NLWJC - Kagan
DPC - Box 061 - Folder-004

Welfare - FLSA etc [7]

Cynthia A. Rice 04/24/97 03:36:35 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: taxing workfare/welfare benefits

What do you think?

---------- Forwarded by Cynthia A. Rice/OPD/EOP on 04/24/97 03:39 PM ----------

MAZUR_M @ A1
04/23/97 03:46:00 PM

Record Type: Record

To: Cynthia A. Rice

cc:
Subject: taxing workfare/welfare benefits

Cynthia,
It seems to me that IRS will not be getting helpful advice out very soon on the issue of what types of welfare/workfare payments are taxable for income and payroll tax purposes. It might be appropriate to put together a joint DPC/NEC decision process that would develop legislative options in this area and run parallel to the process involving IRS. I could imagine a proposal being developed that would simply codify current practice in the area of taxation and provide some reasonable safe harbors for tax treatment and that would cost nothing in terms of foregone revenue (because the legislation just followed current practice). Alternatively, the exclusion for benefits could be expanded at some revenue cost.

What do you think about this?
Mark

Cynthia/Diana/Mark –
Sorry for taking so long to answer this. I think this is a good idea. I'd favor putting together legislation making clear that benefits aren't taxable and don't qualify the recipient for the EITC. Can we put such legislation together quickly, so we can pop it out if needed? If so, let's.
Elena

WOMEN EMPLOYED INSTITUTE

22 West Monroe Street, Suite 1400 • Chicago, Illinois 60603
Voice 312.782.3902 • Fax 312.782.5249

April 25, 1997

President William J. Clinton
The White House
1600 Pennsylvania Ave.
Washington, DC 20500

Dear President Clinton:

On behalf of hundreds of thousands of women in poverty who will be required to meet the work requirements of Temporary Assistance for Needy Families (TANF) under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, we urge you to support employment protections for participants of "Workfare" and other work-related programs.

Most Workfare programs, which states can create to meet their TANF work requirements, require TANF recipients to work in exchange for their benefits. Unfortunately, TANF does not mention the full range of employment and anti-discrimination laws that can protect Workfare participants from unlawful conduct. Current workers who do not receive TANF are already protected by such employment laws as the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act, the Family and Medical Leave Act and the Occupational Safety and Health Act. Denying Workfare participants similar protections sends the intolerable message that employers need not worry about treating Workfare participants fairly or with dignity and would allow Workfare employers to benefit from the labor of Workfare participants who are trying to support their families.

In a typical Workfare arrangement, employers will get TANF recipients to work for 20 hours per week and perform any work that the employer assigns. The employer will direct the participant's work, supervise the participant, and monitor the participant's progress, but will not be required to pay the participant's wages, provide skill training or commit to hiring the participant permanently. In most cases, the employer's extensive authority to direct and control the participant's work will satisfy the legal tests, such as the "economic realities" test that courts have used to determine whether a worker is covered by a particular employment law.

If employment protections are denied to Workfare participants, then this "make work" program, which is not creating jobs, is punishing recipients. In the absence of basic employment protections, Workfare participants are treated as prisoners who may have to endure discrimination or working in unsafe and hazardous environments or risk being sanctioned and losing their TANF benefits if they do not work under these conditions.

In light of TANF's strict work participation requirements and our economy's lack of a sufficient number of entry-level jobs, we must create programs and policies that help women find livable wage jobs that can support women and their families. Unfortunately, many Workfare programs will not advance these goals. Workfare forces participants to work in any job without regard to whether they need additional education, pre-employment or vocational skills training, or whether that job will lead to permanent, unsubsidized employment before their time limited cash assistance expires. But, if states decide to implement Workfare programs, basic employment protections must be extended to program participants.

As you stated in your proclamation for Women's History Month, women are almost an equal share of the labor force, yet gender barriers still exist that must be broken down. Do not allow Workfare to increase the barriers that women on welfare face as they work to become self-sufficient. We count on you to insure that Workfare workers are covered by the same employment protections that our country ensures for the rest of our workforce.

Sincerely,

American Friends Service Committee
American Jewish Congress Commission for Women's Equity
Black Women's Agenda, Inc.
Center for Women Policy Studies
Chicago Commons Employment and Training Center
Chicago Jobs Council
Child Care Action Campaign
Clearinghouse on Women's Issues
Church Women United
Day Care Action Council of Illinois
Hadassah
Illinois Hunger Coalition
INET for Women
League of Women Voters of Chicago
League of Women Voters of Illinois
Mid America Institute on Poverty
National Association of Social Workers
National Center for the Early Childhood Workforce
National Council of Negro Women, Inc.
National Organization for Women
National Women's Conference

New Girl Times
North Lawndale Family Network
Poverty Law Project
Women Employed Institute

cc: Erskine Bowles, Chief of Staff
Albert Gore, Vice-President
Seth Harris, Department of Labor
✓ Elena Kagan, Domestic Policy Counsel
Cynthia Metzler, Department of Labor
Bruce Reed, Domestic Policy Counsel
Donna Shalala, Health and Human Services
Ray Uhalde, Department of Labor, Employment and Training Administration
Ellen Vargyas, Equal Employment Opportunity Commission

WR-FLSA

U.S. Department of Labor

Assistant Secretary for Policy
Washington, D.C. 20210

MEMORANDUM FOR THE ACTING SECRETARY

FROM: SETH HARRIS

DATE: APRIL 23, 1997

SUBJECT: PRESS BRIEFING ON WELFARE ISSUES

Attached is a memorandum from Stacey Grundman regarding a press briefing scheduled for next Thursday by several worker and welfare advocacy groups on the application of employment laws in the welfare reform context. Unless you object, I will send copies of this memorandum to the appropriate people in the White House tomorrow for informational purposes.

The event's organizers have tentatively expressed interest in arranging for the workers who will participate in the press briefing to meet with me that morning. It would be a private meeting not open to the press. If a request is eventually made, I intend to agree to the meeting.

We will provide additional information as it becomes available.

cc: Bill Samuels
Stacey Grundman
Marvin Krislov

MEMO

To: Seth Harris
From: Stacey Grundman
Subject: Advocates/Labor Press Briefing on Labor Laws and Welfare
Date: April 23, 1997

As I mentioned, a number of welfare advocates and labor unions are planning a press briefing on the application of labor laws to welfare recipients. The briefing is scheduled for 12:30 on Thursday, May 1 and will focus on the minimum wage -- though other labor (and, I presume, non-discrimination) laws are also likely to be raised.

Sponsors: Involved organizations include the AFL-CIO, AFSCME, SEIU, Center on Budget and Policy Priorities, Center for Law and Social Policy, Women's Legal Defense Fund, and the National Employment Law Project.

Presentation: Speakers have not been confirmed at this point. The current plan seems to be to begin with a series of speakers who will talk about the importance of labor protections for welfare workers. Tentative speakers include Wade Henderson, Ellen Bravo, David Smith, and a representative of ALSMO (Association of Lutheran Social Ministry Organizations).

The second component will be presentations by two NYC welfare workers and Kathy Wilkinson (the minimum wage worker who introduced President Clinton at the minimum wage bill signing event).

Finally, Steve Savner and another not-yet-determined expert will answer questions on the application of the laws.

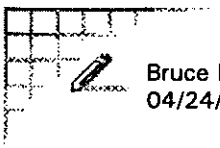
Message: The groups are hoping to illustrate the importance of the minimum wage in making welfare reform a successful effort to move people from welfare to work. The emphasis seems to be on the need to move welfare recipients into work that provides dignity, leads to independence and self-sufficiency, and ensures the safety of workers. The intention does not seem to be to attack on the Administration for inaction but to provide additional support for a favorable decision by the White House. They also view this as a response to the APWA resolution calling for an exemption from the minimum wage and other labor laws for welfare recipients.

Hill Visits: There is a possibility that meetings with targeted congressional offices will be arranged to begin to educate staff on these issues.

I will provide additional information as I receive it.

CC: Bill Samuels, John Fraser, Marvin Krislov, Kathy Curran, Rich Fiesta, Meg Schryver

WR-FLSA



Bruce N. Reed
04/24/97 01:21:56 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP

cc: Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP
Subject: Re: FLSA and Food Stamps: Paper from Dept of Ag

I'm for all 3. Can Ag live with all 3?

WR-FL8A

Cynthia/EK/DF -BR

Copy to Elena + Cynthia From Stacy Dean -Diana

Combining Food Stamp and TANF Benefits for the Purposes of Work Requirements

Issue -- A legislative fix may be necessary if minimum wage requirements are applied to TANF workfare: Under the new welfare law States are required to move large portions of their TANF caseload into work activities. By FY02, States must place 50% of their caseload in activities which last at least 30 hours per week[1]. (In FY's 97-98, only 20 hours are required.) Many States will try to meet these work requirements by placing recipients in workfare slots. If it is determined that the Fair Labor Standards Act applies to these workfare positions, then States cannot require individuals to work more hours each month than the individual's monthly benefit divided by the minimum wage. Almost no State's TANF benefit is high enough to meet this requirement.[2]

One way for States to mitigate this problem would be to count the value of a household's food stamp benefit towards the total benefit which recipients must work off as a part of their work requirement. The Food Stamp Act (FSA) allows States to require TANF recipients to perform workfare for the value of the food stamp benefit, but work requirements for the two programs are not consistent. Specifically, the FSA contains a prohibition against requiring individuals with children under age 6 to participate in work activities. Approximately, 62% of the AFDC families had children under age six in 1994. This barrier would create significant obstacles for States who wish to meet the work requirements by creating workfare slots without raising TANF benefits. For the purposes of wage supplementation, there are no barriers to combining Food Stamps to the underlying TANF benefit because there are no specific exemptions from workfare.

Cynthia — what is % w/kids under 6 but over 1 ?

Administrative Fixes: States could request a Food Stamp demonstration waiver from this prohibition. However, there are a couple of complications with using demonstration waivers as a solution. First, the demonstration waiver authority is intended for time limited welfare experiments which apply to limited portion of the State caseload and require an evaluation. It is likely States would consider these requirements as burdensome and problematic with regards to meeting their requirements. Second, the exemption for households with children under six exists in two places in the FSA. One is within the food stamp work requirements and the other is in the workfare provisions. USDA is prohibited under statute from waiving the food stamp work requirement exemption. Some might interpret a waiver of the workfare requirements as undermining Congressional intent. Finally, States may have some flexibility under a Food Stamp Simplifed Program. However, USDA staff do not believe this is true. Even if it is, many States may not want to adopt a Simplied Program, and its requirements are significantly more burdensome than a demonstration waiver.

Legislative Fixes: The Administration could formally propose, or could informally propose as a part of the technicals bill discussion, an amendment to the food stamp act which would eliminate the exemption from work requirements and workfare for individuals working to fulfill an TANF

Yes

[1]Of these 30 hours, 10 may be education or job training while the rest must be in work.

[2]Using July 1996 AFDC benefit levels, only Alaska and Hawaii's maximum benefit for a three person family is in excess of the minimum wage when divided by 30 hours per week.

requirement. This would not be inconsistent with the Administration's previous position on the Food Stamp work requirement child care exemption -- the Administration would have lowered the exemption age to 1 as long as child care was available. Also, it would assist States in meeting their TANF work requirements and it would continue to provide an exemption for non-TANF households who may not have the necessary child care to fulfill the requirement.

Recommendation: If a policy is announced which would indicate that the FLSA applies to TANF workfare slots, information should be provided on the food stamp issue. Food Stamps could be combined with TANF for the purposes of wage supplementation and for workfare as long as the household does not have children under six. The Administration should proposal a technical amendment to fix the problem for households with children under six. In the interim, the Adminstration should state that it would provide waivers to States that feel they need them immediately to meet the 20 hour per week requirement.

Agree

(ii) The Secretary may suspend the termination of payments under subparagraph (C)(i) for such period as the Secretary determines appropriate, and instead withhold payments provided for under subsection (a), in whole or in part, until the Secretary is satisfied that there will no longer be any failure to comply with the requirements of subparagraphs (A) and (B) and subsection (b)(1)(A), at which time such withheld payments shall be paid.

(iii) Upon a finding under subparagraph (C)(i) of a substantial failure to comply with any of the requirements of subparagraphs (A) and (B) and subsection (b)(1)(A), the Secretary may, in addition to or in lieu of any action taken under subparagraphs (C)(i) and (C)(ii), refer the matter to the Attorney General with a request that injunctive relief be sought to require compliance by the Commonwealth of Puerto Rico, and upon suit by the Attorney General in an appropriate district court of the United States and a showing that noncompliance has occurred, appropriate injunctive relief shall issue.

(c)(1) The Secretary, shall provide for the review of the programs for the provision of the assistance described in subsection (a)(1)(A) for which payments are made under this Act.

(2) The Secretary is authorized as the Secretary deems practicable to provide technical assistance with respect to the programs for the provision of the assistance described in subsection (a)(1)(A).

(d) Whoever knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery, any funds, assets, or property provided or financed under this section shall be fined not more than $10,000 or imprisoned for not more than five years, or both, but if the value of the funds, assets or property involved is not over $200, the penalty shall be a fine of not more than $1,000 or imprisonment for not more than one year, or both.

WORKFARE

SEC. 20. [2029] (a)(1) The Secretary shall permit any political subdivision, in any State, that applies and submits a plan to the Secretary in compliance with guidelines promulgated by the Secretary to operate a workfare program pursuant to which every member of a household participating in the food stamp program who is not exempt by virtue of the provisions of subsection (b) of this section shall accept an offer from such subdivision to perform work on its behalf, or may seek an offer to perform work, in return for compensation consisting of the allotment to which the household is entitled under section 8(a) of this Act, with each hour of such work entitling that household to a portion of its allotment equal in value to 100 per centum of the higher of the applicable State minimum wage or the Federal minimum hourly rate under the Fair Labor Standards Act of 1938 [(29 U.S.C. 201 et seq.)].

(2)(A) The Secretary shall promulgate guidelines pursuant to paragraph (1) which, to the maximum extent practicable, enable a political subdivision to design and operate a workfare program under this section which is compatible and consistent with similar workfare programs operated by the subdivision.

(B) A political subdivision may comply with the requirements of this section by ~~operating—~~

~~(i) a workfare program pursuant to title IV of the Social Security Act (42 U.S.C. 601 et seq.); or~~

~~(ii) any other~~ *operating any*[20-1] workfare program which the Secretary determines meets the provisions and protections provided under this section.

~~(b)(1) A household~~ *(b) A household*[20-2] member shall be exempt from workfare requirements imposed under this section if such member is—

~~(A)~~[20-3] *(1)* exempt from section 6(d)(1) as the result of clause (B), (C), (D), (E), or (F) of section 6(d)(2);

~~(B)~~ *(2)* at the option of the operating agency, subject to and currently actively and satisfactorily participating at least 20 hours a week in a work ~~training program~~ *activity*[20-4] required under title IV of the Social Security Act (42 U.S.C. 601 et seq.);

~~(C)~~ *(3)* mentally or physically unfit;

~~(D)~~ *(4)* under sixteen years of age;

~~(E)~~ *(5)* sixty years of age or older; or

~~(F)~~ *(6)* a parent or other caretaker of a child in a household in which another member is subject to the requirements of this section or is employed fulltime.

~~(2)~~[20-5]~~(A) Subject to subparagraphs (B) and (C), in the case of a household that is exempt from work requirements imposed under this Act as the result of participation in a community work experience program established under section 409 of the Social Security Act (42 U.S.C. 609), the maximum number of hours in a month for which all members of such household may be required to participate in such program shall equal the result obtained by dividing—~~

~~(i) the amount of assistance paid to such household for such month under title IV of such Act, together with the value of the food stamp allotment of such household for such month, by~~

~~(ii) the higher of the Federal or State minimum wage in effect for such month.~~

~~(B) In no event may any such member be required to participate in such program more than 120 hours per month.~~

~~(C) For the purpose of subparagraph (A)(i), the value of the food stamp allotment of a household for a month shall be determined in accordance with regulations governing the issuance of an allotment to a household that contains more members than the number of members in an assistance unit established under title IV of such Act.~~

(c) No operating agency shall require any participating member to work in any workfare position to the extent that such work exceeds in value the allotment to which the household is otherwise entitled or that such work, when added to any other hours worked during such week by such member for compensation (in cash or in kind) in any other capacity, exceeds thirty hours a week.

(d) The operating agency shall—

[20-1] Effective July 1, 1997, section 109(e)(1) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) amends subpara. (B) by striking "operating—" and all that follows through "(ii) any other" and inserting "operating any".

[20-2] Effective July 1, 1997, section 109(e)(2)(A)(i) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) amends para. (1) by striking "(b)(1) A household" and inserting "(b) A household".

[20-3] Effective July 1, 1997, section 109(e)(2)(C) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) redesignates subparas. (A) through (F) as paras. (1) through (6), respectively.

[20-4] Effective July 1, 1997, section 109(e)(2)(A)(ii) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) amends subpara. (B) by striking "training program" and inserting "activity".

[20-5] Effective July 1, 1997, section 109(e)(2)(B) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) strikes para. (2).

(1) not provide any work that has the effect of replacing or preventing the employment of an individual not participating in the workfare program;

(2) provide the same benefits and working conditions that are provided at the job site to employees performing comparable work for comparable hours; and

(3) reimburse participants for actual costs of transportation and other actual costs all of which are reasonably necessary and directly related to participation in the program but not to exceed $25 in the aggregate per month.

(e) The operating agency may allow a job search period, prior to making workfare assignments, of up to thirty days following a determination of eligibility.

(f) DISQUALIFICATION.—An individual or a household may become ineligible under section 6(d)(1) to participate in the food stamp program for failing to comply with this section.

(g)(1) The Secretary shall pay to each operating agency 50 per centum of all administrative expenses incurred by such agency in operating a workfare program, including reimbursements to participants for work-related expenses as described in subsection (d)(3) of this section.

(2)(A) From 50 per centum of the funds saved from employment related to a workfare program operated under this section, the Secretary shall pay to each operating agency an amount not to exceed the administrative expenses described in paragraph (1) for which no reimbursement is provided under such paragraph.

(B) For purposes of subparagraph (A), the term "funds saved from employment related to a workfare program operated under this section" means an amount equal to three times the dollar value of the decrease in allotments issued to households, to the extent that such decrease results from wages received by members of such households for the first month of employment beginning after the date such members commence such employment if such employment commences—

(i) while such members are participating for the first time in a workfare program operated under this section; or

(ii) in the thirty-day period beginning on the date such first participation is terminated.

(3) The Secretary may suspend or cancel some or all of these payments, or may withdraw approval from a political subdivision to operate a workfare program, upon a finding that the subdivision has failed to comply with the workfare requirements.

SEC. 21. [2030] DEMONSTRATION OF FAMILY INDEPENDENCE PROGRAM.

(a) IN GENERAL.—Upon written application of the State of Washington (in this section referred to as the "State") and after the approval of such application by the Secretary, the State may conduct a Family Independence Demonstration Project (in this section referred to as the "Project") in all or in part of the State in accordance with this section to determine whether the Project, as an alternative to providing benefits under the food stamp program, would more effectively break the cycle of poverty and would provide families with opportunities for economic independence and strengthened family functioning.

(b) NATURE OF PROJECT.—In an application submitted under subsection (a), the State shall provide the following:

tification period unless there is a change in the composition of the household.

(vi) CHANGE IN HEAD OF HOUSEHOLD.—If the head of a household leaves the household during a period in which the household is ineligible to participate in the food stamp program under subparagraph (B)—

(I) the household shall, if otherwise eligible, become eligible to participate in the food stamp program; and

(II) if the head of the household becomes the head of another household, the household that becomes headed by the individual shall become ineligible to participate in the food stamp program for the remaining period of ineligibility.

6(d)(2)(B) (2) A person who otherwise would be required to comply with the requirements of paragraph (1) of this subsection shall be exempt from such requirements if he or she is (A) currently subject to and complying with a work registration requirement under title IV of the Social Security Act, as amended (42 U.S.C. 602), or the Federal-State unemployment compensation system, in which case, failure by such person to comply with any work requirement to which such person is subject shall be the same as failure to comply with that requirement of paragraph (1); (B) a parent or other member of a household with responsibility for the care of a dependent child under age six or of an incapacitated person; (C) a bona fide student enrolled at least half time in any recognized school, training program, or institution of higher education (except that any such person enrolled in an institution of higher education shall be ineligible to participate in the food stamp program unless he or she meets the requirements of subsection (e) of this section); (D) a regular participant in a drug addiction or alcoholic treatment and rehabilitation program; (E) employed a minimum of thirty hours per week or receiving weekly earnings which equal the minimum hourly rate under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(a)(1)), multiplied by thirty hours; or (F) a person between the ages of sixteen and eighteen who is not a head of a household or who is attending school, or enrolled in an employment training program, on at least a half-time basis. A State that requested a waiver to lower the age specified in subparagraph (B) and had the waiver denied by the Secretary as of August 1, 1996, may, for a period of not more than 3 years, lower the age of a dependent child that qualifies a parent or other member of a household for an exemption under subparagraph (B) to between 1 and 6 years of age.

(3) Notwithstanding any other provision of law, a household shall not participate in the food stamp program at any time that any member of such household, not exempt from the work registration requirements of paragraph (1) of this subsection, is on strike as defined in section 501(2) of the Labor Management Relations Act, 1947, [(29 U.S.C. 142(2))]because of a labor dispute (other than a lockout) as defined in section 2(9) of the National Labor Relations Act [(29 U.S.C. 152(9))]: *Provided,* That a household shall not lose its eligibility to participate in the food stamp program as a result of one of its members going on strike if the household was eligible for food stamps immediately prior to such strike, however, such household shall not receive an increased allotment as the result of a decrease in the income of the striking member or members of the

Emily Bromberg
04/25/97 10:37:39 AM

Record Type: Record

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

cc:
Subject: flsa

According to DOL, a number of welfare advocates and labor unions are planning a press briefing on the application of labor laws to welfare recipients 5/1 at 12:30. Sponsors are AFL-CIO, AFSME, SEIU, Center on Budget and Policy Prioirities, Women's Legal Defense Fund. Speakers include Kathy Wilkinson--the minimum wage worker who intorduced POTUS at min wage bill signing. Hill visits are like to happen as well. According to DOL, message is "not to attack us for inaction but provide support for a favorable decision".

Not helpful. Any chance we'd make our decision known (with privitization) by then?

WR-FLSA

Combining Food Stamp and TANF Benefits for the Purposes of Work Requirements

Issue -- A legislative fix may be necessary if minimum wage requirements are applied to TANF workfare: Under the new welfare law States are required to move large portions of their TANF caseload into work activities. By FY02, States must place 50% of their caseload in activities which last at least 30 hours per week[1]. (In FY's 97-98, only 20 hours are required.) Many States will try to meet these work requirements by placing recipients in workfare slots. If it is determined that the Fair Labor Standards Act applies to these workfare positions, then States cannot require individuals to work more hours each month than the individual's monthly benefit divided by the minimum wage. Almost no State's TANF benefit is high enough to meet this requirement.[2]

One way for States to mitigate this problem would be to count the value of a household's food stamp benefit towards the total benefit which recipients must work off as a part of their work requirement. The Food Stamp Act (FSA) allows States to require TANF recipients to perform workfare for the value of the food stamp benefit, but work requirements for the two programs are not consistent. Specifically, the FSA contains a prohibition against requiring individuals with children under age 6 to participate in work activities. Approximately, 62% of the AFDC families had children under age six in 1994. This barrier would create significant obstacles for States who wish to meet the work requirements by creating workfare slots without raising TANF benefits. For the purposes of wage supplementation, there are no barriers to combining Food Stamps to the underlying TANF benefit because there are no specific exemptions from workfare.

Administrative Fixes: States could request a Food Stamp demonstration waiver from this prohibition. However, there are a couple of complications with using demonstration waivers as a solution. First, the demonstration waiver authority is intended for time limited welfare experiments which apply to limited portion of the State caseload and require an evaluation. It is likely States would consider these requirements as burdensome and problematic with regards to meeting their requirements. Second, the exemption for households with children under six exists in two places in the FSA. One is within the food stamp work requirements and the other is in the workfare provisions. USDA is prohibited under statute from waiving the food stamp work requirement exemption. Some might interpret a waiver of the workfare requirements as undermining Congressional intent. Finally, States may have some flexibility under a Food Stamp Simplifed Program. However, USDA staff do not believe this is true. Even if it is, many States may not want to adopt a Simplied Program, and its requirements are significantly more burdensome than a demonstration waiver.

Legislative Fixes: The Administration could formally propose, or could informally propose as a part of the technicals bill discussion, an amendment to the food stamp act which would eliminate the exemption from work requirements and workfare for individuals working to fulfill an TANF

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[1] Of these 30 hours, 10 may be education or job training while the rest must be in work.

[2] Using July 1996 AFDC benefit levels, only Alaska and Hawaii's maximum benefit for a three person family is in excess of the minimum wage when divided by 30 hours per week.

requirement. This would not be inconsistent with the Administration's previous position on the Food Stamp work requirement child care exemption -- the Administration would have lowered the exemption age to 1 as long as child care was available. Also, it would assist States in meeting their TANF work requirements and it would continue to provide an exemption for non-TANF households who may not have the necessary child care to fulfill the requirement.

Recommendation: If a policy is announced which would indicate that the FLSA applies to TANF workfare slots, information should be provided on the food stamp issue. Food Stamps could be combined with TANF for the purposes of wage supplementation and for workfare as long as the household does not have children under six. The Administration should proposal a technical amendment to fix the problem for households with children under six. In the interim, the Adminstration should state that it would provide waivers to States that feel they need them immediately to meet the 20 hour per week requirement.

U.S. Department of Labor
Assistant Secretary for Policy
Washington, D.C. 20210

MEMORANDUM FOR ELENA KAGAN
KEN APFEL
EMILY BROMBERG

FROM: SETH HARRIS

DATE: MARCH 27, 1997 - Noon

SUBJECT: ATTACHED L.A. TIMES ARTICLE ON WELFARE REFORM

I wanted to make you aware of the attached L.A. Times story which ran today. It discusses an APWA resolution urging that the Administration waive the Fair Labor Standards Act for welfare recipients. I am working on getting a copy of the resolution and will pass it along when I do.

The L.A. Times reporter has called and asked us for comment. We have given her our usual and approved "we're working on it" line. Is there anything else you would like us to say to the reporter? Obviously, we will need to move fast if we want to state any other position. Please let me know.

Attachment
bcc

Thursday, March 27, 1997

PREV STORY
NEXT STORY

FRONT PAGE
NATION & WORLD
STATE & LOCAL
SPORTS
BUSINESS & TECHNOLOGY
LIFE & STYLE
CALENDAR
COMMENTARY
WEEKLY SECTIONS

ORANGE COUNTY
SAN FERNANDO VALLEY
VENTURA COUNTY

Group Pushes to Limit Workfare Benefits

■ Labor: Resolution presses White House to exempt welfare recipients from such laws as minimum wage. Debate could have vast implications.

By MELISSA HEALY, Times Staff Writer

WASHINGTON--Putting the White House in a difficult political bind, a coalition of state and local human services agencies on Wednesday urged the Clinton administration to waive provisions of the Fair Labor Standards Act--including the minimum wage--for welfare recipients placed in community service jobs.

A resolution passed Wednesday by the American Public Welfare Assn. marks a significant escalation of pressure on the administration to rule on a central question of welfare reform. Requiring states to pay "workfare" participants the minimum wage of $5.15 per hour (beginning Sept. 1, 1997) and comply with other provisions of the labor act, such as overtime pay, could undermine their ability to administer welfare programs more efficiently than the federal government, the agencies contend.

Labor groups and advocates for the poor, however, are pressing Clinton equally hard to ensure that the labor act applies to welfare recipients required to work in community service jobs as a condition of receiving public aid.

The position the White House ultimately takes is expected to have enormous financial implications, since hundreds of thousands of welfare recipients who cannot be placed in private-sector jobs are likely to wind up on the rolls of state workfare programs.

State administrators fear that branding welfare recipients who are fulfilling work requirements as workers could have far-reaching consequences. It could possibly make them eligible for a wide range of costly employee benefits, including unemployment insurance, workers compensation and paid vacation and sick days.

Labor officials have declared that most workfare participants should be entitled to health and safety coverage under the Occupational Health and Safety Act, the right to

organize and join unions under the National Labor Relations Act and protection against discrimination under civil rights laws.

The state officials fear that if they are required to provide such a range of benefits and protections, costs will soar. And if the same requirements are applied to the nonprofit organizations who often provide workfare opportunities, they added, the complexity and cost of the new requirements likely would drive away many such groups--and the work experience they provide welfare recipients.

"The impact of this is potentially monumental," said Clarence Carter, commissioner of Virginia's Department of Social Services. "It may be a slippery slope argument but, if indeed you say the [labor act] applies, and that begins to define these people as workers as we currently know it, then who's to say that every other work requirement wouldn't apply. . . ? It's a whole host of problems. And they could very well be bogeymen. But the possibilities are frightening."

At a recent rally organized here by a welfare rights organization, White House special assistant Gene Sperling told demonstrating workfare participants that the issue was under review at the White House. Faced with hooting activists carrying placards reading "A day's work for a day's pay" and "Welfare Workers Union, Yes!" Sperling said that the administration's "overall orientation" is to see the laws applied broadly.

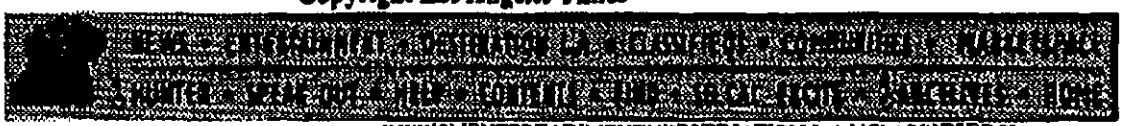
Among state welfare agency administrators, such hints touched off a flurry of angst and activity, which culminated in Wednesday's resolution. The staff of the American Public Welfare group polled its state agency chiefs, asking whether application of the labor laws to welfare recipients would pose a hardship. Within 48 hours--a lightning pace for such a disparate coalition--31 state administrators fired back with their concerns.

"This is a complicated enough bill and a very, very difficult bill that's going to strain everyone to get it done," said Cornelius Hogan, secretary of Vermont's Human Services Agency. "We just don't need another complication."

One of the most prominent workfare programs that predated welfare reform--the federal JOBS program--required states to pay minimum wage for hours spent in job-related activity by welfare recipients transitioning to work. And many states' programs, including New York's and Wisconsin's strict workfare programs, are designed to assure that minimum wage requirements are

met.

"This is real work, so people should be compensated as such," said Steven Kest, executive director of the Assn. of Community Organizations for Reform Now, which organized the rally and meeting with Sperling in mid-March. "You can't have it both ways. Either this is training or it's work and it's clearly not training," he said of New York's workfare program.



Diana Fortuna 03/28/97 01:09:10 PM

Record Type: Record

To: Emily Bromberg/WHO/EOP
cc: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP
bcc:
Subject: Re: flsa

major new legal problem that food stamp law appears to prohibit families w/kids under 6 from being required to work. Something like half the families fit this profile. This would give Mississippi a lot of company. OMB/USDA are trying to find out if there is an administrative remedy but so far no luck. They are going to tell HHS about the problem now. USDA and OMB are working on a legislative fix. This problem doesn't appear to be changing our basic position so far though.

It's kind of weird that it appears that no one has figured this out (states, labor) to date.

Emily Bromberg

Emily Bromberg
03/28/97 11:37:48 AM

Record Type: Record

To: Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP

cc:
Subject: flsa

any update here? i'm hearing that we have a major FS problem re: requiring mothers with kids under 6 to work.

Diana Fortuna 02/24/97 06:30:43 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Kenneth S. Apfel/OMB/EOP, Stacy L. Dean/OMB/EOP

cc:
Subject: Some info from HHS on existing workfare programs and minimum wage

First message is my response to the second message, which is a bit confusing.

---------- Forwarded by Diana Fortuna/OPD/EOP on 02/24/97 06:29 PM ----------

Diana Fortuna 02/24/97 06:29:07 PM

Record Type: Record

To: mpugh @ acf.dhhs.gov @ INET @ LNGTWY
cc:
bcc: Records Management
Subject: Re: CWEP, AWEP, Waivers

Thanks for your helpful email.

Our basic question is to what extent have states already been paying minimum wage. So we will be interested to look at the size of AWEP programs that didn't pay minimum wage. Is there a way to separate non-mw AWEP program from mw AWEP programs?

On waivers, I understand your point that waivers either simply folded in AWEP/CWEP, or else they included private sector/ wage supplementation which was always paid at minimum wage.

Our goal would be to say something like "x% of state workfare programs already pay minimum wage", where x% is fairly high. And if x% isn't that high, that would be very useful to know that we are changing the rules on the states.

mpugh @ acf.dhhs.gov

mpugh @ acf.dhhs.gov
02/24/97 05:30:00 PM

Record Type: Record

To: Diana Fortuna

cc:
Subject: CWEP, AWEP, Waivers

Diana -- I'll give you a call on this but wanted to send it in writing as well...

In answer to your question about how many states have been running CWEP and AWEP programs under JOBS, according to the most recent data (JOBS 1995-1996 characteristics book):

* 32 states have CWEP programs, which are exempt from FLSA but not from the minimum wage (participants cannot work more hours than their check will cover at $4.75/hr)

* 41 have AWEP programs, which HHS interpreted as sharing CWEP's FLSA exemption. The tricky thing is that AWEP allows flexibility in hours (so that employees work a consistent number from month to month regardless of fluctuations in the welfare check).

* There isn't a helpful way to answer your third question, which I understand was how many state waivers were silent on the min wage issue or did not meet mw. CWEP and AWEP (created under JOBS) provided states with all of the flexibility they needed in this area, so when they asked for waivers it was for provisions other than wages/hours in these "public" work activities. Usually it was for other things, like extending the amount of time people could be on work supp, or broadening eligibility standards and income disregards. States often incorporated their CWEP and AWEP activities under the "statewide welfare reform" umbrella, but you won't find things in the CWEP/AWEP area that they couldn't have done anyway without a waiver. (Work supp and the subsidized private sector stuff was different, but those types of things never had a FLSA exemption and always had to pay min wage).

I am sending both of you a chunky fax full of helpful (I promise) information (like which states have been doing this and how large a %age of their caseload was in). States don't have to tell us too much about what they are going to do under TANF, so our info is spotty in this area. We have indications that many will continue with current arrangements, simply expanding them.

Hope this is what you need. If it isn't, call me -- Margaret 401-6944

file

Diana Fortuna 02/24/97 02:03:20 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Stacy L. Dean/OMB/EOP
Subject: Minimum wage

I asked John Monahan for HHS's info on how often they have granted subminimum wage in the past. He gave me the same general, non-quantified response we have gotten in the past: all CWEP workfare had to meet minimum wage; some AWEP workfare did not; and some waivers were mushy on the topic. I assume you want me to follow up and ask them to quantify this? (Stacy, have you asked HHS for this as well?)

CA - Never be able to meet work reqs

1) Is The wk exper "wk"
2) Is There an ER/EE wkhip
3) If st EE - sick/vac time
4) Recreating entitlement

elig for leave?
pensions?
S. Sec?

Not considered wk before - Why now??
& has changed in The wk active themselves.

NEED PAPER — Applic of FLSA to aliens and child only cases. - prevented from doing this

(*) Implications of responsibility K? Can you deal w/ some of These issues? By K

6ET

10th Cir case

Johns v Smart - Gen./Ass Proj.

3/2 Conf call FLSA - Welfare

KY - should be defined as wk
community service placements -
learning ops for people who aren't employable.
trying to instill wk ethic
bad msg to clients
= not enuf $$

[redacted] Stats - CWEP v AWEP?
KY - 92% AWEP

Need flexibility to design approp placements -
Whole point of b/k grant.
Encouraging states to game the syst!

ER/EE [redacted] relationship -
no such relship in cum service

"Suffer + permit to wk"

(*) What happens to client who refuses to wk??
Sanctions
Reinstating the ent by req'ing a W.W.

If st. pays, then they become ST EEs — w/ all
that entails
If emp pay, who would want to?

From: Kenneth S. Apfel on 03/18/97 12:32:51 PM

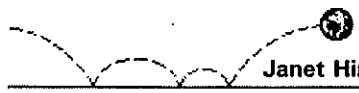
Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: Labor Law and Welfare

fyi

---------- Forwarded by Kenneth S. Apfel/OMB/EOP on 03/18/97 12:34 PM ----------



Janet Himler 03/18/97 12:05:53 PM

Record Type: Record

To: Kenneth S. Apfel/OMB/EOP

cc: Cynthia M. Smith/OMB/EOP, Jill M. Pizzuto/OMB/EOP
Subject: Labor Law and Welfare

---------- Forwarded by Janet Himler/OMB/EOP on 03/18/97 12:06 PM ----------

Lotus Notes Newsstand™

Daily Report for Executives

No. 52 Tuesday March 18, 1997

REGULATION, ECONOMICS AND LAW

Welfare

White House Reviews Labor Law To Determine Welfare Recipients' Coverage

The Clinton administration contends that welfare recipients who must participate in local workfare programs to receive benefits should be covered by the Fair Labor Standards Act, the federal law that sets out minimum wage and overtime requirements, presidential advisor Gene Sperling said March 17.

Sperling, a special assistant to the president for economic policy and chair of the National Economic Council, told a group of workfare participants and grass roots activists that the White House is continuing to review federal labor law to determine whether welfare recipients who must work for their benefits are covered by the law and whether they are permitted to organize.

"We are trying to find out right now what the best legal course to take is," Sperling said during a noon event sponsored by the Association of Community Organizations for Reform Now. ACORN invited Sperling to discuss the president's welfare reform initiative, while it pressed its case that workfare recipients should have the right to organize for the purpose of collective bargaining.

Haven't Heard from the Lawyers

"Our orientation and our hope is that the [FLSA] law applies as broadly as possible so that anybody working [in workfare programs] does get the minimum wage and . . . and has the right to organize," he said.

"We are trying to find out how the law works best," according to Sperling. But he admitted that the White House still has not heard back from all its lawyers on this matter. "Sorry to say, I just do not know the answer," he said, again stressing that the administration's "overall orientation" is that workfare participants are covered by federal wage and hour provisions.

Sperling reiterated that the president is committed to pushing through his proposal to improve the new welfare law. As laid out in the president's fiscal 1998 budget request, the president wants Congress to approve a $3 billion job placement and job creation program over three years, allotting $750 million for fiscal 1998. Sperling, however, was booed when he said that program would allow mayors to decide how to spend the money.

Organizing Under Way in Cities

Workfare participants from the New York's Work Experience Program were among those participating in the event. Some participants of the WEP program, for example, must pick up litter in New York City parks as part of the WEP's requirement to receive welfare benefits.

ACORN said it is working with WEP workers who want to organize "to win better working conditions, training, and permanent jobs." Since December 1996, more than 6,000 workfare participants in New York and Los Angeles have signed ACORN cards, the organization said.

Also attending the event were participants from Los Angeles, Philadelphia, Houston, Chicago, Boston, and several other cities, according to ACORN, which describes itself as a grassroots community organization that represents about 100,000 low- and moderate -income families in 30 cities.

"We're here in Washington to make it clear that 'fixing' welfare reform must include creating real jobs at living wages as well as protections for workfare workers' rights as workers to organize," according to ACORN National President Maude Hurd. The Rev. Jesse Jackson also was on hand to lend his support for workfare participants' right to organize.

Following the noon discussion, held at a Capitol Hill church, the group marched to the Capitol building and to the Department of Health and Human Services to raise public of their public awareness of their position.

From DOL

DRAFT -- FOR INTERNAL USE ONLY

Proposed Action Plan: Welfare Protection and Labor Laws

*TECHNICAL ASSISTANCE. DOL and HHS would offer technical assistance to states to explain the laws and discuss the options states might choose in designing their programs to meet both FLSA and TANF requirements.

*OUTREACH AND PUBLIC EDUCATION. DOL and HHS would begin a consultation process with state groups, worker advocates, and welfare advocates to collect information and obtain their input. We also want to promote a better understanding of the importance of maintaining both worker protections and strong work requirements.

*CONSULTATION AND FACT FINDING. DOL and HHS will collect information from states and others about the details and magnitude of problems that could arise in meeting both FLSA and TANF requirements. This might include a pilot effort with several states in which we can work intensively to ensure that their planned TANF work models meet FLSA requirements.

*DEVELOPING ADMINISTRATION OPTIONS. With the information gained from consultation with states and others, we will develop a range of acceptable policy solutions to this issue.

Ask DF -
Sr IOC can.

CONFIDENTIAL DRAFT INFORMATION--NOT FOR PUBLIC DISCLOSURE

Guide to the Application of Workplace Laws to Welfare Recipients in Work Activities[1]

The passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) in August 1996 increased emphasis on the need to move welfare recipients from welfare to work. Under the Act, Aid to Families with Dependent Children (AFDC) was replaced with Temporary Assistance for Needy Families (TANF). The new welfare law gives state and local governments broad latitude to meet specified work requirements. However, the existence of other laws affecting workers and the workplace must be considered and, where applicable, the provisions of these laws must be met.

Work Activities and Requirements: The new welfare law requires 25 percent of all TANF families and 75 percent of two-parent families to have an adult engaged in work activities in FY 1997 (families with no adult are exempted). The required participation rates increase each year, culminating at 50 percent (for all families with an adult) and 90 percent for two-parent families in FY 2002. In order to be counted towards the work participation rate, a single parent is required to be engaged in work activities, as defined by the bill, for 20 hours per week in FY 1997. For an adult in a two-parent family, 35 hours of work are required. The mandated hours of work for single parents also increase, to 25 hours in FY 1999 and 30 hours in FY 2000. States have the option of exempting single parents of children under one from the work requirement. Qualifying work activities include a range of subsidized and unsubsidized, private and pubic sector employment. In addition, a limited number of TANF recipients can meet the work requirement by participating in vocational training.

Common Questions: The following is a list of general questions regarding the applicability of workplace laws to welfare recipients in work activities. It is intended to serve as a preliminary guide to answer fundamental questions about the interaction of the welfare law and workplace laws such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), Unemployment Insurance and anti-discrimination laws. The impact of these laws on work programs for welfare recipients are complex and the answers to many questions will be determined by the specific facts of the particular situation. States should consider the applicability of these laws as they design and implement their work programs.

OK

This guide is simply a starting point. It can not provide the answers to the wide variety of inquiries that could be raised regarding specific work programs. Instead, we hope it will alert you to areas where we can provide additional assistance on particular issues that may arise. Many of these will have to be answered on a case-by-case basis. Please call XX at XXX for additional guidance.

OK

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[1] This publication is for general information and is not to be considered in the same light as official statements of position contained in Interpretive Bulletins and in opinion letters [of the Department of Labor].

(1) Will welfare recipients participating in work activities under the new welfare law be covered by employment laws such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), Unemployment Insurance and anti-discrimination laws?

The new welfare law does not exempt welfare recipients from these laws. Therefore, the laws will apply to welfare recipients in the same way they apply to other workers.

Add: If an EE, yes; if not, no.

The Fair Labor Standards Act

(2) Does that mean that welfare recipients engaged in work activities under the new welfare law will have to be paid the minimum wage?

NO
case-by-case analysis

In most cases, yes. The minimum wage and other FLSA requirements apply to welfare recipients as they apply to all other workers. If welfare recipients qualify as "employees" under the FLSA's broad definition, they must be compensated at the applicable minimum wage.

The FLSA definition of "employee" focuses on the economic realities of the workplace relationship. Welfare recipients would probably be considered employees in most of the work activities described in the the new welfare law. Exceptions are likely to include individuals engaged in activities such as vocational education, job search assistance, and secondary school attendance because these programs are not likely to be considered employment under the FLSA.

NO.

Just describe law.

(3) What about welfare recipients who are participating in training programs? Wouldn't they be exempt from the minimum wage laws?

There are situations in which "bona fide trainees" are not considered to be "employees" under the FLSA and thus are **not** required to be paid the minimum wage. However, in order to be a "bona fide trainee" exempt from the minimum wage, a welfare recipient must be engaged in an activity that meets the criteria established under the FLSA. The relevant criteria for a "bona fide" training program are:

- Training is similar to that given in a vocational school;
- Training is for the benefit of the trainee;
- Trainees do not displace regular employees;
- Employer derives no immediate advantage from trainees' activities;
- Trainees are not entitled to a job after training is completed; and
- Employer and trainee understand that trainee is not paid.

(4) What about "workfare" arrangements that require welfare recipients to participate in work activities as a condition for receiving cash assistance?

Welfare recipients in "workfare" arrangements, which require recipients to work in return for their welfare benefits, must be paid the minimum wage if they are "employees" under the FLSA in their workfare assignment. States may consider all or a portion of cash assistance as wages so long as the payment is clearly identified and treated as wages, the payment is understood by all parties to be wages, and all applicable FLSA record keeping criteria are met.

(5) Could States that operate Community Work Experience Programs (CWEP) for welfare recipients under the predecessor JOBS program continue to operate such programs in the same manner under the new welfare law? Under CWEP, the welfare grant divided by the hours worked were required to meet or exceed the minimum wage.

The new welfare law eliminated the CWEP program. The old welfare law specifically stated that a CWEP participant was not entitled to a salary or any other work or training expense provided under any other law. Under the new law, welfare recipients must be compensated at the minimum wage if they are classified as "employees under the FLSA's ~~broad~~ definition. States that wish to continue programs similar to those that existed under CWEP may need to modify their programs to reflect this change.

(6) Can Food Stamps be counted towards meeting minimum wage requirements?

In certain circumstances, it seems that Food Stamps benefits (coupons or their cash value) can contribute towards meeting minimum wage requirements for TANF recipients in work activities.

Under the **Food Stamps work supplementation program,** employers can receive the value of the food stamp allotment as a wage subsidy for new employees hired as part of the work supplementation program. In effect, the program allows Food Stamps benefits (converted to a cash wage subsidy) to be counted towards the minimum wage. This program is restricted to recipients of TANF or other public assistance and contains specific worker protections and non-displacement provisions.

Under the **Food Stamps workfare program**, participants "work off" the value of their food stamp coupons. The maximum hours that a food stamp recipient can be required to work is determined by dividing the value of the food stamp allotment by the minimum wage. Participation in Food Stamps workfare programs can be counted towards TANF participation requirements. Consequently, states can operate programs in which part of a TANF recipient's

required work hours could be performed in return for food stamp benefits and part for TANF benefits.

(7) May noncash benefits other than food stamps, such as child care services or transportation, be credited toward meeting FLSA minimum wage requirements?

Noncash benefits like these may be counted as wages if they are provided by the employer and meet other traditional FLSA criteria for crediting of non-cash benefits. Credit may not be taken for pensions, health insurance (including Medicaid), or other benefit payments excluded under the FLSA. In order to be credited, noncash benefits must meet the following criteria:

- Acceptance of noncash benefits must be voluntary;
- Noncash benefits must be customarily furnished by the employer to its employees, or by other employers to employees in similar occupations; and
- Noncash benefits must be primarily for the benefit and convenience of the employee.

Occupational Safety and Health Act

(8) How does the Occupational Safety and Health Act (OSHA) apply to welfare recipients participating in work activities under the new welfare law?

The new welfare law does not exempt employers from meeting OSH Act requirements. Therefore, OSH Act coverage applies to welfare recipients in the same way that it applies to all other workers. However, because the OSHA does not have direct jurisdiction over public sector employees in many states, the question of who is the responsible "employer" is an important one. This is particularly true in cases where work activities are administered as part of a public-private partnership. In these situations, the determination of whether the employee is in the public or private sector will by made on a case-by-case basis by OSHA. Generally, case law under OSHA tends to place compliance responsibility on the party most directly controlling the physical conditions at a worksite.

(9) Does that mean that all welfare recipients in work activities who are deemed to be public employees are thereby exempt from health and safety regulations?

Sometimes yes, sometimes no. In the 23 states and two territories where there are OSHA-approved state plan, the states are required to extend health and safety coverage to employees of state and local governments. To the extent participants in these states and territories are

employees of public agencies, they would be protected by the applicable health and safety standards. In the other states and territories, there would be no OSHA coverage of participants who are public sector employees.

(10) Can a public agency be held jointly liable for compliance with OSHA regulations? If so, how?

Yes. In general, the greater a state's involvement in the placement and control of participant's work activities, the greater the chance that a state could be considered a joint employer. If a state's involvement is extensive, it could be held jointly liable for OSHA (under state OSHA plans) violations -- even if the participant is actually working on the premises of a private employer. However, the mere payment of a state subsidy to an employer would not be enough to create a joint employment relationship.

Unemployment Insurance

(11) Are welfare recipients participating in work activities covered by the Unemployment Insurance (UI) System ?

Generally, unemployment insurance laws apply to welfare recipients in work activities in the same way that they apply to all other workers. Coverage extends only to workers who are considered "employees" according to definitions provided by state UI laws. Consequently, if welfare recipients are in work activities where they would be classified as employees, they will be covered by the UI system.

There are some exceptions. While federal law requires states to extend UI coverage to services performed for state governments and non-profit employers, services performed as part of publicly-funded "work-relief" employment or "work training" programs are not covered. A number of community service-related activities under the new welfare law could fall within the "work-relief" exception to UI coverage of services performed for state and local agencies or nonprofit organizations.

An Unemployment Insurance Program Letter (UIPL 30-96) issued in August 1996 clarified the criteria applicable to the "work-relief" and "work training" exceptions. It focused on whether the purpose of the activity is to primarily benefit community and participant needs (versus normal economic considerations) and whether the services are otherwise normally provided by other employees. If such activities do not meet the criteria for the exception, participants providing services for these entities would likely be covered by the UI program.

So get what?

(12) What about welfare recipients who are working for private sector employers? Will they be covered by the UI program?

The "work relief" and "work training" exceptions for UI do not apply to the private sector. As stated above, for private employers the question of UI coverage will hinge on whether a participant is deemed an "employee." The tests for making these determinations are determined by the states and are generally similar to the common law test which is based on "the right to direct and control work activities."

Anti-Discrimination Laws

(13) Would federal anti-discrimination laws apply to complaints of welfare recipients who participate in work activities under the new welfare law?

Any "EE" standard?

Yes. Anti-discrimination issues could arise -- primarily under titles VI and VII of the Civil Rights Act, the Americans with Disabilities Act, section 504 of the Rehabilitation Act, and the Age Discrimination in Employment Act. Furthermore, if participants work for employers who are also federal contractors, discrimination complaints could be filed under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, or the Vietnam Era Readjustment Assistance Act. As with the other laws discussed above, these laws would apply to welfare recipients as they apply to other workers.

sgg: h:\...\keyques6

MEMORANDUM FOR ACTING DOL DEPUTY SECRETARY CYNTHIA METZLER
HHS DEPUTY SECRETARY KEVIN THURM

FROM: NANCY KIRSHNER, DOL DIRECTOR OF IGA
JOHN MONAHAN,HHS DIRECTOR OF IGA

RE: RECOMMENDED CONSULTATION STRATEGY

What follows is a strategy to educate key constituents about USDOL's roles and responsibilities in interpreting and enforcing various employment laws and their impact on the implementation of welfare reform at the state and local level. We believe it is critically important to establish a coordinated consultation process that will enable DOL and HHS to receive input from key state and local constituents prior to initiating official communications from the federal departments to the state and local governments.

Preliminary inquires made on an informal basis reinforce our belief that the majority of state policy makers and implementors are not currently focussed on employment law impacts. However, prior to initiating a consultation and communication effort, we both believe that the two departments must have a clear understanding of each other's roles and responsibilities as well as detailed and specific answers to many significant questions. Once we feel satisfied that sufficient information and documents exist, we are prepared to proceed as follows:

I. Initiate discussion with the DOL & HHS Regional Secretary's Representatives

- Our regional staff are speaking regularly to policymakers and advocates from the states. We want to brief them on the issues as defined by the two departments, hear from the regions about examples of these issues emerging already and establish regularized discussions.

II. Consultation with small group of key constituents:

- There is currently little evidence that even the Washington representatives for our key state and local partners have focussed on employment law issues and the ramifications for implementation of welfare reform.

- Our relationships should enable us to enter into an informal dialogue immediately. Armed as well with information from the Regional Representatives we should have a good perspective as we initiate these discussions.

- DOL & HHS should not be contacting state and local administrators directly without first involving their Washington representatives in our plans. Our ultimate success could depend on how we approach these groups.

- Either individual or group discussions should occur with the following:

  National Governors' Association representative-Evelyn Ganzglass or Susan Golonka/Jonathan Jones(Gov. Carper)

  National Conference of State Legislatures Representative-Sheri Steisel

  APWA representative-Elaine Ryan

  NACo representative-Reggie Todd/Neil Bomberg/Maralina Sanz
  NLC representative-Jose Dimas
  USCM representative-Joan Crigger/Laura Waxman

  State Labor Commissioners Rep.-David Scott (CSG)

- Outreach to a small group of state and local policymakers should occur via conference call to seek their input on appropriate mechanism for distributing information and guidance.

III. Communicating with the States

- Following discussions with the Washington representatives, we should disseminate written documents articulating the Administration's approach to application of FLSA and related labor protections and providing dol's best test technical guidance for states. These materials should go to:

  State Human Services Directors, Secretaries and Welfare Directors
  State Labor Commissioners
  Governor's Welfare Advisors
  State Legislative Leaders and Committee Chairs

IV. Communicating with Localities

- Local officials must also be kept informed of our goals
  Letter to Mayors and County Executives local officials should review the same materials as those sent to key state officials.

- Meetings with key local officials during their visits to DC to gain input and feedback from them can be set up during February and March.

V. Communicating with Program Staff

- Regions need to develop a mechanism for regular communication with state and local programmatic staff who will be expected to comply with these guidelines.

- Each interagency regional team will be asked to identify a single mechanism for advising state and local program staff regarding labor issues.

MEMORANDUM FOR THE ACTING SECRETARY

Through: Geri Palast
Assistant Secretary, OCIA

From: Rich Fiesta

Date: February 19, 1993

Re: LABOR STANDARDS-WELFARE REFORM CONGRESSIONAL OUTREACH

This memorandum outlines a proposed strategy to educate Members of Congress and their staff on the application of federal standards in the context of the welfare reform law. It is important that the Administration and the Department quickly and accurately inform Congress on how labor laws will apply once implementation of welfare reform begins in 1997. Already, according to the February 19 New York Times, Senator Daschle and Representative Gephardt have announced plans to introduced legislation to define workfare participants as employees for purposes of minimum wage coverage and the right to bargain collectively. The Administration, through interdepartmental discussions during the past several weeks, appears to be ready to announce that these laws already apply without additional legislation, except in the case of state employees who are governed by state law for collective bargaining purposes. Therefore, there is a need to inform Congress as soon as the Administration makes final decisions on the labor standards issues.

I. Finalize Administration Positions

- Once the DOL-HHS-USDA-Treasury-OMB discussions are concluded the decisions on the application of labor laws should be communicated to Congress quickly in order to avoid speculation or miscommunication in these areas. The February 19 New York Times article is an example why the Administration's positions should be quickly communicated to avoid confusion.

II. Meet with Key Hill Parties

- OCIA has had practically no inquiries to date from Congress on the applicability of labor standards under the new welfare law. Once the Administration positions become known and state and local governments begin to plan for the implementation of the law, congressional inquiries will undoubtedly increase.

- Our established relationships with the relevant members, committees, and staff will enable us to inform them of the Administration's positions.

- Formal, small briefings of the key staff by DOL and possibly with HHS or other parts of the Administration seem the best way to communicate the Administration's positions.

  The key players are as follows:

  Senate Labor and Human Resources Majority and Minority Staff (Jeffords/Kennedy - full committee; DeWine/Wellstone - subcommittee)

  House Education and the Workplace Majority and Minority Staff (Goodling/Clay - full committee; McKeon/Kildee and Ballenger/Owens - subcommittees)

  Senate Democratic Policy Committee (Daschle)

  House Democratic Policy Committee (Gephardt)

  Senate Finance Committee (Roth/Moynihan)

  House Ways and Means Committee (Archer/Rangel - full committee and Shaw/Levin - subcommittee)

- OCIA has a call into Mary Burdett at HHS Congressional Affairs and plans to consult with her as well

III. Documents for Congressional Briefings

Have??

- DOL, through ASP, is currently preparing several documents on the implementation of the welfare law and labor standards.

  - The document most appropriate for Congress is a series of questions and answers regarding the application of labor laws to the welfare law regarding the Fair Labor Standards Act, the Occupational Safety and Health Act, unemployment insurance, and anti-discrimination laws, and whether workers in welfare to work programs can work for food stamps which can be applied toward the minimum wage.

  - This type of document is easy to read and follow and it seems the most appropriate for congressional briefings. Should more detailed technical or legal questions arise then DOL can provide information and assistance on a case by case basis.

From POL

DISCUSSION DRAFT - FOR INTERNAL DISTRIBUTION ONLY

CREDIT FOR NON-CASH BENEFITS UNDER § 3(m) OF THE FLSA

I. OVERVIEW

- Under section 3(m) of the FLSA, an employer may take credit toward it minimum wage obligation for the reasonable cost of non-cash benefits it provides to its employees only if such benefits are "facilities" similar to room and board. In addition, the other criteria for crediting the cost of non-cash benefits must be met, including:

  1. the acceptance of such benefits must be voluntary and uncoerced;
  2. the facilities must be customarily furnished to employees; and
  3. the facility must be primarily for the benefit and convenience of the employee, and not the employer. (This has been interpreted to mean that the facility may not be an incident of and necessary to the employee's employment, and may not be an ordinary business expense the employer would otherwise incur.) 29 CFR 531.30-32.

II. EXAMPLES OF FACILITIES

- Although it most often comes up in the context of room and board, the term "facilities" in certain circumstances may include: meals furnished at company restaurants; general merchandise furnished at company stores; fuel for the personal use of the employee; and transportation furnished employees between their homes and work, where the transportation is not necessary to the employment (such as transportation for maintenance-of-way employees of a railroad). 29 CFR 531.32(a).

- Under some circumstances, child care also might qualify as a "facility" under section 3(m). However, the one case which construed child care denied the employer's 3(m) credit because the court found that 1) the employees neither understood nor agreed that child care was part of their wages (thus their acceptance was not voluntary and uncoerced); and 2) the employer failed to prove his reasonable costs. Reich v. Giaimo. Because the employer's attempt to claim 3(m) credit failed on these grounds, the court did not address the issue of customarily furnished.

III. CUSTOMARILY FURNISHED

- Facilities will be considered to be "customarily furnished" "if the facilities are furnished regularly by the employer to his employees or if the same or similar facilities are

customarily furnished [to] [sic] other employees engaged in the same or similar trade, business, or occupation in the same or similar communities." 29 CFR 531.31.

- The courts and the Department have only rarely been called upon to construe or interpret the "customarily furnished" criterion. However, we have found no instances where the term "customarily furnished" has been interpreted based upon anything other than the employees' position or job group. Thus, we have found no support for the proposition that an employer may provide a facility to only a subgroup of all the employees in a particular position, such as based on wage levels, and still take a wage credit for the provision of the facility to that targeted group.

- A facility may properly be considered "customarily furnished" even if it has not been the employer's custom or practice to do so in the past. As long as the facility is "regularly provided" to employees from the time of the employer's inception of the policy forward, it may be considered customarily furnished.

NOTE TO ELENA, DIANA

FROM: CYNTHIA

FYI-- ATTACHED IS PRIOR LAW LANGUAGE REGARDING WORK SUPPLEMENTATION AND WORK FARE. ELENA -- THERE ARE EXCEPTIONS TO LABOR LAWS FOR BOTH KINDS OF WORK, BUT SEEMINGLY DIFFERENT EXCEPTIONS.

Please verify that I summarized it correctly in the memo. CR

Is WIN happ AWEP?
or something altogether
different?

104TH CONGRESS
1st Session

COMMITTEE PRINT

WMCP:
104–7

COMPILATION

OF THE

SOCIAL SECURITY LAWS

INCLUDING THE SOCIAL SECURITY ACT,

AS AMENDED, AND RELATED ENACTMENTS

THROUGH JANUARY 1, 1995

VOLUME I

PRINTED FOR THE USE OF THE

COMMITTEE ON WAYS AND MEANS BY ITS STAFF

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

(IV) job development and job placement; and

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

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

(II) on-the-job training;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(7) No individual receiving aid to families with dependent children under a State plan shall be excused by reason of the fact that such State has a work supplementation program from any requirement of this part relating to work requirements, except during periods in which such individual is employed under such work supplementation program.

(f) COMMUNITY WORK EXPERIENCE PROGRAM.—(1)(A) Any State may establish a community work experience program in accordance with

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

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

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

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

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

(E) Participants in community work experience programs under this subsection may perform work in the public interest (which otherwise meets the requirements of this subsection) for a Federal office or agency with its consent, and, notwithstanding section 1342 of title 31, United States Code[182], or any other provision of law, such agency may accept such services, but such participants shall not be considered to be Federal employees for any purpose.

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

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

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

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

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

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

(B) at such time or times after the close of the period prescribed under subparagraph (A) as the State agency may determine but not to exceed a total of 8 weeks in any period of 12 consecutive months.

[182]See Vol. II, Title 31.

State of New Jersey
OFFICE OF THE GOVERNOR
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CHRISTINE TODD WHITMAN
Governor

March 3, 1997

The Honorable William J. Clinton
The President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear President Clinton:

Last Thursday, the New Jersey Assembly passed and sent on to the Senate the final bills needed to implement this State's response to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which you signed last August. This legislation was very carefully crafted to protect existing workers from displacement resulting from the assignment of welfare recipients to workfare positions, and to provide a wide range of legal protections to welfare clients who are assigned to community work experience or similar jobs in the public or private, non-profit sectors.

This legislation also includes an innovative, cost-effective approach to providing workers compensation insurance coverage to welfare recipients participating in workfare assignments, building on the existing self-insured program for state employees. New Jersey is proud of the worker/client protections which are an integral part of our WorkFirst legislation, which is expected to receive final approval in the Legislature within the next two weeks. New Jersey's welfare reform legislation has received overwhelming bipartisan support as it has proceeded through the legislative process, including the worker protection provisions.

I am therefore very concerned about reports that the White House is considering changes in federal welfare reform that may undermine the important progress we have made in New Jersey. Specifically I understand that the White House may soon approve the US Department of Labor's determination that Community Work Experience Placements (CWEP), more commonly referred to as "workfare," must be covered by the Federal Labor Standards Act. Although no information has been shared with the states, it would appear that these unpaid positions would be covered by the minimum wage provisions of this legislation.

This interpretation would greatly undermine the work requirements in Work First and the federal welfare reform legislation. Virtually every state will need to create many short-term, flexible positions that provide some very basic work experience for recipients who are not yet ready for employment in order to meet the very high work participation rates that are required. It is also very important that welfare recipients work in these positions as close as possible to the average work week of 35 hours so that they can be prepared for real employment.

we really are discouraging this

New Jersey could not afford to fund these positions and meet the minimum hours of work requirements in the federal welfare reform legislation, much less at a full-time level, if the federal minimum wage is required and only the cash grant can be applied towards meeting that requirement. We estimate that it would cost about $24.8 million by 2000 when 30 hours of work activities are required for single parents and 35 hours are required for two-parent families. If this proposed policy applies to General Assistance and single able-bodied childless adults receiving Food Stamps, it would cost an additional $50.8 million. Allowing states to count the value of Food Stamps, Medicaid, and child care towards the cost of meeting any minimum wage requirement would greatly reduce the negative impact of this proposed policy.

If the other labor statutes also apply and we must treat welfare recipients as employees and provide a pay check rather than a welfare grant and include wage withholding, the costs would be much greater. Such a policy would end welfare reform as we know it.

The proposed policy would discriminate against states where there may be insufficient low-skilled jobs due to high unemployment or for other reasons. These states could have created CWEP positions until times were better, but under the proposed policy such an option would be limited. Also, most states obviously would not have the resources to fund such positions at the minimum wage during an economic downturn. It also discriminates against states that have invested resources in services to promote self-sufficiency rather than increasing the cash grant.

True

The purpose of converting the old broken system of welfare into a block grant was to allow the flexibility states need to implement tough work requirements within capped funding. Placing states now in a bureaucratic straight jacket of federal labor rules even before states have a chance to reform welfare sends the wrong message to the nation and the families we are trying to serve.

I urge you to continue to support work and not approve this misguided policy.

Sincerely,

Christine T. Whitman

Christine Todd Whitman
Governor

Enclosure
c: Congressional Delegation
Secretary Donna Shalala
Acting Secretary Cynthea Metzler

DEPARTMENT OF HUMAN SERVICES
DIVISION OF FAMILY DEVELOPMENT

ESTIMATED COST OF PROVIDING WORK ACTIVITIES AND CHILD CARE SERVICES TO CWEP PARTICIPANTS

STATE FISCAL YEAR 2000

	TANF FAMILIES	GA/NON-TANF FOOD STAMP	TOTAL
AVERAGE MONTHLY NUMBER OF CWEP PARTICIPANTS	6,222	8,000	14,222
AVERAGE MONTHLY ASSISTANCE PAYMENT (a)	$ 336	$ 140	
TOTAL ANNUAL AMOUNT OF CASH ASSISTANCE TO CWEP PARTICIPANTS	$ 25,087,104	$ 13,440,000	$ 38,527,104
NUMBER OF HOURS OF WORK PER MONTH (b)	130	130	
REQUIRED MONTHLY CASH COMPENSATION PER PARTICIPANT (c)	$ 669	$ 669	
TOTAL REQUIRED ANNUAL CASH COMPENSATION FOR CWEP PARTICIPANTS	$ 49,949,096	$ 64,222,560	$ 114,171,656
ADDITIONAL ASSISTANCE COSTS	$ 24,861,992	$ 50,782,560	$ 75,644,552

(a) Excludes Food Stamps, Emergency Assistance and Medical Assistance
(b) 30 hours per week times 4.33 weeks in a month. (Additional requirement of five more hours for two parent families has not been considered.)
(c) Based on payment of minimum wage of $5.15 and excluding employer's contribution to Social Security, Unemployment and Disability Insurance, etc.

Have to do?

Keith J. Fontenot
03/12/97 12:19:31 PM

Record Type: Record

To: Diana Fortuna/OPD/EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: FLSA in 94 and 96 Administration WR Bills

My recollection is that the 96 bill was put together under great duress -- there were pending welfare reform and budget bills in many quarters on the hill, and the Administration wanted to put something together very fast. I'm sure material went around, but to my knowledge the FLSA application was never flagged as an issue.

Diana Fortuna

Diana Fortuna 03/11/97 07:44:40 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP, Elena Kagan/OPD/EOP, Keith J. Fontenot/OMB/EOP, Jeffrey A. Farkas/OMB/EOP

cc:
Subject: Re: FLSA in 94 and 96 Administration WR Bills

This is wacky! Keith, pardon my ignorance of pre-8/96 history, but under what circumstances was the 96 draft put together? Did it get a lot of scrutiny and debate, or did we just throw it together? And why the big shift from 94 position?

---------- Forwarded by Diana Fortuna/OPD/EOP on 03/11/97 07:42 PM ----------

Cynthia A. Rice 03/11/97 07:08:04 PM

Record Type: Record

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

cc:
Subject: Re: FLSA in 94 and 96 Administration WR Bills

Jeff Farkas found basically that our '94 bill kept worker protections for workfare protections while our '96 bill did not (see below). This will make our roll-out even more tricky.

---------- Forwarded by Cynthia A. Rice/OPD/EOP on 03/11/97 07:01 PM ----------

Cynthia A. Rice 03/09/97 08:48:03 PM

Record Type: Record

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

cc: Kenneth S. Apfel/OMB/EOP

Subject: Gov. Whitman's complaint re: cost of minimum wage not valid if food stamps are counted

I was reading Gov. Whitman's letter more carefully today, and noticed that all the calculations are based on counting ONLY cash assistance towards the minimum wage. She says paying the minimum wage for 30 hours a week will cost NJ $333 per participant more per month. The HHS data I got from Elena's files say that if food stamps are counted in paying the minimum wage:

NJ could SAVE $67/month for a family of 3
NJ would SAVE $197/month for a family of 4
NJ would lose $152/month for a family of 2

Depending on the distribution of the population, New Jersey may not have to spend more after all. Of course, the state could only make up the loss for two person families if it cut cash benefits for larger families, so those families (even with the subsequent rise in food stamps) would be worse off.

1. In any case, we should get ASPE to run numbers based on the actual family sizes in each state, shouldn't we? Then we can have a total savings or loss number for each state which we can release if we so chose. What do you think?

P.S. Ken -- Bruce asked if someone would check our '94 and '96 bills requirements re: Fair Labor Standards Act so we can be prepared to answer the question "Have we changed our policy?" Could someone on your staff do that or should I call HHS?

File WR FLSA

ating incident, the South has decided to continue its recently resumed participation in American-sponsored nuclear conversion and famine relief efforts. On Thursday, Seoul promised a new installment of food aid through the United Nations.

But South Korean officials have seized upon the incident to question, yet again, the premise that the safest way to deal with North Korea is to encourage a modicum of stability and greater interchange between the North and the outside world. Instead some southern policy makers seem to prefer pushing the wobbly northern regime toward total breakdown, a course filled with danger. A sudden collapse of North Korea could be accompanied by a huge outpouring of desperate refugees and military adventurism, including possible attacks against pects that the South has been deliberately inflaming North-South relations for domestic political ends, fanning manageable incidents into major crises to distract attention from the financial scandals and political problems afflicting the Seoul Government.

Ms. Albright arrives in Seoul tomorrow at a time when increasing signs of instability in the North make it vital and urgent for the United States and South Korea to coordinate their policies closely. In previous stops of this, her first foreign journey as Secretary of State, she has been admirably straightforward about raising sensitive diplomatic issues. She should make clear to her South Korean hosts that Washington now expects them to keep domestic political concerns from disrupting the only realistic approach to the northern danger.

Don't Unionize Workfare

Long before welfare was overhauled by Congress last year, New York City had introduced work requirements for welfare recipients. Now the city's largest public employee union wants to organize the 35,000 welfare recipients working in city jobs for their benefits, and the national A.F.L.-C.I.O. is seeking to unionize hundreds of thousands of such "workfare" participants around the country.

The city union's goal is to improve the wages, working conditions and benefits for those on workfare. The union is raising some legitimate questions, but organizing welfare workers into a union is not an appropriate way to address them. Mayor Rudolph Giuliani should consider alternative means to insure that the rights of people in the workfare program are respected.

•

The city's workfare program is viewed by many other cities as a potential model. According to Richard Schwartz, the departing mayoral assistant who got the program started, the city may have 51,000 welfare recipients working next year, nearly half again as many as now.

Union cooperation is essential, since welfare recipients are working alongside city employees cleaning parks, streets and housing projects at wages substantially less than what city workers earn. The unions are understandably concerned that over the long run, the cheap labor provided by the workfare program will make it harder for the union to win pay increases for its rank-and-file members.

Last year Mr. Giuliani negotiated an agreement with Stanley Hill, executive director of District Council 37 of the American Federation of State, County and Municipal Employees, not to use welfare workers to do jobs that otherwise would be done by public employees. As a result, Mr. Hill backed off his demand that workfare not be expanded. Now Mr. Hill and some community groups report that welfare workers are not being given proper clothing or equipment to do their jobs, and that there are inadequate provisions for them to have lunch or even go to the bathroom. They charge that welfare workers lack grievance procedures if their supervisors punish them unfairly for tardiness or other infractions.

These complaints cannot be dismissed. City Hall should figure out a way to insure that workers have the tools and conditions they need to do their jobs with self-respect. But it would be a mistake to organize welfare workers into a union, because what they are doing does not amount to a job.

Instead, in return for receiving welfare, they must show up at a work site, follow instructions and carry out tasks that the city might not even be subsidizing if it did not have to put welfare recipients to work. In addition to their welfare checks, participants also receive vouchers for day care if needed. Many also get Medicaid, food stamps and other benefits that increase their total compensation.

Advocacy groups are right to point out that the workfare program does not offer training or help in getting a permanent job. But the city cannot afford by itself to guarantee training or jobs for everyone on welfare. That is a task that needs to be shared by the city, state and Federal governments, as well as private employers.

The imposition of time limits on welfare, a step that this page has criticized, means that all levels of government have an urgent task to find jobs for people forced off the rolls. But the workfare program must be given a chance to succeed on its own terms by providing limited work opportunities for those still on welfare — under working conditions that are humane.

The New York Times

FRIDAY, FEBRUARY 21, 1997

The New York Times
FRIDAY, FEBRUARY 21, 1997

Leave Standards to the St

those standards should be. There is great concern among those involved in education at state and local levels that once Washington creates national standards, mandates will follow.

It should be up to states and local school boards to decide what students need to learn. Education is a local issue. This is the way our parents and communities want it, and that is how it should be. After all, the states and local taxpayers are the ones who pay for schools.

That is why Goals 2000, President Clinton's laudable effort to improve education, has languished: It came

National tests are the wrong way to improve our schools.

from Washington, became embroiled in Washington politics and was perceived by the public as an attempt by the Federal Government to meddle in local school issues. Even though the program offered states money to pursue the national goals, state and local educators and parents were leery of Washington's involvement.

Setting world-class standards for our schools will be successful only if it is done from the ground up — by parents, teachers, administrators, businesses and local taxpayers. Indeed, when the National Education Summit, a conference of the nation's governors and business leaders held last spring, set a goal of having every state establish such standards within two years, the idea was for states and communities to take on the task.

The benefit of this approach is that it allows every state the flexibility to address the individual needs of its children and the communities they live in. States may want to see schools in different cities and towns achieve the same level of academic success, but there are different roads to the same destination.

Wisconsin is one example. Although my most recent budget requires every school district to set rigorous standards and every student to pass a graduation test, we are leaving it up to each school district to determine its standards and its tests, with the state offering assistance to communities.

Muzzled by Beijing

Nobody can say how many millions died in the famine. For almost four decades, China's leaders have feared to find out. The figure that foreign demographers think likely is 30 million.

The famine of 1959-61 is not an episode in history finished and over.

After Deng, how much longer?

Thirty-six years on, the same Communist Party that created the famine rules China yet — the party of Mao, of Deng and of the successor dictatorship already installed.

It was an unusual famine, even for Asia, where as we know life is cheap, except for those selected to die. The victims were not killed by nature's harshness. They were murdered, as sure as if they had been shot, by the Communist Government.

Mao Zedong ordered earth and peasants to grow unsuitable crops at escalating rates. The soil turned to dust; 20 years later I saw it swirling across collectives and villages.

The Communists left barely enough food for rats to eat, and be eaten. Police and party terrorism prevented the world from knowing.

The party and its armed forces still dictate agricultural and all other policies, still govern by terrorism. And the West is their servant.

By its own will, and for coin, Western democracies beg Beijing for deals, and for partnership in shaping the 21st century. In Deng's time the West remained faithful, no matter how many students he ordered shot, pouring hundreds of billions into trade and investment that strengthen the Communists and their army.

In return, Beijing indeed made Western democracies its partners. They obeyed orders not to help the victims of political and religious oppression. Morally and practically, the West became the silent partner in their persecution.

Playing down their own countries' security interests, President Clinton and other Western leaders also muzzle themselves about Beijing's sale of missile and nuclear equipment to other dictatorships. But increasingly Americans shouting wake-up calls find they have allies. The mail on columns urging boycotts or shareholder action is buoying.

Yesterday the Province of St. Joseph of the Capuchin Order in Milwaukee and the Passionists, a Roman Catholic religious community, sent word that they had used their 100 shares of Boeing stock to put a resolution before the next annual meeting. It calls on the company to observe basic human rights in its China operation. If every religious person or group followed the Passionists' and Capuchins' example, business could not brush them off.

More journalists are investing their talents in exposing Chinese repression and military double dealing. Please read "Hungry Ghosts," by Jasper Becker (Free Press), about the famine, and "The Coming Conflict with China," by Richard Bernstein and Ross H. Munro (Knopf).

The Weekly Standard, under Bill Kristol, is reminding conservatives of their obligations to fight Communist oppression. This week: 12 clear-minded pieces on China by members of Congress, journalists and China specialists. (Copies: 1-800-983 7600.)

These people are important, as will be every American who refuses to be a servant of Beijing. We must now acknowledge that President Clinton is the prisoner of Beijing. He has not told and will not tell the truth about stepped-up Chinese repression and military defiance. He would have to admit the failure of his appeasement policies, and for this he has neither the will nor courage.

But if conservatives and liberals with reach of word persuade the public to show its anger, perhaps Al Gore will become his own man about China when he runs for President. He could start earlier, as Bill Triplett challenges in The Weekly Standard. He could demand compliance with legislation against sales of cruise missiles — the Gore-McCain act of 1992.

China sells Iran improved versions of a missile system the Iranians used before — to kill 37 sailors aboard the U.S.S. Stark.

The silence, the use of the power and creativity achieved by democracy to lift the Chinese Communists to strengths they could never otherwise have even aspired to — madness, born of greed and betrayal.

One day America will ask how it happened. Meantime Americans individually and in groups, even as small as the Midwestern Passionists, can refuse to put on the muzzle their government wears. □

From: Kenneth S. Apfel on 02/18/97 05:48:27 PM

Record Type: Record

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

cc:

Subject: Call to Andy King on minimum wage

I called her and asked about Gephardt and the minimum wage issue. She knew absolutly nothing about a Gephardt role in the issue; she asked around in her office and came up dry. Gephardt is in California with the AFL today, so my guess (and Andy's) is that he heard about the issue and said something to the effect that everyone should be paid at least the minimum wage. She said she would try to call if she hears anything to the contrary.

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
FORTUNA_D @ A1 @ CD @ LNGTWY
Gene B. Sperling/OPD/EOP
GREEN_MG @ A1 @ CD @ LNGTWY
Russell W. Horwitz/OPD/EOP
Emily Bromberg/WHO/EOP

Diana Fortuna 02/21/97 01:33:16 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: Re: Call from NGA

Is Bruce saying that I should push HHS to let states count child care? I can do this, but I think it will come as a shock to them, given where we have been.
---------- Forwarded by Diana Fortuna/OPD/EOP on 02/21/97 01:30 PM ----------

Elena Kagan
02/21/97 11:13:06 AM

Record Type: Record

To: Diana Fortuna/OPD/EOP

cc:
Subject: Re: Call from NGA

I agreed, though noted that hhs would be extremely resistant to either.
---------- Forwarded by Elena Kagan/OPD/EOP on 02/21/97 11:12 AM ----------

Bruce N. Reed
02/21/97 11:06:52 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: Re: Call from NGA

Tell her to push to count child care, not Medicaid, don't you think?

Diana Fortuna 02/21/97 05:54:40 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: flsa

Emily is also stressing to me that she feels she has no choice but to push for a governors' meeting.
---------- Forwarded by Diana Fortuna/OPD/EOP on 02/21/97 05:51 PM ----------

Emily Bromberg
02/21/97 04:06:19 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP, Kenneth S. Apfel/OMB/EOP

cc:
Subject: flsa

ray (nga) gave marcia and i an earful on our favorite subject--welfare and minimum wage. he is claiming it will derail the whole welfare to work process. he is insisting on a white house meeting to discuss before we decide. he knows that we met with labor to discuss and are close to an answer. i don't think we have a choice. bruce/ken/elena--could you stand to do this on monday?

Diana Fortuna 02/20/97 06:49:37 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Kenneth S. Apfel/OMB/EOP, Emily Bromberg/WHO/EOP

cc:

Subject: Call from NGA

Susan Golonka of NGA called to ask about FLSA. She was hoping that we would take the opportunity to talk to states about the impact on them before rushing to make a decision here. And that they were hoping we would let them count Medicaid as well as food stamps toward the min. wage. She said she's been getting panicked calls from a few states. (I obviously kept to our talking points.)

February 17, 1997

MEMORANDUM FOR THE VICE PRESIDENT

FROM: BR

SUBJECT: LABOR ISSUES IN WELFARE REFORM

You may be asked at the AFL-CIO meeting about two welfare reform implementation issues of great importance to the labor movement. This memorandum provides you with some background on these issues, which the Administration is now in the process of resolving. Two q&a, which reflect a consensus view on how to address these issues, are attached to this memo. We recommend that you not discuss these issues unless asked to do so.

1. Application of worker protection laws to working welfare recipients

As the work requirements of the new welfare law begin to go into effect, a critical question for both the labor movement and the states is whether worker protection laws -- particularly the minimum wage law (Fair Labor Standards Act) -- protect welfare recipients who take part in workfare or subsidized employment programs. The DPC and OMB have been running an interagency process (involving DOL, HHS, USDA, and others) to hammer out an answer to this question. We expect to have a detailed recommendation for the President within the next few weeks, as well as a strategy for rolling out this controversial Administration policy.

There is general agreement among the agencies, as a matter of both law and policy, that the Fair Labor Standards Act should be read to require payment of at least the minimum wage to most people in workfare and wage supplementation programs. On this reading, participants in such programs would count as "employees" under the Act, thus qualifying for minimum wage protection -- except for a few who would count as "trainees" instead. Bruce Reed has given the AFL private assurances that the Administration will adopt this basic position.

Requiring the minimum wage for workfare recipients, however, will raise obvious difficulties for the states, in light of the new welfare law's work provisions. Even if a recipient is working only 20 hours each week, the existing welfare grant in many states will fall short of a minimum wage salary. As the work requirement in the law increases to 25 and then to 30 hours, and as the minimum wage also increases, more and more states will discover that their welfare grants are insufficient.

One way to mitigate this new burden on the states is to count benefits other than cash assistance toward the minimum wage. There is a very strong legal argument, based on provisions in the food stamp law, that states may add the value of food stamps to the basic

welfare grant for purposes of complying with the minimum wage. Even if both these streams of benefits are counted, however, a number of Southern states will immediately come up short, and as the minimum wage increases and the work requirements become more severe, other states will join them over time. Allowing states to count the value of other benefits -- child care, housing, or transportation -- toward the minimum wage would remove this problem, but this proposal raises a number of legal and policy questions. DPC and OMB are currently working through these and similar issues with the affected agencies in an effort to apply the minimum wage law to working welfare recipients without imposing large new costs on states.

The interagency group also is reviewing what other labor protections apply to welfare recipients in workfare or subsidized employment programs. The consensus view is that OSHA, unemployment insurance, and anti-discrimination laws will apply in the same way they do for other workers. We have yet to get a firm opinion from Treasury as to whether the monies paid to these welfare recipients will be subject to FICA and other taxes, as well as eligible for the EITC. Finally, these workers may well become eligible to unionize. Recent newspaper articles have suggested that some unions will undertake large-scale organizing efforts targeting welfare recipients, and we should probably expect some of the efforts to be successful.

Recommendation: As the President has agreed, you should not raise the minimum wage issue at the AFL meeting. Announcing a position favorable to the unions in this context would make the decision look entirely political and increase the risk of a negative reaction from the governors and Congress. When asked about the issue, you should make a strong statement of principle that workers shouldn't be paid a subminimum wage, whether or not they come off the welfare rolls. But you should also be careful to note that the Administration is still in the process of developing its final positions on the complex issues arising from the intersection of the labor laws and the new welfare law.

2. Privatization of welfare functions

Another issue that may arise at the AFL meeting concerns efforts by some states to privatize their welfare operations. Texas has had a waiver request pending at HHS and USDA for months that would allow it to contract with private parties to do all eligibility determinations for food stamps and Medicaid. (The new welfare law specifically grants states the right to privatize TANF operations.) Wisconsin has a more limited waiver request pending. We probably have legal authority to grant such waivers.

This issue is of obvious importance for unions with large numbers of public sector employees, because a waiver means a loss of jobs for their members. As of now, however, the unions are not pressing us for a decision, perhaps because they expect us to allow at least some privatization. We have been getting pressure from Governors Bush and Thompson, but the interagency group is still not yet ready to make a recommendation.

Background on Labor Issues in Welfare Reform

Minimum Wage and Other Labor Protections

As states begin to put welfare recipients to work, a key question for the labor movement and for the states is whether welfare recipients who take part in workfare or subsidized employment programs are protected by labor laws such as the Fair Labor Standards Act. The most obvious protection this law offers is payment of the minimum wage, but there are a host of other protections (and costs to employers) that are connected: collective bargaining rights, taxation, unemployment insurance, and workers' compensation.

We are in general agreement that these workers should be paid the minimum wage, but two major issues remain:

- What streams of benefits should count toward the minimum wage?
- Have we thought through the consequences of other rights and costs that appear to come along with the minimum wage, and how they would affect the success of welfare reform?

The Department of Labor and HHS believe that, as a legal matter, it is quite clear that the Fair Labor Standards Act does apply to people in workfare and wage supplementation programs -- that essentially they are employees, with limited exceptions for "trainees." Labor and HHS argue that this is not really a change in Federal policy, since they would argue that these rules have generally applied to welfare waiver programs -- with the exception of AFDC workfare programs, where the old law did explicitly permit states to ignore the Fair Labor Standards Act.

However, the scale of the coming welfare-to-work effort is so much larger than under previous law that these requirements may still come as a shock to the states, and will raise affordability questions that didn't exist in those smaller programs. Also, the focus on enforcement of these laws will inevitably be much greater now than in the past.

Minimum Wage: One problem in requiring the minimum wage is that the existing welfare grant in many states is too low to convert it into a minimum wage salary, even if the recipient is only working 20 or 25 hours a week. Therefore, the question is whether to include in that calculation a variety of other government benefits, such as food stamps, child care, housing assistance, and transportation.

Legally, there is a strong argument that food stamps can be added to the basic welfare grant to help support a minimum wage. However, even if the two grants are combined, several Southern states will probably still come up short, especially for smaller families. The problem gets worse as the minimum wage and the work

~~requirements increase over time.~~

We would make it easier for states if we permitted them to count the value of other benefits, like child care or transportation, toward the minimum wage. However, DOL believes the law does not permit this, unless those benefits are offered to all employees, not only those on welfare. (States may be motivated to segregate workfare recipients in an effort to get around this requirement.) In addition, counting in-kind assistance toward wages opens the door to counting these benefits as income for the purposes of calculating TANF, food stamps, and SSI benefits, which would generally reduce benefits.

Other Labor Protections: We are still in the process of sorting out what other requirements states and employers would face if participants in workfare and subsidized employment programs are considered employees under labor law. DOL's opinion is that most other standard labor protections would apply, including OSHA, unemployment insurance, and anti-discrimination laws.

The thorniest outstanding questions have to do with taxes and collective bargaining rights. We have yet to hear from Treasury as to whether these wages or benefits would be subject to FICA and other taxes, as well as eligible for the EITC. On collective bargaining, the National Labor Relations Board will have to rule on the facts in individual situations, but it is likely they would rule that these workers are eligible to unionize. There has been some recent media attention on efforts to unionize workfare recipients in New York City, and there certainly would be more attention if the ruling were made that these workers had the right to unionize.

We are working to resolve these issues in the next week or two. In addition, we are thinking through our strategy on the Hill, given the likelihood of a backlash there once these interpretations are known.

Privatization

A second issue concerns efforts by some states to privatize their welfare operations. Texas has had a request pending at USDA and HHS for months that would outsource eligibility determinations for food stamps and Medicaid state-wide. Wisconsin has a more limited waiver request pending. Current law requires these programs to use "merit systems" employees -- essentially government workers. However, we may be able to waive this requirement if we want to. This is a major issue for unions with a large number of public sector employees (AFSCME and SEIU) since it would lead to a direct loss of membership. Our analysis is not as far along here. The unions are not pressing us for a decision, since they fear we will not rule entirely in their favor. However, we can expect increasing pressure from Govs. Bush and Thompson.

2/14 FLSA Meeting

food stamp hoops?

1) How many states won't make mark
2) somehow repealing welfare.

All agree they are "employees"

FLSA should apply - in same way as to anyone else.

Of course "trainee" category still holds.

Food stamps can be counted toward m.w. — continue to collect FS ben, but "earning" it.

And of course TANF. | (welfare) 2 either it all ~~or~~ (wage supp) converted to EF in cash

some other services could be a part if meet some set of criteria - unlikely but possible.

both bring in set of benefits under regs.

Routine application + approval process.

But legally contestable. And AFL will. * [Two funding streams married - have done in past in some states - really fairly easy.

Most optimistic scenario - maximum AFDC/FS ben (eg nothing in pub housing)

Done for 20 hrs + 30 hrs

Minor prob till 98 (20 hrs) (bigger in 2-person households)

99 - 25

2000 - 30 hr. - pretty bad if really 30 hrs of wk.

won't work very well at all - w/ 2 parent families

Other labor laws??

Not determined "EE" - may mean something different.

NCRA – Likely that in priv sector – p. will be "ee" – part of bargaining unit; some bargaining unit?? prob not.

Others covered by state law – sh pick up EE law.

~~OSHA~~ – applies to priv sector ee's in same way.

UI – Same would apply

~~CWEP~~ – Asst Secy for Tax Policy, Treasury. Meeting tomorrow morning w/ DOL { Subject to SS, FICA, ?? Elig for EITC?? If not taxable don't get EITC / If taxable EITC

How to roll out?

Provide tech. assist – e.g., how to make people trainees – how to comply w/ law.

Just talk w/ Treas – (NGA / states / etc.)

Hill possibilities –

CWEP-like exemption

give more flexibility on wh

to

Undecided questions

1. Tax issue
2. NCRA issues
3. What counts when??

Endgame

DRAFT -- FOR INTERNAL USE ONLY

Welfare Protection and Labor Laws

*CONSULTATION AND FACT FINDING. We want to gain more information from states and others about the details and magnitude of problems that could arise in meeting both FLSA and TANF. DOL and HHS also are considering a possible pilot effort with several states in which we can work intensively to ensure that their planned TANF work modes meed FLSA requirements. TECHNICAL ASSISTANCE. DOL and HHS would like to offer technical assistance to states to explain the laws and the options states can choose in designing their programs to meet both FLSA and TANF requirements.

*OUTREACH AND PUBLIC EDUCATION. DOL and HHS would begin a consultation process with states groups, worker advocates, and welfare advocates to gain more information about the issue and to obtain their input and feedback. We also wan to promote a large understanding of the importance of maintaining BOTH worker protections and strong work requirements.

*DEVELOPING ADMINISTRATION OPTIONS. With the information gained from consultation with states and others, we will develop a range of acceptable policy solutions to this issue.

*INCREASING PRIVATE SECTOR OPPORTUNITIES. Efforts to increase private sector employment for TANF participants, like the President's Welfare-to Work proposal will make it easier for states to meet the requirements of both laws while supporting the Administration's commitments to move people from welfare to work and minimum wage, and to maintaining the integrity of the FLSA and the minimum wage.

New York Times, 2/9/97

City Labor Head Backs Effort to Organize Workfare Participants

By STEVEN GREENHOUSE

In an important boost to the metropolitan area's most ambitious unionization drive in years, Stanley Hill, head of New York City's largest union of municipal workers, said yesterday that he would back efforts to organize the city's 35,000 welfare recipients who are required to work for their benefits.

Mr. Hill, executive director of District Council 37, which has 125,000 members, said that in an effort to see how his powerful union can help, he will meet next week with a community group that has gotten more than 4,000 city workfare laborers to sign authorization cards pledging their support for a union. The workers are looking to the labor movement for help as they increasingly complain about working conditions under the city's fast-growing workfare program, by far the nation's largest.

"I think it's a good idea," Mr. Hill said in an interview. "These people should have collective bargaining rights. They should have the same rights as other workers. Workfare must not be allowed to become synonymous with indentured servitude."

But Mr. Hill acknowledged that the drive to unionize welfare laborers faces a major obstacle: New York City is not required to recognize or bargain with such workers, even if a majority backs a union, because under state law they are not considered traditional workers, but rather welfare recipients.

"The law is that they're not defined as employees, but we're going to try to get that changed possibly down in Washington or at the state level," he said.

Union officials acknowledge, however, that it will not be easy to persuade the Republican Congress in Washington or the Republican State Senate in Albany to pass legislation that would enable workfare laborers to form unions. Such legislation could be expected to make welfare programs more expensive at a time when Federal and state governments are eager to reduce welfare spending and budget deficits.

In New York City, welfare recipients are sweeping streets, cleaning parks and working as hospital aides, receiving as little as $68.50 in cash and $60 in food stamps every two weeks for their 26 hours of work a week.

With the new Federal welfare law requiring states and cities to put hundreds of thousands of welfare recipients into workfare jobs, the nation's labor movement fears that such workers not only will be used to replace unionized workers but will put downward pressure on wages. Mr. Hill's parent union, the American Federation of State, County and Municipal Employees, and several other large unions are focusing on this fast-growing pool of laborers as ripe for unionization.

Sheila Duncan, a welfare recipient who has worked in recent months as a Sanitation Department sweeper, said she is eager to join a union for workfare laborers. "We think a union will help get us permanent jobs and better working conditions," she said. "And most important a union might make them treat us with respect. For 24 years, I worked in procurement in the Transit Authority before I was laid off, and we don't deserve to be treated this way."

On Thursday afternoon, Ms. Duncan joined more than 100 other participants in the Work Experience Program, known as WEP, at a demonstration at Sanitation Department headquarters near City Hall to demand that department officials recognize them as a union and discuss grievances.

Many workers at the demonstration complained that the department does not give them gloves, coats or boots and does not allow them to use the bathrooms in the Sanitation Department garages where they are based. Several also complained that when they sweep streets, they have to keep their lunch bags tied to the garbage cans they push around because they have nowhere else to store their lunches. And when they sit down to eat lunch, they said, they have no place to wash their hands.

"It would be great if the union could get the city to promise to turn the workfare jobs into permanent jobs," said Robert Jones, a Sanitation Department sweeper in Coney Island.

Richard Schwartz, a senior adviser to the Mayor, said: "The fact is that welfare recipients participating in work programs in exchange for their benefits do not have the right to unionize. Further, the Federal welfare reform that President Clinton signed mandates workfare at a level of 25 percent of all recipients in the coming year."

Mr. Schwartz said that since March 1995, the city's welfare rolls have declined to 925,000, a 235,000 drop that he said was the largest ever recorded by any city.

City officials say workfare assignments are not jobs, but rather an opportunity for people who are able-bodied to give something back to the community in exchange for their benefits.

"Many of these people have been out of work for a long time, and this is exactly the preparation they need to get work," Mr. Schwartz said.

Officials have also said that they have heeded the workers' needs for suitable work clothes. "The city has purchased thousands of coats, gloves, hats and boots and has gone to considerable expense and effort to insure that they're distributed to all the W.E.P.'s in the system," Mr. Schwartz said.

Since early December, the Association of Community Organizations for Reform Now, a group of community organizers known as Acorn, has been working to help New York's workfare laborers form a union. With more than 4,000 authorization cards already signed, the group's leaders say they hope to collect more than 15,000 cards by this spring and present them to Mayor Giuliani to pressure him to recognize and bargain with the workers, even if state law does not require him to do so.

"If we have 15,000 to 20,000 cards and can move a lot of people into the streets and get the rest of organized labor behind us, we'll have a real chance of getting the city to recognize us," said John Kest, who is Acorn's director of organizing.

Workfare laborers are not defined as employees by law.

Independent of Acorn, a second community group, W.E.P. Workers Together, is trying to organize the workfare laborers not so much into a union, but into an organization that will pressure the city into sitting down with them to discuss grievances and work rules.

"Legally, we think it's difficult now to pursue formal unionization," said Benjamin Dulchin, an organizer with W.E.P. Workers Together. "Still, there's no question that W.E.P. workers need to have a voice to make their work less abusive."

In recent weeks, the workfare laborers have turned up the pressure on the city. Last Sunday, they heckled Parks Commissioner Henry J. Stern at a Groundhog Day ceremony in Queens. Two weeks ago, workers sat in at Mr. Stern's office to demand that he meet with them to discuss grievances. Also last month, workfare laborers took over 10 of the Parks Department's district offices to demand coats and gloves.

Mr. Hill said that Gerald W. McEntee, president of the American Federation of State, County and Municipal Employees, has urged him to support organizing the workfare laborers. Such an effort might create tensions with Mr. Giuliani, a man with whom Mr. Hill has maintained warm relations even though they have opposed each other in negotiations.

"Mayor Giuliani has never said to me, 'Don't organize people,'" Mr. Hill said.

Last September, Mr. Hill called for a moratorium on expanding the city's workfare program, saying he was concerned that the program provided little training and did not hold out the hope of permanent jobs for participants. A few days later, Mr. Hill lifted his call for a moratorium after Mr. Giuliani agreed to regular meetings to monitor the program and discuss how it might lead to permanent jobs. Mr. Hill said 250 workfare laborers have moved into permanent hospital, parks and school lunchroom jobs thanks to these meetings.

Effort to Organize Workfare Participants Gets Backing of Powerful City Labor Leader

Nancy Siesel/The New York Times

Workfare laborers demonstrated across the street from the Sanitation Department on Thursday to press for better conditions and equipment.

Food stamps – law specif permits states to req. people to wk for their food stamps

but says – can't be req'd to wk for any less than min wage

Poss reading – FLSA never comes into play – preempted by this statute

2/11 Seth / Marvin

2 ways to use f.s → work

1. work supp – st can cash out / give to EEs as subsidy

then – m.w will apply

but f.s. going toward ee-toward your pay

2. FS / workfare –

st may req wk in return for f.s. – but not for less than min wage

lawyers think if – if & st does this, f.s. count as wages – FLSA satisfies.

make believe they are wages.

set up programs –

opens up whole new pot of $ for them.

unions upset at 1st blush.

Priv sector – "EEs" – FLSA def is broadest.

Pub sector diff.

Apfel mtg on FLSA/Privatization

1. FLSA etc (other emp laws)

Apply to EEs under workfare in same way as as any other EE

A job is a job. Not much flexib.

KA: when is something not a job?

Ex- either training OR a job (no such thing as "work experience")

| degree of supervision ben. to ER |

fact-by-fact anal.

Test - whether something is an "EE"

KA: How do we deal w/ TANF wk reqs?

(25 hrs per wk) * (visiting) min wage = ___ (more than some states will want to pay)

cash ass. counts toward wage.

other things?

Food stamps
Child care
Transportation

} How do they count? (toward min wage)

Applied to MI now:

If they put p. in wk exper prog to satisfy wk reqs — then they're going to run into a problem.

OthCiv coop- goes other way.

WST wkweek – Monday

2. Privatization –

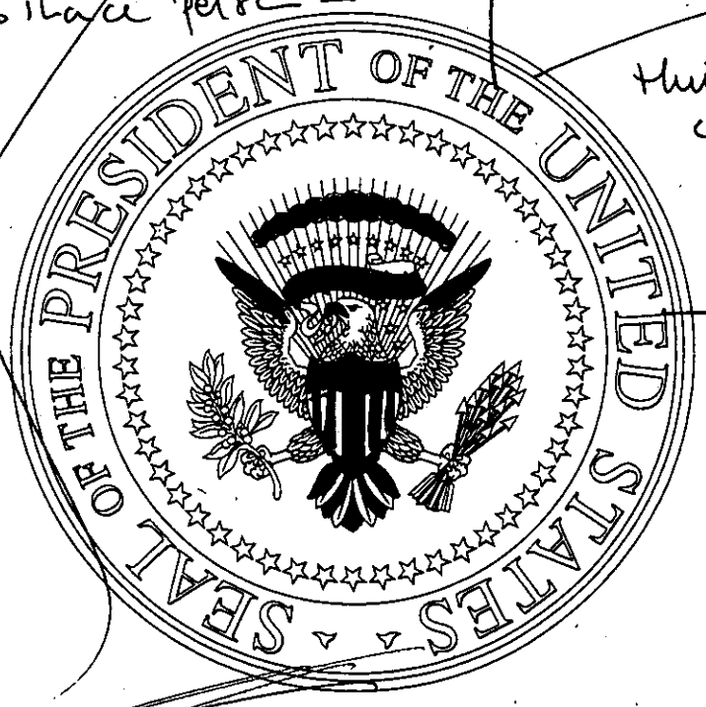
Unemp insurance – mostly can't be fed out.
"inherently gvtal" – OPM reg. (?)
No diff btw MA + TX.
granted

Not a waiver authority

2. Food stamps:
certif should be done by merit syst EEs –
specific public.
Main issue: Demo Auth
perversion – This
OR Reform stat – so no waiver nec.

3. Medicaid –
Can waive.
But is there a core of pub activs that
should be done by pub EEs?
How does this notion apply in the context
of a syst like TX which it is almost
entirely automated.

News Report



Elena Kagan
218A OEOB

Monday, February 10, 1997

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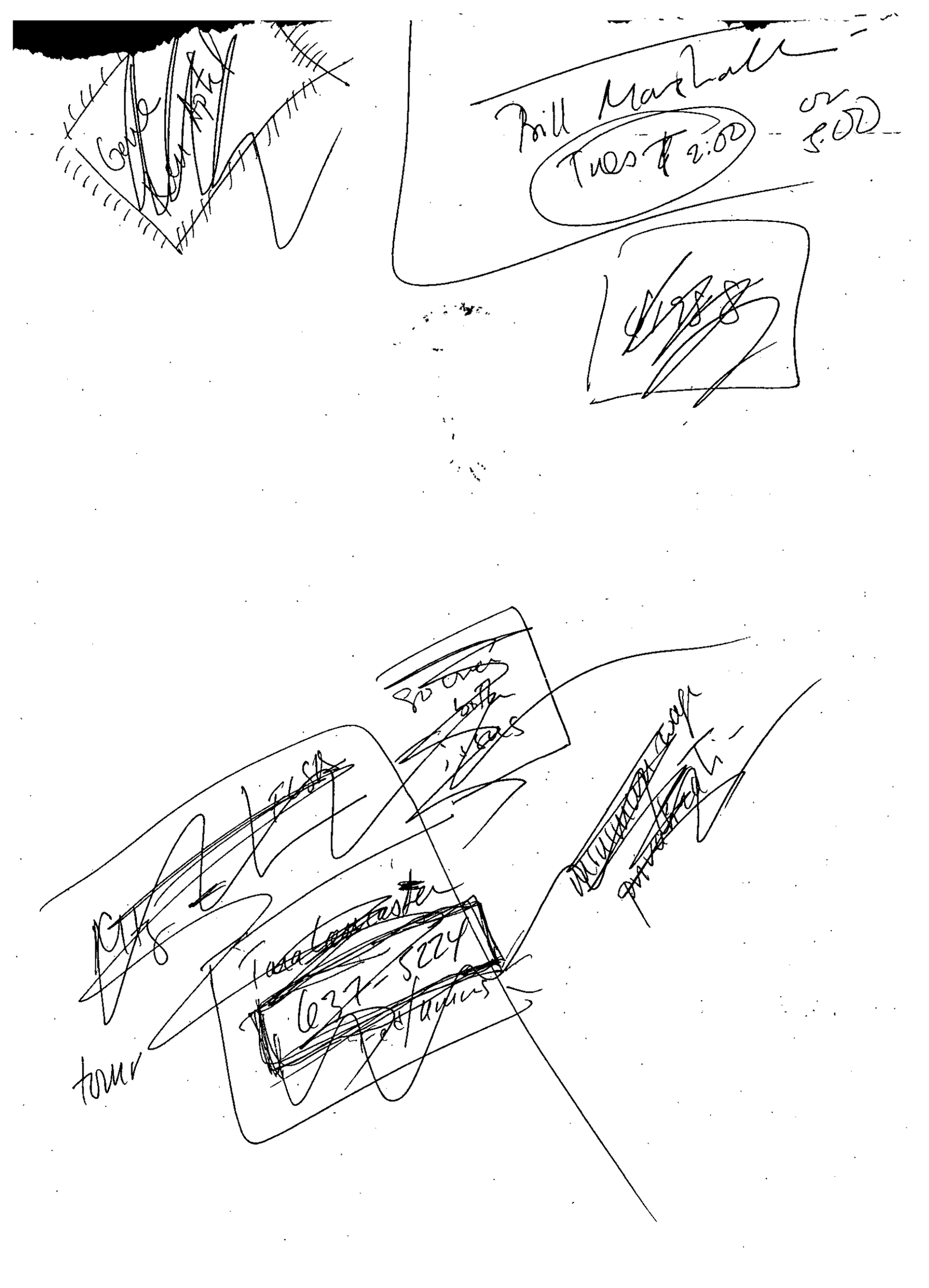

An Unlikely Legislator Ove

Learning-Disabled Handyman Finds That Persistence Pays Off

By MICHAEL JANOFSKY

CONCORD, N.H. — The seventh try was the lucky charm for Peter F. Leonard. After six failures to win election to the New Hampshire House of Representatives, he won a vacant seat last November by a handful of votes.

Now proud and giddy and festooned with buttons that proclaim his love for Jesus and New Hampshire, Mr. Leonard sits among 399 other House members, representing a district in downtown Manchester, the state's largest city, and helping to shape the future of the state.

But more than pride and colorful buttons set him apart from his colleagues. A lifelong resident of New Hampshire, Mr. Leonard is a 53-year-old learning-disabled handyman and a divorced father of three grown children who has no permanent address, no car, no office, no telephone and, for the moment, no viable means of employment.

Living alone on Social Security disability, charity and the $100 a year each House member is paid, he rents a cramped room at the Cadillac Motel on the fringe of downtown Manchester and travels on a Trailways bus, commuting 20 miles to the Capitol in Concord every day the Legislature is in session.

While most other legislators return to jobs as doctors, lawyers and consultants, Mr. Leonard returns to O'K Parker's bar and restaurant, where he sets up a makeshift office on a pool table or the bar, whichever is vacant. His new business cards include the telephone number of the bar so that constituents can leave a message for him.

In exchange for the accommodation, which often includes lunch, compliments of the owner, Theodore Parker, Mr. Leonard spends an hour early each day cleaning the bar and the restrooms before walking the quarter-mile to the bus station.

But it is a great life, he says with an ever-present smile and a Forrest Gump kind of earnestness. "I'm a symbol that anybody can do what you want if you put your mind to it," he said. "Just as long as I don't let it go to my head. It's not worth it if it goes to my head; then I won't do a good job for the taxpayers."

Mr. Leonard's election has caused something of a stir around Manchester and Concord. He has already been the subject of several news articles and television profiles since the election, focusing not only on his living conditions but also on a learning disorder that causes him trouble with reading and spelling. He mispronounces many words, and in answering questions it is often apparent that he needs extra time to formulate his thoughts.

"I'm not disabled; I have a disability," he said, expressing a distinction that has caused him a good deal of psychological pain over the years. As a child, he said, he was often derided by friends and even family members as "a screwup." He struggled through school, and eventually gained a high school equivalency degree.

Then he held a succession of disparate jobs. He worked in a shoe factory. He picked up trash for the city. He ran an elevator. For many years, he was a maintenance man at the Palace Theater across the street from O'K Parker's, and loved the stage so much that he began showing up at night in a tuxedo to greet the patrons.

Twice, he said, he was invited to join a play's cast, once as a pirate in "Peter Pan" and then as a Nazi officer in "The Sound of Music," when he actually had a line to deliver: "They are gone."

The notion of entering politics struck in the early 1980's, he said, as he walked along a street in downtown Manchester. He heard a voice. He was sure it was God.

"Like it says in the Bible, God talks to people," Mr. Leonard said. "He was talking to me. He told me, 'I want you to go into politics to help my handicapped children.' I looked around and didn't see anybody. I turned around and started to walk again, and I heard the voice again. This time it said: 'You've got the power to work with the handicapped because you understand them. You know their needs.' "

He answered the call in 1983 by running for city selectman, and lost. A year later he tried for the two-year House term, and failed by only 36 votes. Friends suggested that he demand a recount, but that would have cost him $100, which he did not have.

Every other year he tried again, always losing until last fall, when he ran as a Democrat on a platform most New Hampshire politicians embrace: no new taxes. His 1,155 votes gained him the last of three vacant seats and made him part of a banner year for state Democrats. As Jeanne Shaheen became the first New Hampshire Democrat to win election as governor in 18 years — and the first woman to hold the office in the state's history — Democrats picked up 33 seats in the House, closing the gap with Republicans to 253 to 145, with 2 independents.

For Mr. Leonard, the campaign was a breeze. Years of running for office and working in the area had made him a familiar figure around Manchester. Rather than knock on doors or give speeches, he hung posters around the downtown area and marched in a few parades. Over all, he said he spent $31 for the posters and $12 for filing fees.

In the Capitol, winning appointment to the House Transportation Committee because of his mode of travel, he has made a strong early impression on many of his colleagues, most of it positive.

"He was the one freshman we all knew when he arrived," said Representative Donna Sytek, the House Speaker. "He's a pleasant enough fellow. But all we require a member to bring here is common sense and a good philosophy. For a man who has survived in the way he has, he's proved he has them."

Representative Peter Hoe Burling, the House Democratic leader, put it this way: "What he brings to this place — and believe me, this place can get a little cynical — is an essential goodness that really brings us all back on track."

But others are not so sure about Mr. Leonard, who struggled to stay awake one day last week during a Transportation Committee hearing. When a panel member, Representative Robert H. Milligan, a Republican from Merrimack, learned that a reporter and a photographer were spending the day with Mr. Leonard for a news article about him, Mr. Milligan asked, "How do you think this makes the rest of us look?"

Another committee member, Representative Philip M. Ackerman, a Nashua Democrat, said that while most of his colleagues had accepted Mr. Leonard, some belittled him in private. "It happens," Mr. Ackerman said. "But I've also heard a lot of positive comments."

Around Manchester, too, the reviews are mixed. While many people admire Mr. Leonard's pluck, Betsy Guenther, who owns a crafts shop across the street from the bar, said she had "absolutely no confidence" in Mr. Leonard as a legislator.

"It's a sad commentary on the voting public," Ms. Guenther said.

Mr. Leonard has introduced several bills since the session opened last month. Two are still alive, one that would ban other states from using the mail to send lottery entries to New Hampshire residents and one to designate four theaters in the state as historical landmarks.

He has yet to make a speech in general session, but he does not concede that he is any less prepared or dedicated than more garrulous and articulate colleagues.

"I'm Irish and French — that means I'm stubborn," he said with a laugh. "And I'm not shy. Anybody in life, whether you're handicapped or a mainstream person, can do anything, and I was brought up to never give up. If you give up, you might as well be dead."

The New York Times

WEDNESDAY, FEBRUARY 19, 1997

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Labor Leaders Seek to Unionize Welfare Recipients Who Must Go to Work

By STEVEN GREENHOUSE

LOS ANGELES, Feb. 18 — The A.F.L.-C.I.O's leaders have decided to seek to unionize the hundreds of thousands of welfare recipients who will be required to work for their benefit$, with the dual goal of improving their working conditions and pressuring states and cities to give them permanent jobs.

With the labor movement vowing to step up its organizing, especially of low-wage workers, union leaders say it is important to recruit workfare employees into unions because they are one of the fastest-growing labor pools in the country. These leaders contend that it is also important to attract these workers to unions because, in their view, state and city governments are using workfare employees to replace higher-paid union workers.

Several union leaders disclosed today that at a closed-door meeting on Monday, the federation's 54-member executive council voted to back a drive to organize more than one million people who social policy experts estimate will be placed on workfare under the new Federal welfare law. The labor leaders said they would soon initiate efforts to organize workfare participants in New York, New Jersey, Alaska, California and Maryland.

These leaders face bigger obstacles than those in many other organizing drives. In New York, state agencies have ruled that people on workfare are not employees and can not be represented by a union. Another obstacle is that unions may not be allowed to bargain to raise the wages of workfare recipients because their pay is a welfare check.

"People on welfare who work should be treated like any other workers," said Andrew L. Stern, president of the Service Employees International Union. "We should try to improve their wages and working conditions the way we do with other workers covered by collective bargaining agreements."

A dual goal of providing permanent jobs and improving working conditions.

This drive could create friction between the union movement and state and city governments. If unions succeed in recruiting workfare participants, they would be pressing governments to raise workers' welfare payments while the states and cities might protest that their budget deficits prevent spending increases.

Mr. Stern said, "If the Government can give tax subsidies to employers who hire welfare recipients, why can't we pay these recipients more for the work they do?"

The union leaders believe recipients would be attracted by the possibility of improved working conditions, like guaranteed training, or warm clothing for workers who clean parks and streets in the winter.

The organizing drive will be undertaken by the service employees and two other unions that also represent many government workers — the American Federation of State, County and Municipal Employees and the Communications Workers of America.

Gerald W. McEntee, president of the state, county and municipal employees union, said, "There is a real question over whether we can bargain wages for these workers, but many of them work under bad conditions, and we can certainly bargain to improve their conditions."

Mr. McEntee contended that in many states, workfare programs were poorly designed because participants received little training and could remain in dead-end, low-paying government jobs for years.

"One of the things we'll seek is to make sure that workfare jobs lead to permanent jobs," he said.

Labor leaders acknowledge that if workfare jobs lead to permanent union jobs there will be little incentive for governments to use workfare workers to replace experienced union workers.

Mr. McEntee said the workfare participants would pay reduced dues, but would otherwise be union members like anyone else. Labor leaders said they were unsure whether workfare workers would have the right to strike and whether governments could cut off their welfare benefits if they did.

In the nation's first successful effort to unionize workfare participants, the state, county and municipal employees union has organized 300 such workers in Alaska. Mr. McEntee said Alaska allowed the workers to join the union because they were doing work similar to jobs already covered by a union contract.

Mr. McEntee said the union won more training for the workers and a pledge that they would be moved into permanent government jobs.

"If they're doing work comparable to what our people are doing, we'd want them to get the same pay and benefits," said Morton Bahr, president of the communications workers organization.

Mr. Bahr said his 700,000-member union was in intense merger talks with the United Food and Commercial Workers organization, which has 1.4 million members. Such a merger would create the nation's largest union by far.

Labor leaders said that in those states that do not consider workfare participants to be employees and refuse to recognize them as union members, the unions would try to organize such workers in informal groups to meet with government officials and discuss working conditions — without formal bargaining.

But Mr. McEntee said that in states that do not consider workfare participants to be workers, unions would lobby state legislatures to change their laws. He and other labor leaders have met with President Clinton to urge him to issue a regulation stating that workfare participants are employees who should be covered by minimum wage and occupational safety laws.

Two weeks ago, Stanley Hill, executive director of District Council 37, New York City's largest union of municipal workers, lent his support to efforts by community activists to organize the city's 35,000 workfare employees, by far the nation's largest program.

In an interview today, Mr. Hill said his union would try to organize them.

"If it's coming from my international president and the A.F.L.-C.I.O., we'll follow the plan," he said. "There's no question this drive will have a tremendous impact on us in the city. It's a tremendous job. But all workers deserve the opportunity to belong to a union."

The federation approved the campaign to recruit workfare employees after a debate in which Mr. Stern urged delaying such a move until labor unions were more prepared to begin the organizing drive. But Mr. McEntee prevailed by arguing that these workers badly needed the protection of unions and threatened the jobs of many union members.

Speaking here, Representative Richard A. Gephardt of Missouri, the House minority leader, and Senator Thomas A. Daschle of South Dakota, the Senate minority leader, said they would propose legislation to define workfare participants as employees covered by minimum wage laws and laws giving workers the right to unionize.

Labor Seeks Protections Under New Welfare Law

Leaders Fear 'Workfare' May Cause Displacement

FEB 20 1997

By Frank Swoboda
Washington Post Staff Writer

LOS ANGELES, Feb. 19—Leaders of some of the nation's largest unions, seeking repayment on their political investment in last year's elections, are pressing the White House to ensure that the new welfare law doesn't cost them jobs.

Labor leaders gathered here for the annual mid-winter meeting of the AFL-CIO are demanding that the millions of welfare recipients headed into the work force be guaranteed the minimum wage and other labor law protections in an effort to keep "workfare" from undermining the wages and benefits of union members.

Several states, including New York, are already operating extensive programs that require welfare recipients to work off their monthly check by cleaning public parks, sweeping streets and doing other jobs to meet the terms of the federal law.

But union officials fear that, if these welfare recipients lack labor law protections, state and local governments might use them to replace existing job-holders.

"The new federal law offers limited protections for current workers faced with losing their jobs as a result of welfare reform," the AFL-CIO said in a resolution. "Real welfare reform must not take job opportunities away from people who already have them."

The Labor Department must determine whether welfare recipients who are working in public jobs in exchange for their benefits are "employees" covered by federal labor laws.

Confidential draft documents show that the department has determined that the Fair Labor Standards Act does apply to workfare participants, but the documents have not been approved by the White House.

Gerald W. McEntee, president of the American Federation of State, County and Municipal Employees, said today that workfare jobs will be especially important if private employers fail to hire welfare recipients in large numbers. He released a memorandum from the U.S. Chamber of Commerce that he said illustrated business's true attitude toward hiring welfare parents.

The memorandum, entitled "Legal Disincentives to Hiring Welfare Recipients," said, "With good reason, employers are unwilling to hire individuals who have been receiving something for nothing when they can continue that lifestyle merely by filing an all-expenses paid lawsuit through which they can obtain a fortune."

The memorandum listed a large number of federal statutes the Chamber said recipients might use to sue employers, including the Fair Labor Standards and Civil Rights acts.

Jeffrey H. Joseph, Chamber vice president for domestic policy, said the memo was given to Health and Human Services Secretary Donna E. Shalala two years ago to "frame the discussions of the employer perspective" on hiring welfare recipients.

Noting that some lawyers now advertise for "classes of victims," he said, "When you start moving tens of thousands from welfare to work, and a lot of them don't stick, and are not working, getting nothing, [you could have] another class of victims."

He said the Chamber now recommends that employers "hire any qualified worker they can get" with the right skills and attitude.

Staff writer Judith Havemann in Washington contributed to this report.

4

QUESTION AND ANSWER ON WELFARE REFORM AND THE MINIMUM WAGE

Question: Is the Administration going to make clear that the Fair Labor Standards Act requires that at least the minimum wage be paid to welfare recipients participating in work activities?

Answer: This Administration is committed to moving people from welfare to work. It's also committed to making sure workers get at least the minimum wage for their efforts. Workers shouldn't be paid a subminimum wage, whether or not they come off the welfare rolls. But the Administration is still studying precisely how the FLSA and other worker protection laws play out in the welfare context. We expect to have a final answer on the minimum wage question within the next few weeks.

QUESTION AND ANSWER ON WELFARE REFORM AND PRIVATIZATION

Question: Is the Administration going to allow states to privatize welfare operations now performed by state employees?

Answer: As you know, the Administration is reviewing requests by certain states to privatize some or all of their welfare operations. The legal and factual questions involved in this decision are very complicated, and I understand that the agencies involved are not yet ready to make any decision.

For Illustrative Purposes Only

TABLE ONE: FAMILY OF THREE

The Difference Between the Minimum Wage and the July 1996 Monthly Maximum Benefits for a family of three

State	Maximum Monthly AFDC Benefit July 1996 for a family of 3	Maximum Monthly Food Stamps Benefit July 1996	Combined AFDC and Food Stamps Benefits	Effective Hourly Wage Rate of Combined Benefits for 20 hrs/wk/mo	Additional Monthly Cost/Case of Minimum Wage for 20 hours/week for 4.3 weeks/mo.	Effective Hourly Wage Rate of Combined Benefits for 30 hrs/wk/mo (See Footnote 4)	Additional Monthly Cost/Case of Minimum Wage for 30 hours/week for 4.3 weeks/mo. (See Footnote 4)
Alaska	**$923**	$321	$1,244	$14.47	($801)	$9.64	($580)
Hawaii	**$712**	$471	$1,183	$13.76	($740)	$9.17	($519)
Connecticut	**$636**	$236	$872	$10.14	($429)	$6.76	($208)
Vermont	**$633**	$237	$870	$10.12	($427)	$6.74	($206)
Rhode Island	**$554**	$299	$853	$9.92	($410)	$6.61	($189)
New York	**$577**	$270	$847	$9.85	($404)	$6.57	($183)
California	**$596**	$248	$844	$9.81	($401)	$6.54	($180)
Washington	**$546**	$289	$835	$9.71	($392)	$6.47	($171)
Massachusetts	**$565**	$257	$822	$9.56	($379)	$6.37	($158)
New Hampshire	**$550**	$262	$812	$9.44	($369)	$6.29	($148)
Minnesota	**$532**	$267	$799	$9.29	($356)	$6.19	($135)
Wisconsin	**$517**	$272	$789	$9.17	($346)	$6.12	($125)
Oregon	**$460**	$313	$773	$8.99	($330)	$5.99	($109)
Michigan	**$459**	$300	$759	$8.83	($316)	$5.88	($95)
Kansas	$429	$313	$742	$8.63	($299)	$5.75	($78)
Montana	$438	$295	$733	$8.52	($290)	$5.68	($69)
New Jersey	$424	$307	$731	$8.50	($288)	$5.67	($67)
North Dakota	$431	$298	$729	$8.48	($286)	$5.65	($65)
South Dakota	$430	$298	$728	$8.47	($285)	$5.64	($64)
Utah	$426	$299	$725	$8.43	($282)	$5.62	($61)
Iowa	$426	$299	$725	$8.43	($282)	$5.62	($61)
Pennsylvania	$421	$301	$722	$8.40	($279)	$5.60	($58)
Maine	$418	$301	$719	$8.36	($276)	$5.57	($55)
Dist. of Columbia	$415	$302	$717	$8.34	($274)	$5.56	($53)

For Illustrative Purposes Only

TABLE ONE: FAMILY OF THREE

The Difference Between the Minimum Wage and the July 1996 Monthly Maximum Benefits for a family of three

State	Maximum Monthly AFDC Benefit July 1996 for a family of 3	Maximum Monthly Food Stamps Benefit July 1996	Combined AFDC and Food Stamps Benefits	Effective Hourly Wage Rate of Combined Benefits for 20 hrs/wk/mo	Additional Monthly Cost/Case of Minimum Wage for 20 hours/week for 4.3 weeks/mo.	Effective Hourly Wage Rate of Combined Benefits for 30 hrs/wk/mo (See Footnote 4)	Additional Monthly Cost/Case of Minimum Wage for 30 hours/week for 4.3 weeks/mo. (See Footnote 4)
New Mexico	$389	$310	$699	$8.13	($256)	$5.42	($35)
Illinois	$377	$313	$690	$8.02	($247)	$5.35	($26)
Maryland	$373	$313	$686	$7.98	($243)	$5.32	($22)
Nebraska	$364	$313	$677	$7.87	($234)	$5.25	($13)
Wyoming	$360	$313	$673	$7.83	($230)	$5.22	($9)
Colorado	$356	$313	$669	$7.78	($226)	$5.19	($5)
Virginia	$354	$313	$667	$7.76	($224)	$5.17	($3)
Nevada	$348	$313	$661	$7.69	($218)	$5.12	$3
Arizona	$347	$313	$660	$7.67	($217)	$5.12	$4
Ohio	$341	$313	$654	$7.60	($211)	$5.07	$10
Delaware	$338	$313	$651	$7.57	($208)	$5.05	$13
Virgin Islands	$240	$402	$642	$7.47	($199)	$4.98	$22
Idaho	$317	$313	$630	$7.33	($187)	$4.88	$34
Oklahoma	$307	$313	$620	$7.21	($177)	$4.81	$44
Florida	$303	$313	$616	$7.16	($173)	$4.78	$48
Missouri	$292	$313	$605	$7.03	($162)	$4.69	$59
Indiana	$288	$313	$601	$6.99	($158)	$4.66	$63
Georgia	$280	$313	$593	$6.90	($150)	$4.60	$71
North Carolina	$272	$313	$585	$6.80	($142)	$4.53	$79
Kentucky	$262	$313	$575	$6.69	($132)	$4.46	$89
West Virginia	$253	$313	$566	$6.58	($123)	$4.39	$98
Arkansas	$204	$313	$517	$6.01 — jeopardy	($74)	$4.01	$147
South Carolina	$200	$313	$513	$5.97	($70)	$3.98	$151
Louisiana	$190	$313	$503	$5.85	($60)	$3.90	$161

For Illustrative Purposes Only

TABLE ONE: FAMILY OF THREE

The Difference Between the Minimum Wage and the July 1996 Monthly Maximum Benefits for a family of three

State	Maximum Monthly AFDC Benefit July 1996 for a family of 3	Maximum Monthly Food Stamps Benefit July 1996	Combined AFDC and Food Stamps Benefits	Effective Hourly Wage Rate of Combined Benefits for 20 hrs/wk/mo	Additional Monthly Cost/Case of Minimum Wage for 20 hours/week for 4.3 weeks/mo.	Effective Hourly Wage Rate of Combined Benefits for 30 hrs/wk/mo (See Footnote 4)	Additional Monthly Cost/Case of Minimum Wage for 30 hours/week for 4.3 weeks/mo. (See Footnote 4)
Texas	$188	$313	$501	$5.83	($58)	$3.88	$163
Tennessee	$185	$313	$498	$5.79	($55)	$3.86	$166
Alabama	$164	$313	$477	$5.55	($34)	$3.70	$187
Mississippi	$120	$313	$433	$5.03	$10	$3.36	$231
Puerto Rico	$180	NA	NA	$0.00	NA	$0.00	NA

Notes:

1. This table uses the maximum monthly AFDC benefits as of July 1996. States have more flexibility under TANF to determine benefit levels and may choose to provide higher or lower benefits than suggested in this table. Food Stamp benefits have increased slightly since 7/96 ($2 for a family of 3).
2. The maximum food stamp benefit assumes 100% excess shelter deduction, no child support deduction, no medical deductions etc.
3. The minimum wage is currently $4.75 an hour but will increase to $5.15 on 9/1/97. The tables use $5.15 as the minimum wage
4. While the number of hours required for participation increases to 30 per week in FY 2000, only 20 of those hours must be within the activities described in Sec. 407. As a result states could place recipients in training for 10 of the 30 and not be required to pay the minimum wage for the 10 hours of training.
5. Although including food stamps as a wage reduces state costs, there are other unquantifiable policy implications that should be considered.
6. AFDC benefits are calculated by the Congressional Research Service
7. Bolded states are those whose AFDC benefit alone is greater than the minimum wage for 20 hrs. for 4.3 weeks.

For Illustrative Purposes Only

TABLE TWO: FAMILY OF TWO

The Difference Between the Minimum Wage and the July 1996 Monthly Maximum Benefits for a family of two

State	Maximum Monthly AFDC Benefit July 1996 For a family of 2	Maximum Monthly Food Stamps Benefit July 1996	Combined AFDC and Food Stamps Benefits	Effective Hourly Wage Rate of Combined Benefits for 20 hrs/wk/mo	Additional Monthly Cost/Case of *Minimum* Wage for 20 hours/week for 4.3 weeks/mo.	Effective Hourly Wage Rate of Combined Benefits for 30 hrs/wk/mo (See Footnote 4)	Additional Monthly Cost/Case of Minimum Wage for 30 hours/week for 4.3 weeks/mo. (See Footnote 4)
Alaska	**821**	231	$1,052	$12.23	($609)	$8.16	($388)
Hawaii	**565**	357	$922	$10.72	($479)	$7.15	($258)
Vermont	**533**	172	$705	$8.20	($252)	$5.47	($41)
Connecticut	**513**	178	$691	$8.03	($248)	$5.36	($27)
New York	**468**	203	$671	$7.80	($228)	$5.20	($7)
New Hampshire	**481**	188	$669	$7.78	($226)	$5.19	($5)
California	**479**	188	$667	$7.76	($224)	$5.17	($3)
Rhode Island	**449**	218	$667	$7.76	($224)	$5.17	($3)
Massachusetts	**474**	190	$664	$7.72	($221)	$5.15	$0
Washington	440	218	$658	$7.65	($215)	$5.10	$34
Wisconsin	440	200	$640	$7.44	($197)	$4.96	$52
Minnesota	437	201	$638	$7.42	($195)	$4.95	$54
Oregon	395	218	$613	$7.13	($170)	$4.75	$79
South Dakcta	380	218	$598	$6.95	($155)	$4.64	$94
Michigan	371	218	$589	$6.85	($146)	$4.57	$103
Iowa	361	218	$579	$6.73	($136)	$4.49	$113
Kansas	352	218	$570	$6.63	($127)	$4.42	$122
Montana	349	218	$567	$6.59	($124)	$4.40	$125
Utah	342	218	$560	$6.51	($117)	$4.34	$132
North Dakcta	333	218	$551	$6.41	($108)	$4.27	$141
Pennsylvania	330	218	$548	$6.37	($105)	$4.25	$144
Dist. of Columbia	326	218	$544	$6.33	($101)	$4.22	$148
New Jersey	322	218	$540	$6.28	($97)	$4.19	$152
Wyoming	320	218	$538	$6.26	($95)	$4.17	$154

For Illustrative Purposes Only

TABLE TWO: FAMILY OF TWO

The Difference Between the Minimum Wage and the July 1996 Monthly Maximum Benefits for a family of two

State	Maximum Monthly AFDC Benefit July 1996 For a family of 2	Maximum Monthly Food Stamps Benefit July 1996	Combined AFDC and Food Stamps Benefits	Effective Hourly Wage Rate of Combined Benefits for 20 hrs/wk/mo	Additional Monthly Cost/Case of Minimum Wage for 20 hours/week for 4.3 weeks/mo.	Effective Hourly Wage Rate of Combined Benefits for 30 hrs/wk/mo (See Footnote 4)	Additional Monthly Cost/Case of Minimum Wage for 30 hours/week for 4.3 weeks/mo. (See Footnote 4)
Maine	312	218	$530	$6.16	($87)	$4.11	$162
New Mexico	310	218	$528	$6.14	($85)	$4.09	$164
Virginia	294	218	$512	$5.95	($69)	$3.97	$180
Nebraska	293	218	$511	$5.94	($68)	$3.96	$181
Maryland	292	218	$510	$5.93	($67)	$3.95	$182
Nevada	289	218	$507	$5.90	($64)	$3.93	$185
Colorado	280	218	$498	$5.79	($55)	$3.86	$194
Ohio	279	218	$497	$5.78	($54)	$3.85	$195
Illinois	278	218	$496	$5.77	($53)	$3.84	$196
Arizona	275	218	$493	$5.73	($50)	$3.82	$199
Delaware	270	218	$488	$5.67	($45)	$3.78	$204
Idaho	251	218	$469	$5.45	($26)	$3.64	$223
Virgin Islands	180	281	$461	$5.36	($18)	$3.57	$231
Florida	241	218	$459	$5.34	($16)	$3.56	$233
Oklahoma	238	218	$456	$5.30	($13)	$3.53	$236
North Carolina	236	218	$454	$5.28	($11)	$3.52	$238
Georgia	235	218	$453	$5.27	($10)	$3.51	$239
Missouri	234	218	$452	$5.26	($9)	$3.50	$240
Indiana	229	218	$447	$5.20	($4)	$3.47	$245
Kentucky	225	218	$443	$5.15	($0)	$3.43	$249
West Virginia	201	218	$419	$4.87	$24	$3.25	$273
Texas	163	218	$381	$4.43	$62	$2.95	$311
Arkansas	162	218	$380	$4.42	$63	$2.95	$312
South Carolina	159	218	$377	$4.38	$66	$2.92	$315

For Illustrative Purposes Only

TABLE TWO: FAMILY OF TWO

The Difference Between the Minimum Wage and the July 1996 Monthly Maximum Benefits for a family of two

State	Maximum Monthly AFDC Benefit July 1996 For a family of 2	Maximum Monthly Food Stamps Benefit July 1996	Combined AFDC and Food Stamps Benefits	Effective Hourly Wage Rate of Combined Benefits for 20 hrs/wk/mo	Additional Monthly Cost/Case of Minimum Wage for 20 hours/week for 4.3 weeks/mo.	Effective Hourly Wage Rate of Combined Benefits for 30 hrs/wk/mo (See Footnote 4)	Additional Monthly Cost/Case of Minimum Wage for 30 hours/week for 4.3 weeks/mo. (See Footnote 4)
Tennessee	142	218	$360	$4.19	$83	$2.79	$332
Louisiana	138	218	$356	$4.14	$87	$2.76	$336
Alabama	$137	218	$355	$4.13	$88	$2.75	$337
Mississippi	96	218	$314	$3.65	$129	$2.43	$378

Notes:

1. This table uses the maximum monthly AFDC benefits as of July 1996. States have more flexibility under TANF to determine benefit levels and may choose to provide higher or lower benefits than suggested in this table. Food Stamp benefits have increased slightly since 7/96 ($2 for a family o
2. The maximum food stamp benefit assumes 100% excess shelter deduction, no child support deduction, no medical deductions etc.
3. The minimum wage is currently $4.75 an hour but will increase to $5.15 on 9/1/97. The tables use $5.15 as the minimum wage
4. While the number of hours required for participation increases to 30 per week in FY 2000 only 20 of those hours must be within the activities described in Sec. 407. As a result states could place recipients in training for 10 of the 30 and not be required to pay the minimum wage for the 10 hours of training.
5. Although including food stamps as a wage reduces state costs, there are other unquantifiable policy implications that should be considered.
6. AFDC benefits are calculated by the Congressional Research Service
7. Bolded states are those whose AFDC benefit alone is greater than the minimum wage for 20 hrs. for 4.3 weeks.

For Illustrative Purposes Only

TABLE THREE: FAMILY OF FOUR

The Difference Between the Minimum Wage and the July 1996 Monthly Maximum Benefits for a family of four

State	Maximum Monthly AFDC Benefit July 1996 For a family of 4	Maximum Monthly Food Stamps Benefit July 1996	Combined AFDC and Food Stamps Benefits	Effective Hourly Wage Rate of Combined Benefits for 20 hrs/wk/mo	Additional Monthly Cost/Case of Minimum Wage for 20 hours/week for 4.3 weeks/mo.	Effective Hourly Wage Rate of Combined Benefits for 30 hrs/wk/mo	Additional Monthly Cost/Case of Minimum Wage for 30 hours/week for 4.3 weeks/mo.
Hawaii	859	567	$1,426	$16.58	($983)	$11.05	($762)
Alaska	1,025	399	$1,424	$16.56	($981)	$11.04	($760)
Connecticut	741	289	$1,030	$11.98	($587)	$7.98	($366)
New York	687	325	$1,012	$11.77	($569)	$7.84	($348)
Vermont	711	298	$1,009	$11.73	($566)	$7.82	($345)
California	707	299	$1,006	$11.70	($563)	$7.80	($342)
Rhode Island	632	365	$997	$11.59	($554)	$7.73	($333)
Washington	642	349	$991	$11.52	($548)	$7.68	($327)
Massachusetts	651	316	$967	$11.24	($524)	$7.50	($303)
Minnesota	621	325	$946	$11.00	($503)	$7.33	($282)
Wisconsin	617	326	$943	$10.97	($500)	$7.31	($279)
Oregon	565	377	$942	$10.95	($499)	$7.30	($278)
New Hampshire	613	327	$940	$10.93	($497)	$7.29	($276)
Michigan	563	352	$915	$10.64	($472)	$7.09	($251)
Kansas	497	383	$880	$10.23	($437)	$6.82	($216)
Montana	527	353	$880	$10.23	($437)	$6.82	($216)
Maine	526	353	$879	$10.22	($436)	$6.81	($215)
North Dakota	517	356	$873	$10.15	($430)	$6.77	($209)
Pennsylvania	514	357	$871	$10.13	($428)	$6.75	($207)
Dist. of Columbia	507	359	$866	$10.07	($423)	$6.71	($202)
New Jersey	488	373	$861	$10.01	($418)	$6.67	($197)
Utah	498	361	$859	$9.99	($416)	$6.66	($195)
Iowa	495	362	$857	$9.97	($414)	$6.64	($193)

For Illustrative Purposes Only

TABLE THREE: FAMILY OF FOUR

The Difference Between the Minimum Wage and the July 1996 Monthly Maximum Benefits for a family of four

State	Maximum Monthly AFDC Benefit July 1996 For a family of 4	Maximum Monthly Food Stamps Benefit July 1996	Combined AFDC and Food Stamps Benefits	Effective Hourly Wage Rate of Combined Benefits for 20 hrs/wk/mo	Additional Monthly Cost/Case of Minimum Wage for 20 hours/week for 4.3 weeks/mo.	Effective Hourly Wage Rate of Combined Benefits for 30 hrs/wk/mo	Additional Monthly Cost/Case of Minimum Wage for 30 hours/week for 4.3 weeks/mo.
South Dakota	478	367	$845	$9.83	($402)	$6.55	($181)
Maryland	450	391	$841	$9.78	($398)	$6.52	($177)
New Mexico	469	370	$839	$9.76	($396)	$6.50	($175)
Nebraska	435	380	$815	$9.48	($372)	$6.32	($151)
Colorado	432	381	$813	$9.45	($370)	$6.30	($149)
Virgin Islands	300	511	$811	$9.43	($368)	$6.29	($147)
Ohio	421	385	$806	$9.37	($363)	$6.25	($142)
Illinois	414	392	$806	$9.37	($363)	$6.25	($142)
Arizona	418	385	$803	$9.34	($360)	$6.22	($139)
Virginia	410	388	$798	$9.28	($355)	$6.19	($134)
Nevada	408	388	$796	$9.26	($353)	$6.17	($132)
Delaware	407	389	$796	$9.26	($353)	$6.17	($132)
Wyoming	390	394	$784	$9.12	($341)	$6.08	($120)
Idaho	382	396	$778	$9.05	($335)	$6.03	($114)
Oklahoma	380	397	$777	$9.03	($334)	$6.02	($113)
Florida	364	397	$761	$8.85	($318)	$5.90	($97)
Indiana	346	397	$743	$8.64	($300)	$5.76	($79)
Missouri	342	397	$739	$8.59	($296)	$5.73	($75)
Georgia	330	397	$727	$8.45	($284)	$5.64	($63)
Kentucky	328	397	$725	$8.43	($282)	$5.62	($61)
West Virginia	312	397	$709	$8.24	($266)	$5.50	($45)
North Carolina	297	397	$694	$8.07	($251)	$5.38	($30)
Arkansas	247	397	$644	$7.49	($201)	$4.99	$20

For Illustrative Purposes Only

TABLE THREE: FAMILY OF FOUR

The Difference Between the Minimum Wage and the July 1996 Monthly Maximum Benefits for a family of four

State	Maximum Monthly AFDC Benefit July 1996 For a family of 4	Maximum Monthly Food Stamps Benefit July 1996	Combined AFDC and Food Stamps Benefits	Effective Hourly Wage Rate of Combined Benefits for 20 hrs/wk/mo	Additional Monthly Cost/Case of Minimum Wage for 20 hours/week for 4.3 weeks/mo.	Effective Hourly Wage Rate of Combined Benefits for 30 hrs/wk/mo	Additional Monthly Cost/Case of Minimum Wage for 30 hours/week for 4.3 weeks/mo.
South Carolina	241	397	$638	$7.42	($195)	$4.95	$26
Louisiana	234	397	$631	$7.34	($188)	$4.89	$33
Tennessee	226	397	$623	$7.24	($180)	$4.83	$41
Texas	226	397	$623	$7.24	($180)	$4.83	$41
Alabama	$194	397	$591	$6.87	($148)	$4.58	$73
Mississippi	144	397	$541	$6.29	($98)	$4.19	$123

Notes:

1. This table uses the maximum monthly AFDC benefits as of July 1996. States have more flexibility under TANF to determine benefit levels and may choose to provide higher or lower benefits than suggested in this table. Food Stamp benefits have increased slightly since 7/96 ($2 for a family of
2. The maximum food stamp benefit assumes 100% excess shelter deduction, no child support deduction, no medical deductions etc.
3. The minimum wage is currently $4.75 an hour but will increase to $5.15 on 9/1/97. The tables use $5.15 as the minimum wage
4. While the number of hours required for participation increases to 30 per week in FY 2000, only 20 of those hours must be within the activities described in Sec. 407. As a result states could place recipients in training for 10 of the 30 and not be required to pay the minimum wage for the 10 hours of training.
5. Although including food stamps as a wage reduces state costs, there are other unquantifiable policy implications that should be considered.
6. AFDC benefits are calculated by the Congressional Research Service
7. Bolded states are those whose AFDC benefit alone is greater than the minimum wage for 20 hrs. for 4.3 weeks.

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February 13, 1997

Application of Workplace Laws to Welfare Recipients in Work Activities

- The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) does not exempt welfare recipients from coverage of federal employment laws such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), Unemployment Insurance and anti-discrimination laws. Therefore, the laws will apply to welfare recipients engaged in work activities in the same way they apply to other workers.

The Fair Labor Standards Act

- **Coverage:** The minimum wage and other FLSA requirements apply to welfare recipients engaged in work activities under PRWORA as they apply to all other workers. If welfare recipients are engaged in work activities that are considered "work" and they are classified as "employees" under the FLSA's broad definition, they must be compensated at the applicable minimum wage.
    - The FLSA definition of "employee" focuses on the economic realities of the workplace relationship. Welfare recipients typically would be considered employees in most of the 12 work activities described in the PRWORA. The only exceptions are likely to be activities such as vocational education, job search assistance, and secondary school attendance which are not considered employment under the FLSA.
- **Training Programs:** Under the FLSA, "bona fide trainees" are not considered to be "employees" and thus are **not** required to be paid the minimum wage. However, in order to be considered a "bona fide trainee" a welfare recipient must be engaged in an activity that meets all six criteria specified in the FLSA. Under PRWORA, it is unlikely that participants would be engaged in activities that these requirements. The six criteria are:
    - Training is similar to that given in a vocational school;
    - Training is for the benefit of the trainee;
    - Trainees do not displace regular employees;
    - Employer derives no immediate advantage from trainees' activities;
    - Trainees are not entitled to a job after training is completed; and
    - Employer and trainee understand that trainee is not paid.
- **Workfare:** Welfare recipients in "workfare" arrangements (that require welfare recipients to participate in work activities as a condition for receiving cash assistance) must be paid minimum wage if their workfare assignment is considered employment under the FLSA. In the context of PWORA, it appears that most "workfare" activities

would constitute employment under the FLSA and that most participants would be considered to be "employees." Therefore, it is likely that the FLSA will require welfare recipients in workfare arrangements to be compensated for their work at the minimum wage.

- States may consider all or a portion of such benefits as wages so long as the payment is clearly identified and treated as wages (and is understood by all parties to be wages) and all applicable record keeping criteria are met.

- **CWEP:** Previously, states could operate Community Work Experience Programs (CWEP) for welfare recipients under the JOBS program. Under CWEP the welfare grant divided by the hours worked was required to meet or exceed the minimum wage. The old welfare law specifically stated that a CWEP participant was not entitled to a salary or any other work or training expense provided under any other law. The CWEP provision was not included in PRWORA.

  - Consequently, participants in a CWEP-like activity now must be treated and compensated in the same way as other welfare recipients in work activities. If they are engaged in work activities that are considered "work" and they are classified as "employees" under the FLSA's broad definition, they must be compensated at the minimum wage.

- **Food Stamps:** In certain circumstances, it seems that Food Stamps benefits (in coupons or cash value) can contribute towards meeting minimum wage requirements for TANF recipients in work activities.

  - Under the **Food Stamps work supplementation program,** employers can receive the value of the food stamp allotment as a wage subsidy for new employees hired as part of the work supplementation program. In effect, the program allows Food Stamps benefits (converted to a cash wage subsidy) to be counted towards the minimum wage. This program is restricted to recipients of TANF or other public assistance and contains specific worker protections and non-displacement provisions.

  - Under the **Food Stamps workfare program**, participants "work off" the value of their food stamps (coupons). The maximum hours that a food stamp recipient can be required to work is determined by dividing the value of the food stamp allotment by the minimum wage. Participation in Food Stamps workfare programs can be counted towards TANF participation requirements. Consequently it seems that states can operate programs in which part of a TANF

recipient's required work hours could be performed in return for food stamp benefits and part for TANF benefits.

Occupational Safety and Health Act

- PRWORA does not exempt employers hiring welfare recipient from meeting Occupational Safety and Health (OSH) Act requirements. Therefore, OSH Act coverage applies to welfare recipients in the same way that it applies to all other workers.

- However, the Occupational Safety and Health Administration (OSHA) does not have direct jurisdiction over public sector employers in many states. In cases where there is an OSHA-approved state plan, the state is required to extend health and safety coverage to employees of state and local governments. There are 23 States and two territories with OSHA-approved state plans. To the extent participants are deemed "employees" of public agencies, they would have applicable health and safety standards. In the other states and territories, there would be no OSHA coverage of participants deemed to be public sector employees.

- Consequently, the question of who is the responsible "employer" is an important one. This is particularly true in cases where work activities are administered as part of a public-private partnership. In these situations, the determination of whether the employee is in the public or private sector will by made on a case-by-case basis by OSHA.

Unemployment Insurance

- Generally, unemployment insurance laws apply to welfare recipients in work activities in the same way that they apply to all other workers. Under the unemployment system, coverage extends only to workers who are considered "employees" according to definitions provided by state UI laws. Consequently, if welfare recipients are in work activities where they would be classified as employees they will be covered by the UI system.

- However, there are some exceptions. While federal law requires states to extend UI coverage to services performed for state governments and non-profit employers, services performed as part of a publicly-funded "work-relief" employment or a "work training" program are not covered. A number of community service-related activities under PRWORA could fall within the "work-relief" exception to UI coverage of services performed for state and local agencies or nonprofit organizations.

- Criteria used to determine whether an activity fall within the "work-relief" and "work training" exceptions focus on whether the purpose of the activity is primarily to benefit community and participant needs (versus normal economic considerations) and whether the services are otherwise normally provided by other employees. If such activities do not meet the criteria for the exception, participants providing services for these entities would likely be covered by the UI program.

- The "work relief" and "work training" exceptions for UI do not apply to the private sector. As stated above, for private employers the question of UI coverage will hinge on whether a participant is deemed an "employee" under state UI laws.

Anti-Discrimination Laws

- Federal anti-discrimination laws will apply to complaints of welfare recipients who participate in work activities under PRWORA. Anti-discrimination issues are most likely to arise under titles VI and VII of the Civil Rights Act, the Americans with Disabilities Act, section 504 of the Rehabilitation Act, and the Age Discrimination in Employment Act. Furthermore, if participants work for employers who are also Federal contractors, discrimination complaints could be filed under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, or the Vietnam Era Readjustment Assistance Act.

(ii) The Secretary may suspend the termination of payments under subparagraph (C)(i) for such period as the Secretary determines appropriate, and instead withhold payments provided for under subsection (a), in whole or in part, until the Secretary is satisfied that there will no longer be any failure to comply with the requirements of subparagraphs (A) and (B) and subsection (b)(1)(A), at which time such withheld payments shall be paid.

(iii) Upon a finding under subparagraph (C)(i) of a substantial failure to comply with any of the requirements of subparagraphs (A) and (B) and subsection (b)(1)(A), the Secretary may, in addition to or in lieu of any action taken under subparagraphs (C)(i) and (C)(ii), refer the matter to the Attorney General with a request that injunctive relief be sought to require compliance by the Commonwealth of Puerto Rico, and upon suit by the Attorney General in an appropriate district court of the United States and a showing that noncompliance has occurred, appropriate injunctive relief shall issue.

(c)(1) The Secretary shall provide for the review of the programs for the provision of the assistance described in subsection (a)(1)(A) for which payments are made under this Act.

(2) The Secretary is authorized as the Secretary deems practicable to provide technical assistance with respect to the programs for the provision of the assistance described in subsection (a)(1)(A).

(d) Whoever knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery, any funds, assets, or property provided or financed under this section shall be fined not more than $10,000 or imprisoned for not more than five years, or both, but if the value of the funds, assets or property involved is not over $200, the penalty shall be a fine of not more than $1,000 or imprisonment for not more than one year, or both.

WORKFARE

SEC. 20. [2029] (a)(1) The Secretary shall permit any political subdivision, in any State, that applies and submits a plan to the Secretary in compliance with guidelines promulgated by the Secretary to operate a workfare program pursuant to which every member of a household participating in the food stamp program who is not exempt by virtue of the provisions of subsection (b) of this section shall accept an offer from such subdivision to perform work on its behalf, or may seek an offer to perform work, in return for compensation consisting of the allotment to which the household is entitled under section 8(a) of this Act, with each hour of such work entitling that household to a portion of its allotment equal in value to 100 per centum of the higher of the applicable State minimum wage or the Federal minimum hourly rate under the Fair Labor Standards Act of 1938 [(29 U.S.C. 201 et seq.)].

(2)(A) The Secretary shall promulgate guidelines pursuant to paragraph (1) which, to the maximum extent practicable, enable a political subdivision to design and operate a workfare program under this section which is compatible and consistent with similar workfare programs operated by the subdivision.

(B) A political subdivision may comply with the requirements of this section by ~~operating—~~

~~(i) a workfare program pursuant to title IV of the Social Security Act (42 U.S.C. 601 et seq.); or~~

~~(ii) any other~~ *operating any*[20-1] workfare program which the Secretary determines meets the provisions and protections provided under this section.

~~(b)(1) A household~~ *(b) A household*[20-2] member shall be exempt from workfare requirements imposed under this section if such member is—

~~(A)~~[20-3] *(1)* exempt from section 6(d)(1) as the result of clause (B), (C), (D), (E), or (F) of section 6(d)(2);

~~(B)~~ *(2)* at the option of the operating agency, subject to and currently actively and satisfactorily participating at least 20 hours a week in a work ~~training program~~ *activity*[20-4] required under title IV of the Social Security Act (42 U.S.C. 601 et seq.);

~~(C)~~ *(3)* mentally or physically unfit;

~~(D)~~ *(4)* under sixteen years of age;

~~(E)~~ *(5)* sixty years of age or older; or

~~(F)~~ *(6)* a parent or other caretaker of a child in a household in which another member is subject to the requirements of this section or is employed fulltime.

~~(2)~~[20-5] ~~(A) Subject to subparagraphs (B) and (C), in the case of a household that is exempt from work requirements imposed under this Act as the result of participation in a community work experience program established under section 409 of the Social Security Act (42 U.S.C. 609), the maximum number of hours in a month for which all members of such household may be required to participate in such program shall equal the result obtained by dividing—~~

~~(i) the amount of assistance paid to such household for such month under title IV of such Act, together with the value of the food stamp allotment of such household for such month, by~~

~~(ii) the higher of the Federal or State minimum wage in effect for such month.~~

~~(B) In no event may any such member be required to participate in such program more than 120 hours per month.~~

~~(C) For the purpose of subparagraph (A)(i), the value of the food stamp allotment of a household for a month shall be determined in accordance with regulations governing the issuance of an allotment to a household that contains more members than the number of members in an assistance unit established under title IV of such Act.~~

(c) No operating agency shall require any participating member to work in any workfare position to the extent that such work exceeds in value the allotment to which the household is otherwise entitled or that such work, when added to any other hours worked during such week by such member for compensation (in cash or in kind) in any other capacity, exceeds thirty hours a week.

(d) The operating agency shall—

[20-1] Effective July 1, 1997, section 109(e)(1) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) amends subpara. (B) by striking "operating—" and all that follows through "(ii) any other" and inserting "operating any".

[20-2] Effective July 1, 1997, section 109(e)(2)(A)(i) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) amends para. (1) by striking "(b)(1) A household" and inserting "(b) A household".

[20-3] Effective July 1, 1997, section 109(e)(2)(C) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) redesignates subparas. (A) through (F) as paras. (1) through (6), respectively.

[20-4] Effective July 1, 1997, section 109(e)(2)(A)(ii) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) amends subpara. (B) by striking "training program" and inserting "activity".

[20-5] Effective July 1, 1997, section 109(e)(2)(B) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) strikes para. (2).

(1) not provide any work that has the effect of replacing or preventing the employment of an individual not participating in the workfare program;

(2) provide the same benefits and working conditions that are provided at the job site to employees performing comparable work for comparable hours; and

(3) reimburse participants for actual costs of transportation and other actual costs all of which are reasonably necessary and directly related to participation in the program but not to exceed $25 in the aggregate per month.

(e) The operating agency may allow a job search period, prior to making workfare assignments, of up to thirty days following a determination of eligibility.

(f) DISQUALIFICATION.—An individual or a household may become ineligible under section 6(d)(1) to participate in the food stamp program for failing to comply with this section.

(g)(1) The Secretary shall pay to each operating agency 50 per centum of all administrative expenses incurred by such agency in operating a workfare program, including reimbursements to participants for work-related expenses as described in subsection (d)(3) of this section.

(2)(A) From 50 per centum of the funds saved from employment related to a workfare program operated under this section, the Secretary shall pay to each operating agency an amount not to exceed the administrative expenses described in paragraph (1) for which no reimbursement is provided under such paragraph.

(B) For purposes of subparagraph (A), the term "funds saved from employment related to a workfare program operated under this section" means an amount equal to three times the dollar value of the decrease in allotments issued to households, to the extent that such decrease results from wages received by members of such households for the first month of employment beginning after the date such members commence such employment if such employment commences—

(i) while such members are participating for the first time in a workfare program operated under this section; or

(ii) in the thirty-day period beginning on the date such first participation is terminated.

(3) The Secretary may suspend or cancel some or all of these payments, or may withdraw approval from a political subdivision to operate a workfare program, upon a finding that the subdivision has failed to comply with the workfare requirements.

SEC. 21. [2030] DEMONSTRATION OF FAMILY INDEPENDENCE PROGRAM.

(a) IN GENERAL.—Upon written application of the State of Washington (in this section referred to as the "State") and after the approval of such application by the Secretary, the State may conduct a Family Independence Demonstration Project (in this section referred to as the "Project") in all or in part of the State in accordance with this section to determine whether the Project, as an alternative to providing benefits under the food stamp program, would more effectively break the cycle of poverty and would provide families with opportunities for economic independence and strengthened family functioning.

(b) NATURE OF PROJECT.—In an application submitted under subsection (a), the State shall provide the following:

agency shall perform onsite reviews of each workfare program once within six months of the program's implementation and then in accordance with the Management Evaluation review schedule for that program area.

(e) *Household responsibilities*—(1) *Persons subject to workfare.* Household members subject to the work registration requirements as provided in § 273.7(a) shall also be subject to the workfare requirements. In addition:

(i) Those recipients exempt from work registration requirements due to being subject to the work incentive program (WIN) under title IV of the Social Security Act shall be subject to workfare if they are currently involved less than 20 hours a week in WIN. Those recipients involved 20 hours a week or more may be subject to workfare at the option of the political subdivision.

(ii) Those recipients exempt from work registration requirements due to the application for or receipt of unemployment compensation shall be subject to workfare requirements; and

(iii) Those recipients exempt from work registration requirements due to being a parent or other household member responsible for the care of a dependent child between the ages of six and twelve shall be subject to workfare requirements. If the child has its sixth birthday within a certification period, the individual responsible for the care of the child shall be subject to the workfare requirement as part of the next scheduled recertification process, unless the individual qualifies for another exemption.

(2) *Household obligation.* The maximum total number of hours of work required of a household each month shall be determined by dividing the household's coupon allotment by the Federal or State minimum wage, whichever is higher. Fractions of hours of obligation may be rounded down. The household's hours of obligation for any given month may not be carried over into another month except when the household wishes to end a disqualification due to noncompliance with workfare in accordance with paragraph (f)(8) of this section.

(f) *Other program requirements*—(1) *Priority placements.* The State agency or political subdivision submitting the plan shall indicate in the plan how it will determine priority for placement at job sites when the number of eligible participants is greater than the number of available positions at job sites.

(2) *Conditions of employment.* (i) Recipients may be required to work up to, but not to exceed, 30 hours per week. In addition, the total number of hours worked by a recipient under workfare together with any other hours worked in any other compensated capacity, including hours of participation in a WIN training program, by such recipient on a regular or predictable part-time basis, shall not exceed thirty hours a week. With the recipient's consent, the hours to be worked may be scheduled in such a manner that more than thirty hours are worked in one week, as long as the total for that month does not exceed the weekly average of thirty hours a week.

(ii) No participant shall be required to work more than eight hours on any given day, except that with the recipient's consent, more than eight hours may be scheduled.

(iii) No participant shall be required to accept an offer of workfare employment if such employment fails to meet the criteria established in § 273.7(i)(1)(iii) and (iv); and § 273.7(i)(2) (i), (ii), (iv), and (v).

(iv) If the workfare participant is unable to report for job scheduling, to appear for scheduled workfare employment, or to complete the entire workfare obligation due to compliance with Unemployment Insurance requirements, the additional work requirements established in § 273.7(e)(1), (2), (3), or (4), or the job search requirements established in § 273.7(f), such inability shall not be considered a refusal to accept workfare employment. If the workfare participant informs the operating agency of the time conflict, the operating agency shall, if possible, reschedule the missed activity. If such rescheduling cannot be completed before the end of the month, this shall not be cause for disqualification.

(v) The operating agency shall assure that all persons employed in workfare jobs receive job-related benefits at the same levels and to the same extent as similar non-workfare employees. These shall be benefits related to the actual work being performed, such as workers' compensation, and not to the employment by a particular agency, such as health benefits. Of those benefits required to be offered, any elective benefit which requires a cash contribution by the participant shall be optional at the discretion of the participant.

(vi) All persons employed in workfare jobs shall be assured by the operating agency of working conditions provided other employees similarly employed.

(vii) The provisions of section 2(a)(3) of the Service Contract Act of 1965 (Pub. L. 89-286), relating to health and safety conditions, shall apply to the workfare program.

(viii) Operating agencies shall not provide work to a workfare participant which has the effect of replacing or preventing the employment of an individual not participating in the workfare program. Vacancies, due to hiring freezes, terminations, or lay-offs, shall not be filled by a workfare participant unless it can be demonstrated that such vacancies are a result of insufficient funds to sustain former staff levels.

(ix) The workfare jobs shall in no way infringe upon the promotional opportunities which would otherwise be available to regular employees.

(x) Workfare jobs shall not be related in any way to political or partisan activities.

(xi) Workfare assignments should, to the greatest extent possible, take into consideration previous training, experience, and skills of a participant.

(xii) The cost of workers' compensation or comparable protection provided to workfare participants by the State agency, political subdivision, or operating agency is a matchable cost under paragraph (g) of this section. Whether or not this coverage is provided, in no case is the Federal government the employer in these workfare programs (unless a Federal agency is the job site), and therefore, USDA does not assume liability for any injury to or death of a workfare participant while on the job.

(xiii) The nondiscrimination requirement provided in § 272.6(a) shall apply to all agencies involved in the workfare program.

(3) *Job search period.* The operating agency may establish a job search period of up to 30 days following certification prior to making a workfare assignment during which the potential participant is expected to look for a job. This period may only be established at household certification, not at recertification. The potential participant would not be subject to any job search requirements beyond those required under § 273.7 during this time.

(4) *Participant reimbursement.* Participants shall be reimbursed by the operating agency for transportation and other costs that are reasonably necessary and directly related to participation in the program. These other costs may include the cost of child care, or the cost of personal safety items or equipment required for performance of work if these items are also purchased by regular employees. These other costs shall not include the cost of meals away from home. No participant cost which has been reimbursed under a workfare program operated under Title IV of the Social Security Act or any other workfare program shall be reimbursed under the food stamp workfare program. Only reimbursement of participant costs which are up to but not in excess of $25 per month for any participant will be subject to Federal cost sharing as provided in paragraph (g)(1) of this section. Child care costs which are reimbursed may not be claimed as expenses and used in calculating the child care deduction for determining household benefits. Pursuant to paragraph (d)(1) of this section, a State agency may decide what its reimbursement policy shall be.

(5) *Good cause.* For the purpose of this section, unless a State agency has determined its good cause policy pursuant to paragraph (d)(1) of this section, good cause shall include:

(i) Circumstances beyond a household member's control, such as, but not limited to: Illness; the illness or incapacitation of another household

USDA

FEB 10 1997

United States Department of Agriculture

Food and Consumer Service

3101 Park Center Drive

Alexandria, VA 22302-1500

SUBJECT: Food Stamp Program Guidance for Self-Initiated Workfare Programs

TO: All Regional Administrators
Food and Consumer Service

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) established a new work requirement under which non-exempt, able-bodied adults without dependents (ABAWDs) will become ineligible if, in the preceding 36-month period, they receive food stamps for three months during which they do not work at least 20 hours per week, participate in and comply with the requirements of a work program for at least 20 hours per week, or participate in and comply with the requirements of a workfare or comparable program.

Several States, including Kentucky, Michigan, Oregon, and Washington, are currently operating—or have expressed an interest in operating—"self-initiated" community service programs. The programs are comparable to workfare and are designed to assist ABAWDs fulfill their work requirement. In these self-initiated programs, ABAWDs voluntarily participate and find their own public service placements. They are also responsible for arranging to have their participation reported to their caseworkers, and for verifying their service hours. Participation requirements range from three hours per week to 25 hours per month. One State plans to use a range of food stamp allotments and corresponding fixed participation hours for ease in administrating and verifying compliance in its program.

We fully support the States' goal of keeping people who are willing to work but cannot find jobs eligible for food stamps. However, the law makes a distinction between work (paid or unpaid volunteer work) at 20 hours per week and workfare. The key distinction is that workfare is a mandatory obligation and noncompliance subjects an individual to disqualification. Failure to work 20 hours a week, averaged monthly, means that the ABAWD loses eligibility for only the month.

Please notify the States in your Regions that these self-initiated programs must conform to the requirements established for workfare in section 20 of the Food Stamp Act and in food stamp regulations at 7 CFR 273.22. These requirements include imposing sanctions for noncompliance, restricting the nature and amount of work performed, and providing work benefits. (Regional Offices may approve plans that do not offer reimbursement for participation expenses, so long as the program serves only people who would otherwise lose eligibility). Note also that, while States may encourage participation for a fixed number of hours, they are prohibited from requiring recipients to work hours that exceed their obligated hours (their allotment divided by the higher of the Federal or State minimum wage). Additionally, States may impose sanctions for noncompliance only for obligated hours—not fixed hours in excess of the participant's obligation.

273.22(f)

If a State intends to operate a self-initiated community service workfare component as part of its employment and training (E&T) program, it must submit an E&T plan modification to the Food and Consumer Service (FCS) for review and approval. If a State intends to operate an independent community service program, it must submit a workfare plan to FCS for review and approval.

If you have any further questions or comments concerning these community service programs, or other workfare programs, contact Micheal Atwell, of the Program Design Branch, Program Development Division, at (703) 305-2449.

Yvette S. Jackson
Deputy Administrator
Food Stamp Program

each workfare program once within six months of the program's implementation and then in accordance with the Management Evaluation review schedule for that program area.

(e) *Household responsibilities*—(1) *Persons subject to workfare.* Household members subject to the work registration requirements as provided in § 273.7(a) shall also be subject to the workfare requirements. In addition:

(i) Those recipients exempt from work registration requirements due to being subject to the work incentive program (WIN) under title IV of the Social Security Act shall be subject to workfare if they are currently involved less than 20 hours a week in WIN. Those recipients involved 20 hours a week or more may be subject to workfare at the option of the political subdivision.

(ii) Those recipients exempt from work registration requirements due to the application for or receipt of unemployment compensation shall be subject to workfare requirements; and

(iii) Those recipients exempt from work registration requirements due to being a parent or other household member responsible for the care of a dependent child between the ages of six and twelve shall be subject to workfare requirements. If the child has its sixth birthday within a certification period, the individual responsible for the care of the child shall be subject to the workfare requirement as part of the next scheduled recertification process, unless the individual qualifies for another exemption.

(2) *Household obligation.* The maximum total number of hours of work required of a household each month shall be determined by dividing the household's coupon allotment by the Federal or State minimum wage, whichever is higher. Fractions of hours of obligation may be rounded down. The household's hours of obligation for any given month may not be carried over into another month except when the household wishes to end a disqualification due to noncompliance with workfare in accordance with paragraph (f)(8) of this section.

(f) *Other program requirements*—(1) *Priority placements.* The State agency [illegible] plan shall indicate in the plan how it will determine priority for placement at job sites when the number of eligible participants is greater than the number of available positions at job sites.

(2) *Conditions of employment.* (i) Recipients may be required to work up to, but not to exceed, 30 hours per week. In addition, the total number of hours worked by a recipient under workfare together with any other hours worked in any other compensated capacity, including hours of participation in a WIN training program, by such recipient on a regular or predictable part-time basis, shall not exceed thirty hours a week. With the recipient's consent, the hours to be worked may be scheduled in such a manner that more than thirty hours are worked in one week, as long as the total for that month does not exceed the weekly average of thirty hours a week.

(ii) No participant shall be required to work more than eight hours on any given day, except that with the recipient's consent, more than eight hours may be scheduled.

(iii) No participant shall be required to accept an offer of workfare employment if such employment fails to meet the criteria established in § 273.7(i)(1)(iii) and (iv); and § 273.7(i)(2) (i), (ii), (iv), and (v).

(iv) If the workfare participant is unable to report for job scheduling, to appear for scheduled workfare employment, or to complete the entire workfare obligation due to compliance with Unemployment Insurance requirements, the additional work requirements established in § 273.7(e)(1), (2), (3), or (4), or the job search requirements established in § 273.7(f), such inability shall not be considered a refusal to accept workfare employment. If the workfare participant informs the operating agency of the time conflict, the operating agency shall, if possible, reschedule the missed activity. If such rescheduling cannot be completed before the end of the month, this shall not be cause for disqualification.

(v) The operating agency shall assure that all persons employed in workfare jobs receive job-related benefits at the same levels and to the same extent as similar non-workfare employees. These shall be benefits related to the actual work being performed, such as workers' compensation, and not to the employment by a particular agency, such as health benefits. Of those benefits required to be offered, any elective benefit which requires a cash contribution by the participant shall be optional at the discretion of the participant.

(vi) All persons employed in workfare jobs shall be assured by the operating agency of working conditions provided other employees similarly employed.

(vii) The provisions of section 2(a)(3) of the Service Contract Act of 1965 (Pub. L. 89-286), relating to health and safety conditions, shall apply to the workfare program.

(viii) Operating agencies shall not provide work to a workfare participant which has the effect of replacing or preventing the employment of an individual not participating in the workfare program. Vacancies, due to hiring freezes, terminations, or lay-offs, shall not be filled by a workfare participant unless it can be demonstrated that such vacancies are a result of insufficient funds to sustain former staff levels.

(ix) The workfare jobs shall in no way infringe upon the promotional opportunities which would otherwise be available to regular employees.

(x) Workfare jobs shall not be related in any way to political or partisan activities.

(xi) Workfare assignments should, to the greatest extent possible, take into consideration previous training, experience, and skills of a participant.

(xii) The cost of workers' compensation or comparable protection provided to workfare participants by the State agency, political subdivision, or operating agency is a matchable cost under paragraph (g) of this section. Whether or not this coverage is provided, in no case is the Federal government the employer in these workfare programs (unless a Federal agency is the job site), and therefore, USDA does not assume liability for any injury to or claim of a [illegible] participant while on the job.

(xiii) The nondiscrimination requirement provided in § 272.6(a) shall apply to all agencies involved in the workfare program.

(3) *Job search period.* The operating agency may establish a job search period of up to 30 days following certification prior to making a workfare assignment during which the potential participant is expected to look for a job. This period may only be established at household certification, not at recertification. The potential participant would not be subject to any job search requirements beyond those required under § 273.7 during this time.

(4) *Participant reimbursement.* Participants shall be reimbursed by the operating agency for transportation and other costs that are reasonably necessary and directly related to participation in the program. These other costs may include the cost of child care, or the cost of personal safety items or equipment required for performance of work if these items are also purchased by regular employees. These other costs shall not include the cost of meals away from home. No participant cost which has been reimbursed under a workfare program operated under Title IV of the Social Security Act or any other workfare program shall be reimbursed under the food stamp workfare program. Only reimbursement of participant costs which are up to but not in excess of $25 per month for any participant will be subject to Federal cost sharing as provided in paragraph (g)(1) of this section. Child care costs which are reimbursed may not be claimed as expenses and used in calculating the child care deduction for determining household benefits. Pursuant to paragraph (d)(1) of this section, a State agency may decide what its reimbursement policy shall be.

(5) *Good cause.* For the purpose of this section, unless a State agency has determined its good cause policy pursuant to paragraph (d)(1) of this section, good cause shall include:

(i) Circumstances beyond a household member's control, such as, but not limited to: Illness; the illness or incapacitation of another household

cost of (1) the certification of applicant households, (2) the acceptance, storage, protection, control, and accounting of coupons after their delivery to receiving points within the State, (3) the issuance of coupons to all eligible households, (4) food stamp informational activities, including those undertaken under section 11(e)(1)(A), but not including recruitment activities, (5) fair hearings, (6) automated data processing and information retrieval systems subject to the conditions set forth in subsection (g), (7) food stamp program investigations and prosecutions, and (8) implementing and operating the immigration status verification system established under section 1137(d) of the Social Security Act (42 U.S.C. 1320b–7(d)): *Provided,* That the Secretary is authorized at the Secretary's discretion to pay any State agency administering the food stamp program on all or part of an Indian reservation under section 11(d) of this Act such amounts for administrative costs as the Secretary determines to be necessary for effective operation of the food stamp program, as well as to permit each State to retain 35 percent of the value of all funds or allotments recovered or collected pursuant to sections 6(b) and 13(c) and 20 percent of the value of any other funds or allotments recovered or collected, except the value of funds or allotments recovered or collected that arise from an error of a State agency. The officials responsible for making determinations of ineligibility under this Act shall not receive or benefit from revenues retained by the State under the provisions of this subsection.

(b) WORK SUPPLEMENTATION OR SUPPORT PROGRAM.—

(1) DEFINITION OF WORK SUPPLEMENTATION OR SUPPORT PROGRAM.—In this subsection, the term "work supplementation or support program" means a program under which, as determined by the Secretary, public assistance (including any benefits provided under a program established by the State and the food stamp program) is provided to an employer to be used for hiring and employing a public assistance recipient who was not employed by the employer at the time the public assistance recipient entered the program.

(2) PROGRAM.—A State agency may elect to use an amount equal to the allotment that would otherwise be issued to a household under the food stamp program, but for the operation of this subsection, for the purpose of subsidizing or supporting a job under a work supplementation or support program established by the State.

(3) PROCEDURE.—If a State agency makes an election under paragraph (2) and identifies each household that participates in the food stamp program that contains an individual who is participating in the work supplementation or support program—

(A) the Secretary shall pay to the State agency an amount equal to the value of the allotment that the household would be eligible to receive but for the operation of this subsection;

(B) the State agency shall expend the amount received under subparagraph (A) in accordance with the work supplementation or support program in lieu of providing the allotment that the household would receive but for the operation of this subsection;

(C) for purposes of—

(i) sections 5 and 8(a), the amount received under this subsection shall be excluded from household income and resources; and

(ii) section 8(b), the amount received under this subsection shall be considered to be the value of an allotment provided to the household; and

(D) the household shall not receive an allotment from the State agency for the period during which the member continues to participate in the work supplementation or support program.

(4) OTHER WORK REQUIREMENTS.—No individual shall be excused, by reason of the fact that a State has a work supplementation or support program, from any work requirement under section 6(d), except during the periods in which the individual is employed under the work supplementation or support program.

(5) LENGTH OF PARTICIPATION.—A State agency shall provide a description of how the public assistance recipients in the program shall, within a specific period of time, be moved from supplemented or supported employment to employment that is not supplemented or supported.

(6) DISPLACEMENT.—A work supplementation or support program shall not displace the employment of individuals who are not supplemented or supported.

(c)(1) The program authorized under this Act shall include a system that enhances payment accuracy by establishing fiscal incentives that require State agencies with high error rates to share in the cost of payment error and provide enhanced administrative funding to States with the lowest error rates. Under such system—

(A) the Secretary shall adjust a State agency's federally funded share of administrative costs pursuant to subsection (a), other than the costs already shared in excess of 50 percent under the proviso in the first sentence of subsection (a) or under subsection (g), by increasing such share of all such administrative costs by one percentage point to a maximum of 60 percent of all such administrative costs for each full one-tenth of a percentage point by which the payment error rate is less than 6 percent, except that only States whose rate of invalid decisions in denying eligibility is less than a nationwide percentage that the Secretary determines to be reasonable shall be entitled to the adjustment prescribed in this subsection;

(B) the Secretary shall foster management improvements by the States by requiring State agencies other than those receiving adjustments under subparagraph (A) to develop and implement corrective action plans to reduce payment errors; and

(C) for any fiscal year in which a State agency's payment error rate exceeds the national performance measure for payment error rates announced under paragraph (6), other than for good cause shown, the State agency shall pay to the Secretary an amount equal to—

(i) the product of—

(I) the value of all allotments issued by the State agency in the fiscal year; times

(II) the lesser of—

(aa) the ratio of—

NOTE TO ELENA KAGAN

FROM: SETH HARRIS

DATE: FEBRUARY 10, 1997

SUBJECT: MATERIALS YOU REQUESTED

Attached are two draft documents we have prepared as part of our internal discussions regarding welfare reform and worker protections:

(1) "Key DOL Questions for Welfare Reform Implementation" which provides a preliminary and general legal analysis of several issues that we expect to arise. This document does not reflect all of our latest thinking, but it is a reasonable starting place.

(2) "FLSA and Welfare Reform" which addresses the question of who is a "trainee" (and therefore not an "employee") for FLSA purposes.

Call me if you need any additional information.

5530

CONFIDENTIAL DRAFT INFORMATION--NOT FOR PUBLIC DISCLOSURE

DRAFT
1/6/97

KEY DOL QUESTIONS FOR WELFARE REFORM IMPLEMENTATION

The following questions and answers are intended to provide a general overview of issues relating to the applicability of Department of Labor administered labor protection laws to work activities provided under the welfare reform law.

(1) Would welfare recipients participating in work activities under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) be considered "employees" for purposes of the FLSA or would they be considered "volunteers" or "trainees" and exempt from such coverage?

The FLSA has a broad definition of employee that focuses on the economic realities of the relationship between the parties carrying out an activity. As with all workers, this standard FLSA test would be utilized to determine if the minimum wage and overtime requirements apply to individuals engaged in activities covered under the Act. Participation in most of the 12 work activities described in the Act would probably result in the participant being considered an employee for purposes of the FLSA (the primary exceptions are nonemployment activities such as

vocational education, job search assistance, and secondary school attendance). While there is a recognized exception under the FLSA for bona fide "volunteers," it is unlikely that participants under PRWORA would meet the criteria for this exception. In addition, while some activities may meet the six criteria necessary for a recipient to be deemed a bona fide "trainee" not subject to the FLSA requirements, this exception generally will not apply.

(2) Are those "workfare" arrangements under which a recipient is required to participate in work activities as a condition for receiving cash assistance (without cash wages in addition to welfare benefits) permissible under the FLSA?

Yes, as long as those participants who are employees for purposes of the FLSA are paid minimum wage and overtime. Using traditional "economic realities" analysis, it appears that most of the required work activities would constitute employment under the FLSA (i.e., participants would be "employees") and thus participants would have to be paid wages at a rate not less than the Federal minimum wage. States employing participants could meet FLSA requirements by paying wages of at least the minimum wage and then offsetting the amount paid from the participant's cash benefits. States employing participants may also consider all or a portion of the cash benefits as wages where the payment

clearly is identified as and is understood to be wages, and certain other criteria (e.g. recordkeeping) are met.

[Note: There is a 1995 10th Circuit Court of Appeals case that held that an SSI "workfare" program was not covered by the FLSA. The decision in this case may not stand further scrutiny; it could be distinguished from the PRWORA; and it is not binding on other Circuits. However, it is the only Court of Appeals decision directly relating to a workfare program.]

(3) Could States that operated Community Work Experience Programs (CWEP) for welfare recipients under the predecessor JOBS program, where the cash benefits divided by the hours worked by the recipient were to equal or exceed the minimum wage, continue to operate such programs in the same manner under the PRWORA?

Some modifications might be required, depending on the state's implementation. While previous law specifically stated that a CWEP participant was not entitled to a salary or any other work or training expense under any other provision of law, this provision was not included in PRWORA.

The modification necessary for FLSA compliance could include payment of wages to the participant for the hours of work and

offsetting reductions in the cash benefits paid to such participant or considering all or a portion of the cash benefits as bona fide wages as described above.

(4) May noncash benefits provided to participants in work activities (e.g. child care services) be credited toward meeting FLSA minimum wage requirements?

Only if such benefits are provided by the employer and meet other traditional FLSA criteria for crediting of non-cash benefits, including (1) that acceptance of such benefits is voluntary, (2) it is customarily furnished to employees in the same position, and (3) they are primarily for the benefit of the employee. The FLSA also specifically prohibits certain employer payments from being credited towards the minimum wage and overtime obligations, including payments for pensions and health insurance (such as Medicaid).

(5) May deductions from a participant's wages be made by an employer, with the effect of reducing the wage to an amount less than the minimum wage, to repay the state for benefits provided to the participant?

77

In order for such deductions to be made, under traditional FLSA standards, the employer may not benefit directly or indirectly

from the deduction, and one of three criteria would have to be met: (1) The employer is legally required to make payments to a third party by court order, statute, etc.; (2) the employee voluntarily assigns a portion of the wages to a third party; or (3) the deduction repays a bona fide cash advance of wages by the employer.

(6) Who is considered the employer of welfare recipients participating in work activities for purposes of the FLSA and OSHA -- the public agency, or the recipient of a wage subsidy or contract, or is there a joint employer relationship?

As with such determinations for any employee, private or public, the determination of who is the employer is fact sensitive and therefore would be determined on a case-by-case basis. The more involved the State is in the placement and control of the work activities of a participant, the greater the possibility that the State would be found to be a joint employer. In these cases, the State could be jointly liable for FLSA, OSHA (under State OSHA plans) and other labor standards violations even where private sector placements are involved. However, the mere payment of a subsidy to an employer would not, in and of itself, be sufficient to create a joint employment relationship.

(7) Would there be any special exceptions to OSHA coverage of welfare recipients carrying out work activities for private sector employers?

OSHA generally applies to private sector employment. While there is no categorical exception under OSHA applicable to PRWORA participants in the private sector, there may be some complicated determinations to be made on a case-by-case basis as to whether participants are "employees", and who is the responsible "employer", under OSHA. In particular, where some work activities are administered as part of a public-private partnership, it is critical for purposes of OSHA coverage whether the relevant employer is a private sector entity or the State. Generally, case law under OSHA tends to place compliance responsibility on the party most directly in control of the physical conditions at a worksite. (Note: the criteria for such determinations are set forth in 29 CFR Part 1975).

(8) Are there any health and safety standards applicable to welfare recipients participating in work activities for public sector employers?

OSHA does not have jurisdiction over public sector employers. However, if a State has an OSHA-approved State plan, the State is required to extend health and safety coverage to employees of

State and local governments. Therefore, the 23 States and two territories with OSHA-approved State plans would have applicable health and safety standards to the extent participants would be deemed "employees" of public agencies. In the other States and territories, there would be no coverage of public sector employment.

(9) Are welfare recipients participating in work activities for public and nonprofit agencies required to be covered under the unemployment compensation program, or do they meet the general exception to such coverage provided to participants in publicly-funded "work relief" or "work training" programs?

Federal UI law requires States to extend UI coverage to services performed for State governments and non-profit employers unless the service is performed for those entities as part of a work-relief employment or work training program. A number of community service-related activities under PRWORA could fall within the work-relief exception to UI coverage of services performed for State and local agencies or nonprofit organizations. An Unemployment Insurance Program Letter (UIPL 30-96) issued in early August clarified the criteria applicable to the work-relief and work training exceptions and generally

focused on whether the purpose of the activity is to primarily benefit community and participant needs (versus normal economic considerations) and whether the services are otherwise normally provided by other employees. If such activities do not meet the criteria for the exception, participants providing services for these entities would likely be covered by the UI program.

(10) Are there any other special exceptions to UI coverage that could be applicable to welfare recipients?

The "work relief" and "work training" exceptions do not apply with respect to services performed for private sector employers. Therefore, in the private sector the issues of whether a participant is an "employee" and which entity is the "employer" will also be critical to determining whether participants are covered by UI. The tests for making these determinations is similar to the common law and other tests used under many other laws, with the right to direct and control work activities being the primary factor for determining who is the employer.

(11) Would Federal non-discrimination laws apply to complaints of welfare recipients relating to the administration of work activities under the PRWORA?

Yes, non-discrimination issues could arise -- primarily under titles VI and VII of the Civil Rights Act, the ADA, section 504 of the Rehabilitation Act, and the ADEA. Furthermore, if participants work for employers who are also Federal contractors, discrimination complaints could be filed under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, or the Vietnam Era Readjustment Assistance Act.

(12) Are there other Acts administered by the Department that are relevant to the implementation of work activities under the PRWORA?

For participants meeting the FLSA definition of "employees", protections under the FLSA Child Labor provisions (for example, restrictions in Hazardous Occupation Orders) would apply. In the somewhat unlikely event that such participants meet the time-in-service and other eligibility requirements of the Family and Medical Leave Act, the protections of that Act would apply as well. In addition, if the work activities relate to Federally-assisted construction, Davis-Bacon Act requirements are likely to be applicable. We are also considering whether participants would be deemed "employees" for purposes of determining compliance with ERISA's minimum participation and nondiscrimination rules.

What about VETS?

There are also a number of employment and training programs administered by the Department under JTPA that could serve welfare recipients and count as work activities under the PRWORA. However, the JTPA labor protections would be applicable to such activities.

It should also be noted that under certain circumstances, the addition of participants to an employer's workforce could trigger coverage of labor protections for all of the employer's workers. For example, if an employer has 48 regular employees and adds 2 participants who meet the FLSA definition of "employees" the employer would reach the 50 employee threshold that could trigger coverage under the FMLA if other criteria are met. Similar results could occur with respect to the triggering of reporting requirements under OSHA and OFCCP and other program areas.

In addition, the number of employees could affect a small employer's eligibility for penalty reductions under programs required to be established pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) for small businesses for violations of certain laws (e.g. OSHA).

CONFIDENTIAL DRAFT - FOR INTERNAL DISTRIBUTION ONLY

FLSA AND WELFARE REFORM

The Fair Labor Standards Act (FLSA) provides minimum wage and overtime protections for covered employees. The FLSA definitions of the terms "employ," "employee" and "employer" are broader than the common law definitions. The FLSA defines "employ" as to "suffer or permit to work." 29 U.S.C. 203(g). "An entity 'suffers or permits' an individual to work if, as a matter of economic reality, the individual is dependent on the entity." Antenor v. D&S Farms, ___ F.2d ___ (11th Cir. 1996). This is a fact-intensive inquiry. Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

The welfare reform law ("TANF") permits 12 categories of "work activities." However, whether someone is an employee protected by the FLSA does not turn on the welfare law's title of the activity. The law contains no definition of those activities or detailed description of how they will be structured. Therefore, we can make no across-the-board judgments regarding whether a person performing in any one of the twelve categories of "work activities" would be an employee under the FLSA.

An employment relationship may exist under the FLSA even where the parties properly label the program as "training" for purposes of the TANF. Where the training is not connected with any employment and is provided in a school setting, the trainee likely is not even engaged in "work" and thus probably is not covered by the FLSA. On the other hand, where the training is provided in a work-based setting, "work" is being performed and an employment relationship may exist. Walling v. Portland Terminal Co., 330 U.S. 148 (1947). The standard FLSA test provides that an employment relationship does not exist in that situation if:

(1) the training is similar to that which would be given in a vocational school;
(2) the training is for the benefit of the trainee;
(3) the trainee does not displace a regular employee;
(4) the employer derives no immediate advantage from the trainee's activities;
(5) the trainee is not entitled to a job after the training is completed; and
(6) the employer and the trainee understand that the

employer will not pay the trainee wages or other compensation.

For example, a trainee may learn to weld by working beside and under the supervision of an experienced welder at a manufacturing plant, without expecting any compensation. If the employer gets no benefit from the trainee's activities, because the time and effort the welder spends in closely observing the trainee outweighs any usefulness, and there is no guarantee that the employer will hire the trainee after the training, the test for employee status probably would not be met.

Even where an individual is an employee, not all training time is compensable hours of work. An employer is not required to compensate an employee for training time if: (1) attendance is outside of the employee's regular working hours; (2) attendance is voluntary; (3) the training is not directly related to the employee's job; and (4) the employee does not perform any productive work during such time. 29 CFR 785.27. For example, if a State, in its capacity as the provider of welfare benefits requires attendance at training that is not job-related, such as training in parenting skills or GED training, such time is not compensable hours worked.

The fact that an employer need not compensate an employee for such training time (or the fact that some people receiving training are not employees at all) does not mean that the activity does not count as a "work activity" for purposes of the TANF.