218(c)(8), 218(d)(5), 218(m)

431. Effect of Exclusions

When an absolute or retirement system coverage group is included under an agreement, the services of all employees who are members of the coverage group are covered unless they are mandatorily or optionally excluded.

432. Mandatory Exclusions

The Federal law requires the exclusion of the following types of services.

(a) Services of Employees Who Are Hired To Relieve Them From Unemployment

This generally excludes the services performed by employees in work relief programs (other than the supervisory or administrative employees for projects). Generally it is the intent of the program which establishes whether it is one designed to relieve from unemployment. This can usually be determined from the statutes or other authorities under which the program is established.

Example 1:
Services of welfare recipients performed in return for assistance payments are excluded from coverage because the primary intent of such work-relief programs is to provide assistance to needy individuals and their families.

Example 2:
Services performed by individuals under work-training or work-study programs which are designed to provide work experience and training to increase the employability of the individual are not excluded from coverage because the primary intent of the programs is not to relieve from unemployment.

Example 3:
Classroom activities under the Summer Youth Programs of the Job Training Partnership Act are not covered because such activity is not employment, i.e., no product or service is provided by the participants, and there is no employer-employee relationship involved with respect to such activities. (See SLCH 643.)

(b) Services Performed In a Hospital, Home or Other Institution by a Patient or Inmate

A "patient" is someone undergoing treatment or receiving care in the institution. An "inmate" is someone who lives in the institution either because he was committed or chose to enter voluntarily.

Mental hospitals, homes for alcoholics, veterans' homes, and correctional institutions are examples of the institutions ordinarily involved in this exclusion.

Services performed outside the institution for the same unit of government which operates it are considered performed "in the institution." Further, services performed as part of the rehabilitative and therapeutic program of the institution are not covered if performed in the institution by a patient or an inmate thereof.

Handbook 3|5

Prior to 1995, the Social Security Act did not exempt these services from Social Security coverage.

Miscellaneous Federal Legislation Affecting State and Political Subdivision Coverage

640. Introduction

Over the years, Federal programs have been enacted to deal with almost every category of economic and social problems. Numerous Federal programs are administered by Federal departments, independent agencies, commissions, and councils designed to provide economic opportunity, social services or cash assistance to people with a variety of needs.

Sometimes, services performed under Federally enacted economic and human development programs do not constitute covered employment under the Social Security Act. However, in some instances, the services are, by statute, designated as being performed in the employ of the United States for purposes of title II of the Social Security Act. Pursuant to section 205(p) of the Social Security Act, the Social Security Administration will decide whether an individual has performed services in covered employment, the periods of such service, and whether remuneration paid for such employment constitutes wages. The head of the government agency designated to administer a particular program will determine the amount of remuneration paid and the periods for which it was paid. The wage payments may include both cash and in-kind remuneration. In some situations, the existence of coverage depends on the status of the employing entity.

These instructions relate mainly to those provisions under the enacting legislation which state that certain services shall be covered employment under the Social Security Act, or, if the legislation does not specifically so state, those services which are covered employment because of the type of services rendered and the entity for which performed.

641. Economic Opportunity Act of 1964

The Economic Opportunity Act of 1964 (referred to as the EO Act) was enacted August 20, 1964. Its major purpose was stated as a mobilization of human and financial resources of the nation to combat poverty in the United States.

Many of the programs which originated under the EO Act are now authorized under separate legislation. Among them is the Job Training Partnership Act which, on October 1, 1983, superseded the Comprehensive Employment and Training Act of 1973. Some other programs that were created as a result of the EO Act and amendments to that Act, were Job Corps, Community Action Program, Headstart, Legal Services and Native American Programs.

642. Job Training Partnership Act - P.L. 97-300

The Job Training Partnership Act (JTPA) superseded the Comprehensive Employment and Training Act (CETA) effective October 1, 1983.

As under the CETA program, services performed under JTPA programs generally are not excluded from the definition of covered employment as activity to relieve from unemployment.

Handbook 4/5

The status of any activity under the JTPA is determined under the usual common-law rules. There is no employer-employee relationship with respect to classroom training activities where the JTPA participant is attending classroom training, lectures, or demonstrations, because no employment services with respect to such JTPA activities are provided by the participant.

If it is determined that the activity is employment, the Federal-State agreement and the mandatory coverage provision of OBRA, will determine the coverage status of the employment if the employer is a State or political subdivision.

If the employment services are performed in a State or political subdivision position which is not covered under the State's agreement for full Social Security coverage, the services performed after April 1, 1986 by individuals newly hired after that date would be subject to mandatory HI-only coverage. See SLCH 210. (Also, such employment services performed after July 1, 1991 in noncovered positions of a State or political subdivision may be subject to mandatory Social Security coverage. See SLCH 215 regarding mandatory Social Security coverage.)

Under the JTPA, which is a Federally funded program, States and political subdivisions organized in service delivery areas, administer jointly with private industry a job training program in the area.

See SLCH chapter 700 for information on what constitutes wages under the JTPA.

643. Work-Study Programs

(a) General

The most frequently encountered work-study programs are the type of programs formerly under title I of the Equal Opportunity Act and currently administered by the Department of Education and by participating colleges and universities.

The purpose of the work-study programs is to stimulate and promote part-time employment of students who are from low-income families and who are in need of earnings if they are to continue their course of study.

The Department of Education enters into agreements with eligible institutions (colleges, universities, and vocational schools) under which the Secretary of Education will make grants to such institutions to assist in the operation of the work-study programs. In brief, Federal funds are allocated in accordance with a prescribed formula, among all States. Grants will then be made of those funds to individual colleges and universities on the basis of the institution's requirements for an expanded work-study program.

(b) Composition of the Work-Study Programs

Participation under these programs shall be available only to a student: (a) who is from a low-income family, (b) is in need of earnings from such employment to pursue a course of study, (c) shows evidence of being able to maintain academic proficiency while employed, and (d) has been accepted as a full-time student or, if already enrolled and attending the institution, is in good standing

Handbook 5/5

Social Security purposes. From 1988 through June 30, 1992, employer-paid premiums for group legal assistance up to $70 per employee could qualify for an exclusion from wages. Prior to 1988, there was no $70 limit on the exclusion.

741. Group-Term Life Insurance

Effective January 1, 1988, employer-paid premiums for group-term life insurance in excess of $50,000 for an employee (including any former employee who separated from employment after 1988) no longer qualify for an exclusion from wages. Amounts not in excess of $50,000 continue to qualify for exclusion. *(P.L. 100-203)*

Employer-paid premiums for former employees who separated from employment before 1989 continue to be excluded from wages if the employee was not reemployed by the same employer after the termination date. *(P.L. 100-647)*

Former employees who separated from employment after 1988 are required to pay the employee portion of the Social Security and Medicare taxes on IRS Form 1040. The employer reports the uncollected tax amounts on the Form W-2. *(P.L. 101-508)*

742. Job Training Partnership Act

Section 142(a) of the Job Training Partnership Act (JTPA) provides that individuals employed in activities, or engaged in on-the-job training authorized under JTPA, be paid wages not less than the highest of:

– the minimum wage under section 6(a)(1) of the Fair Labor Standards Act of 1938;

– the minimum wage under the applicable State or local minimum wage law; or

– the prevailing rates of pay for individuals employed in similar occupations by the same employer.

Section 142(b) of the JTPA refers to "allowances, earnings, and payments." Allowances and payments which are not intended as compensation for employment services are not wages for Social Security purposes. (See SLCH 642 for information on whether services performed under JTPA are covered employment.) The proper classification of any payment for Social Security coverage purposes depends on the circumstances under which the payment is made. It is possible for an individual to receive both wages and a needs-based allowance. The allowance is not part of the salary structure, but is a needs-based payment made by the local agency in addition to any wages paid which are based on services performed by the individual participating in the JTPA program.

If payments under the JTPA program are based on services covered under the Social Security Act, the payments are wages as defined in section 209 of the Act, unless specifically excluded from coverage.

743. Jury Duty

Employer payments to an employee, absent from work on account of jury duty, that represent the difference between the employee's regular wages and the amount received for jury duty are wages.

JBW

1995

SOCIAL SECURITY HANDBOOK

12th Edition

Page 1 of 2

Social Security Handbook, page 2/2

1003. GOVERNMENTAL FUNCTIONS include legislative, executive, and judicial activities; e.g., prevention of crimes; acting for the general welfare and providing for the public safety. Also known as "nonproprietary" functions..

A proprietary function is generally a business engaged in by a State or political subdivision similar to one a private enterprise would engage in for profit. For example, a State or local government may be engaged in a proprietary function when it operates a liquor store, public amusement park, or public utility.

What may be a proprietary function under the laws of one State may not be classified as such in another. The provisions of State law govern in determining whether a function is governmental or proprietary.

1004. THE FOLLOWING KINDS OF WORK CANNOT BE COVERED under a Federal-State agreement:

A. Work devised to relieve employees from unemployment. This does not include many programs financed from Federal funds where the primary purpose is to give the employee work experience or training.
B. Work in a hospital, home, or other institution by a patient or resident thereof.
C. Work by transportation system employees who are covered compulsorily by Social Security (see §1005).
D. Work which would be excluded from Social Security if performed for a private employer, except certain agricultural labor and work by students.
E. Services performed by an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency.

For coverage of services in firefighters' and police officers' positions under a retirement system, see §§1011 and 1012. Services of police officers and firefighters whose positions are not under a retirement system of the State or political subdivision are covered when coverage is obtained for the coverage group.

20 CFR 404.1020 Employment SSA Reg on Employment

§ 404.1020 Work for States and their political subdivisions and instrumentalities.

(a) *General.* If you work as an employee of a State, a political subdivision of a State, or any wholly owned instrumentality of one or more of these, your work is excluded from employment unless—

(1) The work is covered under an agreement under section 218 of the Act (see subpart M of this part); or

(2) The work is covered *transportation service* as defined in section 210(k) of the Act (see paragraph (c) of this section).

(3) You perform services after July 1, 1991, as an employee of a State (other than the District of Columbia, Guam, or American Samoa), a political subdivision of a State, or any wholly owned instrumentality of one or more of the foregoing and you are not a member of a retirement system of such State, political subdivision, or instrumentality. Retirement system has the meaning given that term in section 218(b)(4) of the Act, except as provided in regulations prescribed by the Secretary of the Treasury. This paragraph does not apply to services performed—

(i) As an employee employed to relieve you from unemployment;

(ii) In a hospital, home, or other institution where you are a patient or inmate thereof;

(iii) As an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency;

(iv) As an election official or election worker if the remuneration paid in a calendar year for such service prior to 1995 is less than $100, or less than $1000 for service performed in any calendar year after 1994 and before 2000, or, for service performed in any calendar year after 1999, less than the $1000 base amount, as adjusted pursuant to section 218(c)(8)(B) of the Social Security Act to reflect changes in wages in the economy. We will publish this adjustment of the $1000 base amount in the FEDERAL REGISTER on or before November 1 preceding the year for which the adjustment is made.

(v) As an employee in a position compensated solely on a fee basis which is treated, pursuant to section 211(c)(2)(E) of the Act, as a trade or business for purposes of inclusion of the fees in net earnings from self-employment; or

(4) The work is covered under § 404.1021 or § 404.1022.

(b) *Medicare qualified government employment.* Notwithstanding the provisions of paragraph (a) of this section, your work may be covered as Medicare qualified government employment (see § 404.1315b(c) of this subpart).

(c) *Covered transportation service*—(1) *Work for a public transportation system.* If you work for a public transportation system of a State or political subdivision of a State, your work may be covered transportation service if all or part of the system was acquired from private ownership. You must work as an employee of the State or political subdivision in connection with its operation of a public transportation system for your work to be covered transportation service. This paragraph sets out additional conditions that must be met for your work to be covered transportation service. If you work for a public transportation system but your work is not covered transportation *service*, your work may be covered for social security purposes under an agreement under section 218 of the Act (see subpart M of this part).

(2) *Transportation system acquired in whole or in part after 1936 and before 1951.* All work after 1950 for a public transportation system is covered transportation service if—

(i) Any part of the transportation system was acquired from private ownership after 1936 and before 1951; and

(ii) No general retirement system covering substantially all work in connection with the operation of the transportation system and guaranteed by the State constitution was in effect on December 31, 1950.

(3) *Transportation system operated on December 31, 1950, no part of which was acquired after 1936 and before 1951.* If no part of a transportation system operated by a State or political subdivision on December 31, 1950, was acquired from private ownership after 1936 and before 1951, work for that public transportation system is not covered transportation service unless performed under conditions described in paragraph (b)(4) of this section.

SSA Reg on State + Local Coverage

section 218(g)(2) of the Act all interstate instrumentalities may divide a retirement system based on whether the employees in positions under that system want coverage. The States having this authority are Alaska, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, and Wisconsin.

(b) *Divided retirement system coverage group.* A divided retirement system coverage group is a grouping under a retirement system of positions of members of the system who voted for coverage and positions of individuals who become members of the system (the "yes" group), and positions of members of the system who did not elect coverage (the "no" group) and ineligible employees (see § 404.1208). For purposes of this section for groups covered after 1958, the term "member" also includes individuals who have an option to become members of the retirement system but have not done so. The position of a member in the "no" group can be covered if, within two years after the agreement or modification extending coverage to the "yes" group is executed, the State provides an opportunity to transfer the position to the covered "yes" group and the individual occupying the position makes a written request for the transfer. The members of the "no" group can also be covered if, by referendum, a majority of them vote for coverage. If the majority votes for coverage, all positions of the members of the "no" group become covered. There is no further subdivision of the "no" group into those who voted for and those who voted against coverage. If the State requests, the ineligibles in the "no" group may become part of the "yes" group and have their services covered.

(c) *Referendum procedures.* To divide a retirement system, the State must conduct a referendum among the system's employees. If the system is to be divided, the governor or an individual named by him must certify to the Secretary that:

(1) The referendum was held by written ballot on the question of whether members of a retirement system with coverage under an agreement:

(2) All members of the retirement system at the time the vote was held had the opportunity to vote;

(3) All members of the system on the date the notice of the referendum was issued were given at least 60 days' notice regarding the referendum;

(4) The referendum was conducted under the supervision of the governor or agency or person designated by him; and

(5) The retirement system was divided into two parts, one composed of positions of members of the system who voted for coverage and the other composed of the remaining positions under the retirement system.

After the referendum the State may include those members who chose coverage under its agreement as a retirement system coverage group. The State has two years from the date of the referendum to enter into an agreement or modification extending coverage to that group.

§ 404.1208 Ineligible employees.

(a) *Definition.* An ineligible is an employee who, on first occupying a position under a retirement system, is not eligible for membership in that system because of a personal disqualification like age, physical condition, or length of service.

(b) *Coverage of ineligible employees.* A State may, in its agreement or any modification to the agreement, provide coverage for the services of ineligible employees in one of three ways:

(1) As part of or as an addition to an absolute coverage group;

(2) As part of a retirement system coverage group covering all positions under the retirement system; or

(3) As part of or as an addition to a retirement system coverage group composed of those members in positions in a retirement system who chose coverage.

§ 404.1209 Mandatorily excluded services.

Some services are mandatorily excluded from coverage under a State's agreement. They are:

(a) Services
hired to relieve
ment;
(b) Services p
tion by a public
stitution;
(c) Transports
the Federal In
Act;
(d) Certain
cases of fire,
earthquake, flo
emergency; and
(e) Services o
labor or student
be excluded from
for a private em
(f) Services
218(k)(7)(F) of
§ 404.1208(b).)

[53 FR news, Aug.
FR 39911, Dec. 17, 1

§ 404.1210 Option
loca

Certain service
the State request
coverage. These
plied on a stat
tively by coverag
(a) Services in
elective positions
(b) Services in
part-time positio
(c) Services in
positions where
basis;
(d) Any agricult
services which wo
if performed for
and
(e) For modific
1994, services perf
fficials or electior
ments for those
year are less th
years after 1994 ar
calendar years aft
the $1000 base am
ment to section 2
to reflect changes
ency. We will pub
of the $1000 base
ERAL REGISTER on
preceding the yea
justment is made.

[53 FR 28976, Aug. 2
FR 38397, July 24, 199

SSA Reg on State + Local Coverage 2/2

retirement system with
a agreement;
ers of the retirement
ting the vote was held
city to vote;
ts of the system on the
of the referendum was
as at least 30 days' no-
he referendum;
endum was conducted
vision of the governor
rson designated by him;

ement system was di-
parts, one composed of
embers of the system
coverage and the other
he remaining positions
ment system.

ndum the State may in-
embers who chose cov-
agreement as a retire-
coverage group. The
years from the date of
to enter into an agree-
dification extending cov-
roup.

ligible employees

. An ineligible is an em-
l first occupying a posi-
retirement system, is not
mbership in that system
personal disqualification
ical condition, or length

of ineligible employees. A
n its agreement or any
o the agreement, provide
the services of ineligible
ths of three ways:
if or as an addition to an
age group;
of a retirement system
D covering all positions
ement system; or
of or as an addition to a
ystem coverage group
those members in posi-
rement system who chose

matorily excluded serv-

ces are mandatorily ex-
coverage under a State's
ny are:

(a) Services of employees who are hired to relieve them from unemployment;

(b) Services performed in an institution by a patient or inmate of the institution;

(c) Transportation service subject to the Federal Insurance Contributions Act;

(d) Certain emergency services in case of fire, storm, snow, volcano, earthquake, flood or other similar emergency; and

(e) Services other than agricultural labor or student services which would be excluded from coverage if performed for a private employer.

(f) Services covered under section 218(e)(7)(F) of the Act. (See §404.1208(b).)

[47 FR 33878, Aug. 20, 1982, as amended at 57 FR 60711, Dec. 21, 1992]

§404.1210 Optionally excluded services.

Certain services and positions may, if the State requests it, be excluded from coverage. These exclusions may be applied on a statewide basis or selectively by coverage groups. They are:

(a) Services in any class or classes of elective positions;

(b) Services in any class or classes of part-time positions;

(c) Services in any class or classes of positions where the pay is on a fee basis;

(d) Any agricultural labor or student services which would also be excluded if performed for a private employer; and

(e) For modifications executed after 1994, services performed by election officials or election workers if the payments for those services in a calendar year are less than $1000 for calendar years after 1994 and before 2000, or, for calendar years after 1999, are less than the $1000 base amount as adjusted pursuant to section 218(c)(8)(B) of the Act to reflect changes in wages in the economy. We will publish this adjustment of the $1000 base amount in the FEDERAL REGISTER on or before November 1 preceding the year for which the adjustment is made.

[58 FR 33878, Aug. 20, 1993, as amended at 61 FR 38307, July 24, 1996]

§404.1211 Interstate instrumentalities.

For Social Security coverage purposes under section 218 of the Act, interstate instrumentalities are treated, to the extent practicable, as States, that is:

(a) They must be legally authorized to enter into an agreement with the Secretary;

(b) They are subject to the same rules that are applied to the States;

(c) They may divide retirement systems and cover only the positions of members who want coverage; and

(d) They may provide coverage for firefighters and police officers in positions under a retirement system.

[53 FR 29978, Aug. 22, 1988, as amended at 61 FR 38308, July 24, 1996]

§404.1212 Police officers and firefighters.

(a) *General.* For Social Security coverage purposes under section 218 of the Act, a police officer's or firefighter's position is any position so classified under State statutes or court decisions. Generally, these positions are in the organized police and fire departments of incorporated cities, towns, and villages. In most States, a police officer is a member of the "police" which is an organized civil force for maintaining order, preventing and detecting crimes, and enforcing laws. The terms "police officer" and "firefighter" do not include services in positions which, although connected with police and firefighting functions, are not police officer or firefighter positions.

(b) *Providing coverage.* A State may provide coverage of:

(1) Police officers' and firefighters' positions not under a retirement system as part of an absolute coverage group; or

(2) Police officers' or firefighters' positions, or both, as part of a retirement system coverage group.

(c) *Police officers and firefighters in positions under a retirement system.* All States and interstate instrumentalities may provide coverage for employees in police officers' or firefighters' positions, or both, which are under a retirement system by following the majority vote referendum procedures in