

NLWJC - Kagan

Counsel - Box 038 - Folder 001

Welfare Reform – WSW

Date: February 10, 1997

To: Elena Kagan
Wendy White
Randy Moss

From: Diana Fortuna

Subject: Fax Transmittal

This is background material for our meeting this Wednesday at 3:00.

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

FEB 3 1997

MEMORANDUM TO KEN APFEL

THROUGH: Barry White *[Signature]*
Keith Fontenot *[Signature]*

FROM: Stacy Dean *[Signature]*

RE: Use of Food Stamp Coupons for State Funded Programs

Issue: Washington State has requested to be allowed to issue Food Stamps to legal immigrants, at State expense, after the Food Stamp benefit ban goes into effect this year. The State has agreed to pay any additional costs for printing, issuing, storing and redeeming the State coupons, in addition to paying for the face value of the coupons. Washington uses coupons and not electronic benefit transfer (EBT) to provide benefits. They would prefer to issue Food Stamps rather than a State food coupon because it would be administratively easier for the State, Food Stamps are an understood currency widely accepted by retailers and banking institutions and Food Stamps are more fraud resistant than a new State issued coupon would be. Maryland has recently requested to be allowed to provide its legal immigrants with benefits at State expense as well. (Washington and Maryland could only provide this benefit to immigrants currently in the country since the welfare law prohibits States from providing means tested benefits to new entrants.) Legal immigrants will lose their food stamp eligibility during the period of April 1 to August 22, 1997.

What Has Happened to Date?: USDA initially denied the State's request on November 21, 1996 on the grounds that it violated the Food Stamp Act. On December 6, 1996 the State and advocates asked USDA to reconsider its position. In mid-December, USDA apprised OMB of the Washington request and asked for policy input on whether the State's request should be granted. USDA told the outgoing Governor's office on January 9, 1997 that the Department could not give the State a final decision on the request at that time. Washington's new Governor is reported to have mentioned a need to help this population in his inaugural address, although it is not clear if the standing request from the former Governor still applies to the new Governor.

Is It Legal?: While we have not consulted with OMB General Counsel, our view is that the Food Stamp Act (FSA) does not explicitly permit a State to issue benefits to ineligible households at its own expense, i.e. there is no State supplementation or food stamp contract option under the Act. Section 7(a) of the Act states, "Coupons...shall be issued only to households which have been duly certified as eligible to participate in the food stamp program." In fact, benefits issued to ineligible households are considered to be issued in error and States are held financially liable for such erroneous issuance.

While the FSA does not provide explicit authority for an optional State funded food stamp benefit, some have argued that the Act does provide the Secretary with certain authorities which could be interpreted as sufficient to grant Washington's proposal. Under Section 15, which governs retailer violations and enforcement, the Secretary is granted authority to "*the issuance ...of coupons to such person or persons, and at such times and in such manner, as the Secretary deems necessary or appropriate to protect the interests of the United States...*" This authority is intended to provide the Food Stamp Program with the ability to provide coupons to law enforcement officials for use during their undercover investigations. Nothing precludes the Secretary from using this authority for other purposes. USDA GC advises that this argument is plausible, although not persuasive. Please find attached a copy of USDA's and the Center on Budget and Policy Priorities position papers on this issue.

The mechanism by which the State would repay the Federal government has not been clearly identified yet. However there are several options available, particularly if the State does not have to repay the Food Stamp appropriation and instead repays the Treasury. Also, other Departments have authorities to receive payments from States or individuals under a general "Gifts and Bequests" authority. USDA may have to search further on this question.

Issues to Consider --

Welfare Reform: The Administration strenuously opposed eliminating food stamps as well as other benefits for legal immigrants during the welfare reform debates. While the Administration is not proposing a permanent fix to the food stamp benefit ban for legal immigrants, the President has expressed deep concern with the alien provisions of the Welfare Reform bill. The Administration has already taken steps to delay the implementation of the ban by allowing some States to opt to defer removing legal immigrants from the program for several months. Providing States with another tool to quickly implement a State program for legal immigrants would further support the President's commitment to "soften the blow" of the impact of the food stamp ban on this group. States, advocacy groups and retail trade associations are likely to support approval of the Washington request.

Reaction from the Hill: With the exception of Senator Helms, the food stamp cuts to legal immigrants were generally not endorsed by either the House or Senate Agriculture authorizing committees. However, there were many members of Congress outside the Committees who might consider approval of the Washington proposal as a purposeful attempt to undermine the welfare reform bill. In addition, it is not clear how the Agriculture Appropriators would react. If USDA is unable to find statutory authority which permits the State to repay the Food Stamp appropriation, this proposal could be perceived as the Administration spending FY97 funds on "ineligible households" under what some would consider a specious argument.

On the other hand, it is possible to consider approval of Washington's request as USDA providing a service to the State. Without EBT, Washington is unable to easily provide a food only benefit to legal immigrants. Food Stamps has a certain "brand name value" which the State is requesting to purchase. Because a food stamp coupons are the vehicle by which the State

transfers its State benefit, the Food Stamp Program is not necessarily compromised.

State Supplementation: Aside from their uneasiness about the explicit legal authority for this proposal, USDA appears to be concerned about the precedent the Washington proposal sets for Food Stamp State supplementation. The Washington case is a simple one because the State is offering to provide benefits to an indigent category of people banned from receiving Food Stamps. The Administration opposed this ban and presumably would support a State's effort to pay benefits to this group. However, if the Washington State request is granted the question arises as to whether it sets a precedent only for immigrants or for any situation where a State chooses to provide benefits to ineligible households or more benefits to eligible households? For instance, what if a State chose to provide a voucher to a TANF family that had reached the time limit by supplementing food stamps. USDA might be more uncomfortable approving this type of proposal. A positive decision on Washington does not have to set a precedent for State supplementation and could be thought of simply in terms of USDA contracting a service to the State.

Department policy officials have not yet resolved their thinking about state supplementation in the food stamp program. The subject raises many issues about the adequacy of the federal benefit and whether residents in one State require more food than in another. If the Administration approves the Washington request, it should consider the request in a broader context and decide whether it will only approve State requests to provide benefits to immigrants and ineligible 18-50's or whether it would consider broader proposals to supplement the food stamp benefit.

Parallel System or Not: We assume that Washington State will provide benefits to all legal immigrants according to the same eligibility standards provided for under the Food Stamp Act. But it is possible that the State would establish different eligibility standards and different terms and conditions for the coupons. It is not clear what type of implementing legislation the State would need under its own laws and if that legislation would require the State coupon to follow all the rules prescribed in the FSA as prohibiting the use of benefits for anything other than food, i.e. alcohol or tobacco. This issue could be resolved by USDA agreeing to the proposal as long as State implementing legislation requires any State funded benefit to follow the FSA.

Food Stamp Integrity: USDA has raised concerns that their ability to monitor and enforce retailer integrity if there were a commingling for Federal and State coupons. In an effort to avoid a sanction a store under investigation might be able to effectively argue that State coupons, not Federal, were trafficked. Effectively, USDA is not sure whether the limitations on the usage of food stamps would apply if the State rather than the Federal government funded the benefit. Again, this issue could be resolved with State or Federal legislative language. Washington could be required to provide notification to all authorized retailers in the State and neighboring areas that for retailer and redemption purposes there are no differences between State funded and Federal coupons. Also, the Administration may want to consider a budget amendment to the food stamps appropriation's language if it approves Washington's request asserting the FSA requirements for all coupons.

Size of the Proposal: A preliminary estimate from USDA indicates that Washington issues approximately \$15 million in Food Stamps annually to about 13,500 households with non-citizens. Given that the Food Stamp appropriation will have a \$3 billion unobligated expiring balance at the end of FY97, there are sufficient funds to provide Washington with the additional benefits. Maryland's proposal would cost approximately \$10 million annually. However, if the proposal were approved and no authority can be found to repay the Food Stamp appropriation, the Administration might want to consider FY98 Food Stamp appropriation's language allowing a direct repayment.

Precedent for other States: USDA plans on denying Maryland's request because Maryland has a Statewide EBT system in place. Therefore, Maryland can easily (although not without some costs) establish a separate food-only EBT account for legal immigrants. Essentially, the "brand name" value of the federal food stamp coupon is unnecessary. Maryland can acquire all of the protections it needs via EBT. Retailers and recipients will be unaware of any difference between benefits. We concur with USDA's distinction between EBT and coupon States. EBT States have the flexibility to provide a food-only benefit to immigrants or any other population with no involvement from USDA. This will become more of an issue as States begin to elect food-only vouchers for TANF families who have reached the time limit. Also, if the Administration elects to provide the service to Washington but not Maryland, it further supports the argument that Washington is contracting a service which it cannot provide on its own.

Recommendation:

Unless they are otherwise directed by a White House or OMB policy official, USDA's position is to deny Washington and Maryland's requests. Although he is expected to do so, our understanding is that the new Governor of Washington has not yet contacted USDA to formally renew the State's request. Therefore the Administration may have some more time to consider this matter. However, Maryland's request is still pending with USDA. We recommend denying Maryland's request on the basis that it is an EBT State and can issue a food only benefit on its own without using the Food Stamp appropriation.

You have expressed a strong interest in further pursuing the State's request. We recommend that you meet with USDA policy officials in order to review the policy implications of approving the request. We believe it is critical that the Department be directed to further research its statute in order to establish whether the State could directly reimburse the Food Stamp Program. If not, Treasury will need to be contacted in order to make certain whether or not they could accept the State's payment. In addition, if a decision is made to approve Washington's proposal, we recommend that legislation be sent to Congress to ensure that all Food Stamp benefits, whether State or Federally funded, are a secure instrument to be used for food only. This legislation could also allow States to reimburse the Food Stamp Program directly.

Attachments

USDA

USE OF FOOD STAMP COUPONS FOR STATE FUNDED PROGRAMS

ISSUE: The Washington State Agency requested to be allowed to purchase food coupons from FCS for use in operating a State-funded program for qualified aliens made ineligible by the food stamp welfare reform provisions. The State has agreed to pay any additional costs for printing, issuing, storing and redeeming the State coupons, in addition to paying for the face value of the coupons. FCS denied the State's request on November 21, 1996, on the grounds that it violates section 7(a) of the Food Stamp Act. That Section states that the coupons shall be issued only to households which have been duly certified as eligible to participate in the Food Stamp Program. In addition, appropriations law prohibits cash receipts from being deposited in the appropriations account; rather, the payments from the State would have to be deposited in the general Treasury account. Thus, when the State coupons are redeemed, draw downs would be made from the food stamp redemption account, but the appropriations account could not be credited with the State's payment to offset the expenditure.

On December 6, 1996, the State requested FCS to reconsider its position. Furthermore, Bob Greenstein has intervened on the State's behalf. He refers us to Sec. 15(a) of the Act which gives the Secretary authority to issue coupons to anyone if the Secretary deems it necessary or appropriate to protect the interests of the United States. OGC advises us that this argument, while not persuasive, is plausible.

FACTORS FOR CONSIDERATION:

Political - The President has expressed concern with the alien provision of Welfare Reform. Providing the States with a tool to quickly implement a State program for legal immigrants would align with the President's commitment to "soften the blow" of the impact of welfare reform on this group. Advocacy groups and the retail trade associations would also support this action. Also, food stamp coupons are an already established secure non-cash instrument which can only be used to purchase food. The outgoing Governor is anxious to present this opinion to the legislature before his successor takes office. His successor, a more moderate Democrat, is expected to support a similar proposal, but to limit it to a smaller group of immigrants.

Washington's approval could be controversial in that it is likely to be perceived by the public and members of Congress as undermining the intent of the legislation by continuing a program abolished by law.

Legal - There are various legal issues relative to the fiscal accounting process involved in selling the coupons to States. We looked into the possibility of a reimbursable agreement with the State, but OGC has advised that the Economy Act applies to Federal agencies only. Also, the Intergovernmental Cooperation Act allows technical assistance to States, but would not cover selling coupons to States.

Administrative - There would be an impact on retailer compliance issues due to the commingling of Federal and State coupons. A store's Food Stamp Program redemption history would be comprised which would have an impact on our store monitoring system. In addition, in the case of high redeemers, a store could effectively argue we could not prove whether it was State or Federal coupons being trafficked and thus possibly avoid a Federal sanction. OIG has also expressed concerns about the impact.

We have surveyed the regions and, except for Maryland which wants to use the EBT system for such a program (issues involved in using a State's LBT system are different), no other State has yet expressed an interest similar to Washington's. Washington and other States have other options available to them, including development of State-specific voucher systems or cash payments.

Secretary of Agriculture
Washington, D.C.

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CBPP

December 6, 1996

THE LEGALITY OF WASHINGTON STATE'S PROPOSAL TO PURCHASE FOOD STAMPS FOR LEGAL IMMIGRANTS

Washington State has requested USDA's approval for an arrangement by which it would purchase food stamps from USDA and issue them to legal immigrants who are being made ineligible for federally-funded food stamps under the new welfare law. The State would reimburse USDA for the additional costs of printing, distributing, and redeeming the food stamp coupons used in this project. USDA has expressed several legal concerns about this proposal and may have policy issues as well. Whatever policy determination is made, however, it appears that USDA does have the legal authority to enter into the arrangement that Washington State proposes.

Section 7(a). USDA's letter rejecting Washington State's proposal identified one legal basis for its decision: section 7(a) of the Food Stamp Act. Section 7(a) provides that food stamp "[c]oupons ... shall be issued only to households which have been duly certified as eligible to participate in the food stamp program." USDA interpreted this to prohibit issuance of food stamps to households ineligible for food stamps, such as the legal immigrants Washington State wishes to assist.

Although this is a plausible interpretation of the statute, another interpretation would be that section 7(a) applies only to the operation of the food stamp program, not to separate arrangements such as the one Washington is proposing. Under this view, Washington's program would be analogized to the emergency food stamps issued under section 5(h) of the Food Stamp Act, the commodity program for Indian Reservations authorized under section 4(b), and the nutrition assistance programs for Puerto Rico and American Samoa, none of which operate consistently with section 7(a).

In fact, however, it probably does not matter which reading of section 7(a) one adopts. This is because even if section 7(a) would otherwise bar Washington's proposal, it can be overridden under section 15(a) of the Food Stamp Act. Section 15(a) provides, in pertinent part, that "[n]otwithstanding any other provision of this Act, the Secretary may provide for the issuance . . . of coupons to such person or persons, and at such times and in such manner, as the Secretary deems necessary or appropriate to protect the interests of the United States or to ensure enforcement of the provisions of this Act or the regulations issued pursuant to this Act." Therefore, the Secretary could authorize Washington's proposal if he determines that it is "in the interests of the United States."

The Secretary could readily find that Washington's proposal serves the United States' interests in any of several respects:

- First, the President has repeatedly and vehemently insisted that the new welfare law cuts both food stamps and aid to poor legal immigrants much

too deeply. Washington's proposal, by providing food stamps to those immigrants, responds to the interests the President has identified. This is not inconsistent with Congress's enactment of restrictions on immigrants' eligibility for food stamps in section 402(a) of the new welfare law. That section, part of a budget reconciliation act, sought to save money for the federal government. Nothing Washington has proposed would erode any of those savings. During its consideration of the immigration law, Congress weighed but ultimately rejected a proposal that would have prohibited ineligible legal immigrants from being the representative payee for benefits provided to citizens and eligible immigrants. Congress was not adverse to legal immigrants handling food stamps; it simply did not wish to pay for them in most cases.

- Also, section 412(a) of the new welfare law provides that "a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien . . ." Approving Washington's proposal therefore furthers the congressionally recognized interest of allowing states to determine the needs of legal immigrants within their borders.¹
- Moreover, if Washington is denied use of federal food stamp coupons but continues to wish to provide food assistance to these immigrants, it will be forced to establish its own system for printing, issuing and redeeming scrip. It is highly unlikely that Washington will be able to design a system as efficient, and as counterfeit-resistant, as the federal food stamp coupon system. It is in the interests of the United States to prevent the crime that could result from Washington having to implement an inferior scrip system. Indeed, counterfeiting and trafficking gangs that get their start abusing the system that Washington sets up could sharpen their skills and move on to threaten the integrity of the federal food stamp system. In addition, experience has shown that people who abuse the food stamp system often are involved with illegal drugs. If Washington is forced to establish a scrip system that proves vulnerable to abuse, the likely result will be to benefit persons engaged in federal drug crimes.
- Finally, it is in the interests of the United States to establish a mechanism by which the state fully reimburses the federal government for coupons it issues to legal immigrants rendered ineligible under section 402(a) of the

¹ Section 411(d) of the welfare law requires states to pass affirmative legislation prior to serving undocumented immigrants with state funds. The immigrants affected by section 411(d), however, were ineligible for food stamps under section 6(f) of the Food Stamp Act long before the new welfare law passed. It appears that Washington is only interested in serving those immigrants newly disqualified from food stamps under section 402(a) of the new welfare law. Section 411 therefore apparently is not implicated.

new welfare law. If benefits were issued to these households without this arrangement, USDA's routine mechanism for seeking to recover the costs would be the quality control (QC) system. QC penalties, however, take years to collect and, unless the state already has an error rate twice the national average, provide the federal government with less than one dollar for every dollar of food stamps issued to an ineligible household. Although USDA could ask the Attorney General to sue a state to compel its compliance — or could even eject the state from the food stamp program — USDA has never attempted either of these approaches in the history of the program. Even if USDA sought dollar-for-dollar reimbursement from a state by alleging fraud or ineffective and inefficient state administration of the program, the necessary litigation could be far more costly than negotiating the amicable arrangement proposed here.

Section 15(a)'s authorization for coupons to be issued to serve the "interests of the United States" is separate from its authority to use them to enforce the Act and regulations; the "interests" involved need not be related to preserving the food stamp program's integrity. Indeed, this would not be the first time section 15(a) has been invoked to serve interests of the United States that go beyond the food stamp program. Although section 15(a) is often used to make food stamps available for "sting" investigations, it often has been used in cases where the primary crimes under investigation did not involve food stamps but drugs, explosives, or firearms. By offering to purchase contraband with food stamps, federal and state investigators gain credibility with criminal organizations that may not otherwise be involved with food stamps.

This application of section 15(a) would not open the door to arbitrary nullification of provisions of the Act that prove distasteful to the Secretary. Section 15(a) affects only issuance and redemption activities, and this interpretation of it would not purport to allow the Secretary to spend federal funds for purposes not approved in appropriations acts. The entire cost of Washington's project will be born by Washington. It is difficult to imagine an important congressional policy that an Administration could circumvent solely by changing issuance and redemption practices *in a way that expends no federal funds*. If, of course, Congress becomes dissatisfied with the degree of authority it has delegated through section 15(a), it could amend the Food Stamp Act or enact an appropriations rider to limit the types of interests the Secretary may consider.

Transfers of Federal Funds. Although section 7(a) was the only legal concern identified in USDA's letter to Washington, the Department also may be concerned about the mechanism by which Washington's reimbursement would be provided. Food stamp redemptions by law are paid from the food stamp account, unless otherwise provided by law, funds received by the federal government go into the General Fund. Therefore, even if Washington was fully reimbursing the federal government for the cost of its program, the food stamp account could be drained of funds not author-

ized by Congress, with Washington's checks being deposited in the General Fund. Although the amounts Washington is contemplating — perhaps \$20 million a year — are tiny compared with the size of the food stamp program, theoretically if these amounts are expended from the food stamp account, insufficient funds could remain to pay federally-authorized food stamp benefits, requiring across-the-board reductions under section 18(b).

Fortunately, several mechanisms exist for ensuring that the food stamp account is held harmless. First, instead of writing a check to the federal government for the cost of the food stamps it uses, Washington could simply agree to have USDA reduce the reimbursements it otherwise would receive for its costs of administering the federal food stamp program. This method could account for any likely cost of the proposed program: in fiscal year 1994, for example, Washington received \$34 million in federal administrative reimbursements for the food stamp program. Thus the food stamp account would be making higher expenditures for coupon redemptions originating in Washington State (and for printing and distributing coupons to Washington) but its expenditures for administrative reimbursements to that state would be lower by the same amount.

Alternatively, Washington's agreement to reimburse the federal government for the coupons it uses could be treated as a claim against the state. Section 13(a)(1) of the Food Stamp Act grants the Secretary wide authority to assert, settle, adjust, and collect claims against households, stores, and state agencies "including, but not limited to, claims arising from fraudulent and nonfraudulent overissuances to recipients . . ." Claims collections are deposited into the food stamp account. A contract under which Washington agrees to reimburse the federal government for benefits issued through this program would certainly give USDA the legal basis for asserting a claim against the state, which the state could then pay through section 13(a)(1). Although the procedures sections 13 and 14 establish for collections can be somewhat time-consuming, they were designed for contested claims. Washington could agree to make contemporaneous reimbursements, which USDA could accept pursuant to its authority to "settle and adjust any claim."

Setting a Reimbursement Rate. Although USDA rejected Washington's proposal in concept without seeking to negotiate about the specifics, it may be worth addressing briefly some of the issues involved in establishing the financial relationship between the State and USDA. Washington explicitly offered to pay a reasonable amount to compensate for USDA's additional costs of printing, transporting, and redeeming food stamp coupons. In addition, Washington could not seek USDA reimbursements for administrative time spent certifying ineligible immigrants for the state-funded food assistance benefits. Both of these calculations should be relatively easy: USDA already estimates the costs of operating the coupon system for purposes of establishing into cost neutrality standards for states' electronic benefit transfer (EBT)

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systems. In addition, some states use the same eligibility workers to administer the food stamp program and state general assistance programs; USDA already requires states to employ accounting procedures to separate time spent on food stamps from that spent on other activities.

Since not all food stamps that are issued ever get redeemed, presumably some modest credit should be applied to reflect non-redemption of the coupons Washington is purchasing. Again, national data is readily available to compute the rate of non-redemption.

Although Washington will be using a retailer network established, maintained and policed with federal funds, this imposes no additional costs on the federal government and hence should not be considered in establishing Washington's reimbursement rate. Indeed, by preventing as severe a reduction in food stamp volume as might otherwise take place at stores in areas with large numbers of immigrants, Washington's program could conceivably encourage some stores to stay in the food stamp program and hence remain available to recipients of federally-funded food stamps.

Some households, containing both immigrants and citizens, may receive both federally- and state-funded food stamps. Should these households later prove ineligible for reasons unrelated to their immigrant status (e.g., unreported income or misvalued resources), both the federal and state programs could have claims against the household. The federal claim would be collected through established federal procedures; the state would be left to its own devices to collect its claim. If the household was eligible for some food stamps but fewer than it was issued, the federal program again would need only to concern itself with collecting back the difference between the federally-funded food stamps the household received and the federally-funded food stamps it was eligible to receive: Washington already would have reimbursed USDA for any food stamps issued under its program, with that reimbursement unaffected by whether or not the household eventually turned out to be eligible for the full amount under the state's rules. Because both USDA and Washington would have an interest in preventing trafficking in food stamps, it might well be in the state's interest to enter into a cooperative law enforcement agreement with federal agencies.

Section 17(b) Waiver Authority. Although it appears the regular provisions of the Food Stamp Act provide ample authority for USDA to approve Washington's proposal, this proposal also is approvable through a waiver under section 17(b) of the Food Stamp Act. Although section 17(b) contains a list of provisions that may not be waived, section 7(a) does not appear on that list. (It is unclear whether USDA could waive the restrictions on legal immigrants in sections 402(a) and 403 of the welfare law: although section 17(b)(1)(A) only explicitly references waivers of the provisions of the Food Stamp Act, the general grant of authority for USDA to conduct demonstration projects could be construed to imply authority to disregard any contrary provision of law.)

Similarly, USDA could waive the claims collection procedures of section 13 to the extent necessary to ensure that the funds received from Washington are properly deposited to make the food stamp account whole.

USDA quite properly is loath to use section 17(b) as license to disregard willy-nilly any provisions of the Food Stamp Act that it or a state agency might deem unwise. On the other hand, if the waiver authority can never override rules that Congress has established for the general operation of the food stamp program, it has no meaning at all. Clearly the very same Congress that established the new restrictions on immigrants also sought to expand greatly USDA's authority to accommodate states' requests to deviate from generally applicable program rules.

A waiver to permit Washington to implement its proposal would not open the door to a dismantling of the food stamp program's national standards through the waiver process. Unless USDA intends to give no waivers at all, it presumably will want to identify priorities among possible waivers. The President's oft-stated two major concerns about the welfare bill have been the depth of the cuts affecting legal immigrants and the severity of the food stamp cuts. The waiver Washington is seeking directly addresses both of those presidential priorities at no cost to the federal government. Even congressional opponents of spending federal funds on legal immigrants will be hard-pressed to find a basis for criticizing a waiver that assists these immigrants without incurring any federal costs. Indeed, the reimbursement system Washington has proposed constitutes one of the most reliable and timely cost-neutrality guarantees USDA is ever likely to see.

Although some states are likely to cite a waiver granted to Washington as a precedent for projects they would like to propose, USDA can readily distinguish the Washington project as responding to priorities recognized by *both* the state *and* the President.

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PRIVATIZATION OF THE FOOD STAMP PROGRAM***ISSUES REQUIRING DECISION***

To what extent should the States be permitted to transfer certification responsibilities to the private sector through competitively bid contracts and to what extent should the Merit System of Personnel Administration provisions be waived to allow States to enter into contract agreements?

BACKGROUND

There is increasing interest among the State welfare agencies in transferring the administration of public assistance programs to the private sector through competitively bid contracts. This interest stems, in part from the efforts of the Federal and State governments to test new methods to improve program services and to increase self-sufficiency among program recipients.

Contracting or privatizing certain functions of the Food Stamp Program is not new. Many States have contracts with private agencies to provide Food Stamp Employment and Training services and all States that have implemented an Electronic Benefit Transfer (EBT) system have a contract agreement with a private entity.

What is new is the possibility of contracting with private entities to perform functions that have historically been the responsibility of the public sector, such as conducting the required food stamp interview and determining the food stamp eligibility and benefit level. Such proposals would require a waiver of current statutory and regulatory provisions related to the Merit System of Personnel Administration as required under section 11(e)(6) of the Food Stamp Act of 1977, as amended.

CURRENT PROPOSALS REQUIRING DECISIONS ABOUT THE MERIT SYSTEM OF PERSONNEL ADMINISTRATION**Texas Integrated Enrollment System (TIES)**

TIES is a privatization initiative of the Texas Health and Human Services Commission (HHSC) and the Texas Council on Competitive Government (CCG) in support of a State law enacted in 1995. Under TIES, the certification and eligibility determinations for most public assistance programs, including the Food Stamp, Special Supplemental Nutrition Program for Women, Infants and Children (WIC), TANF and Medicaid programs, would be contracted to the private and/or public sectors through competitive bids. The TIES proposal would require a waiver of the merit system provisions under the Food Stamp Act. The Federal agencies and the State of Texas have been negotiating the conditions for releasing a Request for Offers (RFO) for

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TIES since May, 1996. With the exception of a final decision about the merit system provisions contained in the RFO, all other issues have been resolved.

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Texas is expecting final approval of the RFO in January to be able to release the RFO by the end of the month. Two consortia have been developed with the intention of bidding on the RFO. One consortium is composed of the Texas Workforce Commission, International Business Machines Corporation and Lockheed Martin Corporation. The other consortium consists of the Texas Department of Human Services, Electronic Data Systems Corporation and the Unisys Corporation. Arthur Anderson has also indicated an interest in the proposal but has not aligned itself with a State agency.

Wisconsin Works (W-2)

Under the W-2 proposal, the State would contract on a competitive basis with a public or private agency for certification actions such as gathering client eligibility information, conducting eligibility interviews and data input. The State, presuming Departmental approval of its waiver request of the merit system requirements, released its Request for Proposals (RFP). The State is pending any further action on the RFP process until its receives Federal approval to waive the Food Stamp Merit System provisions.

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PUBLIC RESPONSE

The Department has received numerous letters from employee unions about the TIES proposal, including the American Federation of Labor and Congress of Industrial Organizations (AFLCIO), the American Federation of State, County, and Municipal Employees (AFSCME) and the Service Employees International Union. The unions assert that a waiver of the merit system would result in a decline of client services, including access to program benefits and client confidentiality. The Department received over 1,000 letters from employees in Wisconsin objecting to the W-2 project.

WAIVER AUTHORITY TO CONDUCT DEMONSTRATION PROJECTS

The Food Stamp and Social Security Acts provide the Departments with the authority to waive most statutory requirements to allow the States to conduct demonstration projects. However, because authority for the Merit System of Personnel Management was transferred from the Departments to the Office of Personnel Management (OPM) under the Intergovernmental Personnel Act of 1970, the Departments would need to obtain concurrence from OPM prior to approving any demonstration project that would waive the Merit System of Personnel Management.

Disagree

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OPTIONS

Approve Waiver of Merit System of Personnel Administration. Approval of TIES and the W-2 would require use of the Department's demonstration authority and the necessary approval of the Merit System of Personnel Administration from OPM. The Department's waiver authority for demonstrations is intended to test innovations and is not intended to approve long-term operational alternatives such as those proposed by Texas and Wisconsin. Approval of the waiver may result in additional objections from employees unions and advocacy groups but would be supported by States, the National Governors Association and private corporations which have formed alliances with public agencies to respond to the RFO.

Deny Waiver of Merit System of Personnel Administration. Denial of the TIES and W-2 project would seriously disrupt the progress the Federal and State agencies have made on the proposals. The Federal agencies would receive serious objections from the State and private corporations. Also, a denial may be viewed as inconsistent with the Administration's support for allowing the private sector to be more involved in the administration of public assistance programs. However, it is important to note that during the recent debate on welfare reform legislation, Congressional Conferees reinstated the merit system provisions in the Food Stamp Act that a previous Senate bill had deleted.

Redefine Certification. The Food Stamp Act requires certification to be completed by merit system employees. Certification is not defined in either the Act or program regulations. Current regulations provide that the required interview be conducted by merit system employees. The Department prefers this interpretation (which is supported by the legislative history to the Act) but States want to reinterpret the law so that compliance could be achieved through the automated processing of data by computers which are programmed under State agency direction to make eligibility and benefit decisions. A middle ground could preserve more merit system involvement in a complex eligibility determination process that requires judgment. FCS could require merit system review of applications and interview results before benefits were determined (a process comparable to the supervisory reviews currently used by many State agencies). The Department believes it would be imprudent to eliminate the interview from merit employees on a statewide basis without further testing. *most labor-int?*

Approve small-scale demonstration projects. The Department supports privatization initiatives that may result in improved services and/or administrative costs savings. However, we have concerns about statewide initiatives that have not been proven to be effective any may seriously affect program access to low-income households. For instance, TIES is a Statewide initiative in a State that issues annually approximately 10 percent of food stamp benefits issued nationwide. A demonstration limited to a small number of counties may be supportable by the advocacy groups. Private corporations may object or lose interest in small-scale demonstration projects. It is unclear how the unions and other States would react to such a compromise. *Cost \$1 million*

Wendy -
For today's
5:30 meeting
Ekuo

Food Stamp, Medicaid, and Employment Service Privatization

The applicable section of law governing medicaid administration (42 USC §1396a(a)(4)(A)) authorizes the Secretary to require "the establishment of personnel standards on a merit basis...as are found by the Secretary to be necessary for the proper and efficient operation of the plan..." This language connotes discretion and may be the source of agency claims that the merit system requirement is waivable. For example, the Secretary may find that merit personnel standards are not necessary for "proper operation." On the other hand, the Secretary clearly has the discretion to require merit standards. More importantly, the Secretary's authority under these sections was expressly transferred to the Director of OPM in 1979. The IPA at 42 USC §4728 states that OPM has "all functions, powers, and duties" conferred on the Secretary in the above referenced section of law. Therefore, the Secretary of HHS does not have authority to waive merit standards; that authority resides with OPM.

OPM's IPA implementing regulations (5 CFR Part 900, Subpart F) "apply to those State and local governments that are required to operate merit personnel systems as a condition of eligibility for Federal assistance or participation in an intergovernmental program." (§900.602) Although the regulations do not expressly state that private sector organizations cannot be considered to have merit based personnel systems, there is a very strong implication to that effect. Appendix A to Subpart F of the OPM regulation lists the programs that "have a statutory requirement for the establishment and maintenance of personnel standards on a merit basis." Food Stamps, medicaid and Employment Security (Unemployment Insurance and Employment Services) are expressly listed as programs subject to a requirement for a merit system.

The language in the Food Stamp Act is stronger than the medicaid law regarding the requirement for merit personnel standards (7 USC §2020 (e)(6)(b)). The Food Stamps Act law states that "the State agency personnel utilized in undertaking such [Food Stamp eligibility] certification shall be employed in accordance with the current standards for a Merit System of Personnel Administration or any standards later prescribed by the Director of the Office of Personnel Management pursuant to section 4728 of Title 42..." The IPA also transferred USDA's authority regarding merit personnel systems to OPM.

For the above reasons, merit based standards are a non-waivable bar to privatization. Although the HHS Secretary may have had authority to waive the standards prior to the revision of the IPA in 1979, she does not have such authority now. Only OPM can change its own regulations and they must go through a notice and comment period in accordance with the Administrative Procedures Act (APA) prior to doing so. The APA requires that agency regulations not be changed arbitrarily.

OPM's AUTHORITY UNDER THE INTER-GOVERNMENTAL PERSONNEL ACT

42 USC §4728 delegates the power of the Secretaries of Labor, Agriculture, and HHS to require the establishment of personnel standards on a merit basis to the U. S. Office of Personnel Management.

The statutory references to §4728(a) that are relevant to our discussion are to the following:

- 4728(a)(1): "2019(e)(2) of Title 7" is a reference to the Food Stamp Law prior to 1977 amendments. The provisions formerly contained in 2019(e)(2) are now covered by § 2020(e)(6) of Title 7.
- 4728(a)(2)(A): "the Act of June 6, 1933, as amended (29 USC 49)" is the Wagner-Peyser Act governing employment services; and
- 4728(a)(3)(D): "1396a(a)(4)(A) of this title" is the federal statute authorizing Medicaid

Appendix A to the implementing OPM regulations expressly state that the Food Stamp, Employment Service, and Medicaid Programs "have a statutory requirement for the establishment and maintenance of personnel standards on a merit basis."

ONNEL Ch. 62

Ch. 62 PERSONNEL ADMINISTRATION

42 § 4728

§ 4727. Interstate compacts

The consent of the Congress is hereby given to any two or more States to enter into compacts or other agreements, not in conflict with any law of the United States, for cooperative efforts and mutual assistance (including the establishment of appropriate agencies) in connection with the development and administration of personnel and training programs for employees and officials of State and local governments.

(Pub.L. 91-648, Title II, § 207, Jan. 5, 1971, 84 Stat. 1915.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports
1971 Act, House Report No. 91-1733.
See 1970 U.S. Code Cong. and Adm. News, p. 5879.

LIBRARY REFERENCES

American Digest System
Compacts and agreements between states in general, see States 6.
Encyclopedias
Compacts and agreements between states in general, see C.J.S. States §§ 31, 32, 143.

WESTLAW ELECTRONIC RESEARCH

States cases: 360k[and key number].
See also, WESTLAW guide following the Explanation pages of this volume.

4728. Transfer of functions

Prescription of personnel standards on a merit basis

There are hereby transferred to the Office all functions, powers, and duties of—

- (1) the Secretary of Agriculture under section 2019(e)(2) of Title 7;
- (2) the Secretary of Labor under—
 - (A) the Act of June 6, 1933, as amended (29 U.S.C. 49 et seq.); and
 - (B) section 503(a)(1) of this title;
- (3) the Secretary of Health and Human Services under—
 - (A) sections 2674(a)(6) and 2684(a)(6) of this title;
 - (B) section 3023(a)(6) of this title;
 - (C) sections 246(a)(2)(F) and (d)(2)(F) and 291d(a)(8) of this title; and

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42 § 4728

INTERGOVERNMENTAL PERSONNEL Ch.

(D) sections 302(a)(5)(A), 602(a)(5)(A), 705(a)(3)(A), 1202(a)(5)(A), 1352(a)(5)(A), 1382(a)(5)(A), and 1396a(a)(5)(A) of this title; and

(4) any other department, agency, office, or officer (other than the President) under any other provision of law or regulation applicable to a program of grant-in-aid that specifically requires the establishment and maintenance of personnel standards on a merit basis with respect to the program;

insofar as the functions, powers, and duties relate to the prescription of personnel standards on a merit basis.

(b) Standards for systems of personnel administration

In accordance with regulations of the Office of Personnel Management, Federal agencies may require as a condition of participation in assistance programs, systems of personnel administration consistent with personnel standards prescribed by the Office for positions engaged in carrying out such programs. The standards shall

(1) include the merit principles in section 4701 of this title

(2) be prescribed in such a manner as to minimize Federal intervention in State and local personnel administration.

(c) Powers and duties of Office

The Office shall—

(1) provide consultation and technical advice and assistance to State and local governments to aid them in complying with standards prescribed by the Office under subsection (a) of this section; and

(2) advise Federal agencies administering programs of grants or financial assistance as to the application of required personnel administration standards, and recommend and coordinate the taking of such actions by the Federal agencies as the Office considers will most effectively carry out the purpose of this subchapter.

(d) Transfer of personnel, property, records, and funds; time of transfer

So much of the personnel, property, records, and unexpended balances of appropriations, allocations, and other funds of any Federal agency employed, used, held, available, or to be made available in connection with the functions, powers, and duties vested in the Office by this section as the Director of the Management and Budget shall determine shall be transferred to the Office at such time or times as the Director shall direct.

Ch. 62 PERSONNEL

(e) Modification or
Personnel standards and regulations referred to in this section shall continue in effect unless otherwise prescribed by the Office.

(f) Systems of personnel design, execution,

Any standards or regulations of this section shall insure diversity on the part of personnel in their execution, and management of personnel administration.

(g) Interpretation of
Nothing in this section shall be construed to—

(1) authorize the exercise of any assignment, advancement, or personnel action involving an employee;

(2) authorize the use of merit basis to recruit or school system;

(3) prevent provisions in the form of conditions of the finances of the State;

(4) require or to disclose his religion, or national origin;

(5) require or ee, or any personnel government employment or to take which is designed personal relationships, blood or marriages, or concerning sexual matters;

(6) require or to participate in such activities.

Pt. 900, Subpt. D, App. C

5 CFR Ch. I (1-1-96 Edition)

Office of P

sistance under a program for failure to comply with the requirements. are superseded to the extent that discrimination is prohibited by this subpart. except that nothing in this subpart relieves a person of an obligation assumed or imposed under a superseded regulation, order, instruction, or like direction, before the effective date of this subpart. This subpart does not supersede any of the following (including future amendments thereof): (1) Executive Order 11246 (3 CFR, 1965 Supp.) and regulations issued thereunder or (2) any other orders, regulations, or instructions, insofar as these orders, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in a program or situation to which this subpart is inapplicable, or prohibit discrimination on any other ground.

(b) Forms and instructions. OPM shall issue and promptly make available to all interested persons forms and detailed instructions and procedures for effectuating this subpart as applied to programs to which this subpart applies, and for which it is responsible.

(c) Supervision and coordination. The Director, Office of Personnel Management may from time to time assign to officials of OPM, or to officials of other departments or agencies of the Government with the consent of the departments or agencies, responsibilities in connection with the effectuation of the purposes of title VI and this subpart (other than responsibilities for final decision as provided in §900.410), including the achievement of effective coordination and maximum uniformity within OPM and within the executive branch in the application of title VI and this subpart to similar programs and in similar situations. An action taken, determination made, or requirement imposed by an official of another department or agency acting pursuant to an assignment of responsibility under this paragraph shall have the same effect as though the action had been taken by OPM.

APPENDIX A TO SUBPART D—ACTIVITIES TO WHICH THIS SUBPART APPLIES

1. Personnel mobility assignments of OPM personnel pursuant to title 5, U.S.C. chapter 33 and 5 CFR part 334 (36 FR 6488).

[38 FR 17920, July 5, 1973, as amended at 48 FR 6311, Feb. 11, 1983]

APPENDIX B TO SUBPART D—ACTIVITIES TO WHICH THIS SUBPART APPLIES WHEN A PRIMARY OBJECTIVE OF THE FEDERAL ASSISTANCE IS TO PROVIDE EMPLOYMENT

1. None at this time.

APPENDIX C TO SUBPART D—APPLICATION OF SUBPART D, PART 900, TO PROGRAMS RECEIVING FEDERAL FINANCIAL ASSISTANCE OF THE OFFICE OF PERSONNEL MANAGEMENT

Nondiscrimination in Federally assisted programs or projects:

Examples. The following examples without being exhaustive illustrate the application of the nondiscrimination provisions of the Civil Rights Act of 1964 of this subpart in programs receiving financial assistance under programs of the Office of Personnel Management.

(1) Recipients of IPA financial assistance for training programs or fellowships may not differentiate between employees who are eligible for training or fellowships on the ground of race, color, or national origin.

(2) Recipients of IPA financial assistance for training programs may not provide facilities for training with the purpose or effect of separating employees on the ground of race, color, or national origin.

Subpart E—(Reserved)

Subpart F—Standards for a Merit System of Personnel Administration

AUTHORITY: 42 U.S.C. 4728, 4763; E.O. 11589, 3 CFR part 557 (1971-1975 Compilation).

SOURCE: 48 FR 9210, Mar. 4, 1983, unless otherwise noted.

§900.601 Purpose.

(a) The purpose of these regulations is to implement provisions of title II of the Intergovernmental Personnel Act of 1970, as amended, relating to Feder-

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Office of Personnel Management

§ 900.604

lly required merit personnel systems at State and local agencies, in a manner that recognizes fully the rights, powers, and responsibilities of State and local governments and encourages innovation and allows for diversity among State and local governments in the design, execution, and management of their systems of personnel administration, as provided by that Act.

(b) Certain Federal grant programs require, as a condition of eligibility, that State and local agencies that receive grants establish merit personnel systems for their personnel engaged in administration of the grant-aided program. These merit personnel systems are in some cases required by specific Federal grant statutes and in other cases are required by regulations of the Federal grantor agencies. Title II of the Act gives the U.S. Office of Personnel Management authority to prescribe standards for these Federally required merit personnel systems.

§ 900.602 Applicability.

(a) Sections 900.603-604 apply to those State and local governments that are required to operate merit personnel systems as a condition of eligibility for Federal assistance or participation in an intergovernmental program. Merit personnel systems are required for State and local personnel engaged in the administration of assistance and other intergovernmental programs, irrespective of the source of funds for their salaries, where Federal laws or regulations require the establishment and maintenance of such systems. A reasonable number of positions, however, may be exempted from merit personnel system coverage.

(b) Section 900.605 applies to Federal agencies that operate Federal assistance or intergovernmental programs.

§ 900.603 Standards for a merit system of personnel administration.

The quality of public service can be improved by the development of systems of personnel administration consistent with such merit principles as--

(a) Recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment.

(b) Providing equitable and adequate compensation.

(c) Training employees, as needed, to assure high quality performance.

(d) Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected.

(e) Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, religious creed, age or handicap and with proper regard for their privacy and constitutional rights as citizens. This "fair treatment" principle includes compliance with the Federal equal employment opportunity and nondiscrimination laws.

(f) Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.

§ 900.604 Compliance.

(a) *Certification by Chief Executives.* (1) Certification of agreement by a chief executive of a State or local jurisdiction to maintain a system of personnel administration in conformance with these Standards satisfies any applicable Federal merit personnel requirements of the Federal assistance or other programs to which personnel standards on a merit basis are applicable.

(2) Chief executives will maintain these certifications and make them available to the Office of Personnel Management.

(3) In the absence of certification by the chief executive, compliance with the Standards may be certified by the heads of those State and local agencies that are required to have merit personnel systems as a condition of Federal assistance or other intergovernmental programs.

(b) *Resolution of Compliance Issues.* (1) Chief executives of State and local jurisdictions operating covered programs are responsible for supervising compliance by personnel systems in their jurisdictions with the Standards. They

§ 900.605

shall resolve all questions regarding compliance by personnel systems in their jurisdictions with the Standards. Findings and supporting documentation with regard to specific compliance issues shall be maintained by the chief executive, or a personal designee, and shall be forwarded, on request, to the Office of Personnel Management.

(2) The merit principles apply to systems of personnel administration. The Intergovernmental Personnel Act does not authorize OPM to exercise any authority, direction or control over the selection, assignment, advancement, retention, compensation, or other personnel action with respect to any individual State or local employee.

(3) if a chief executive is unable to resolve a compliance issue to the satisfaction of the Office of Personnel Management, the Office will assist the chief executive in resolving the issue. The Office of Personnel Management, as authorized by section 208 of the Intergovernmental Personnel Act, will determine whether personnel systems are in compliance with the Standards and will advise Federal agencies regarding application of the Standards and recommend actions to carry out the purpose of the Act. Questions regarding interpretation of the Standards will be referred to the Office of Personnel Management.

[48 FR 9210, Mar. 4, 1983; 48 FR 10801, Mar. 15, 1983]

§ 900.605 Establishing a merit requirement.

Federal agencies may adopt regulations that require the establishment of a merit personnel system as a condition for receiving Federal assistance or otherwise participating in an intergovernmental program only with the prior approval of the Office of Personnel Management. All existing regulations will be submitted to the Office of Personnel Management for review.

§ 900.606 Publication of procedures to implement merit requirements.

Procedures to implement these merit requirements will be specified in the Federal Personnel Manual System and other relevant publications of the Office of Personnel Management.

5 CFR Ch. I (1-1-96 Edition)

APPENDIX A TO SUBPART F—STANDARDS FOR A MERIT SYSTEM OF PERSONNEL ADMINISTRATION

Part I: The following programs have a statutory requirement for the establishment and maintenance of personnel standards on a merit basis.

Program, Legislation, and Statutory Reference

Food Stamp, Food Stamp Act of 1977, as amended; 7 U.S.C. 2020(e)(6)(B).

National Health Planning and Resources Development, Public Health Service Act (Title XV), as amended by the National Health Planning and Resources Development Act of 1974, section 1522, on January 2, 1975; 42 U.S.C. 300r-1(b)(4)(B).

Old-Age Assistance, Social Security Act (Title I), as amended by the Social Security Act Amendments of 1939, section 101, on August 10, 1939; 42 U.S.C. 302(a)(5)(A).

Employment Security (Unemployment Insurance and Employment Services), Social Security Act (Title III), as amended by the Social Security Act Amendments of 1939, section 301, on August 10, 1939, and the Wagner-Peyser Act, as amended by Pub. L. 81-775, section 2, on September 8, 1950; 42 U.S.C. 503(a)(1) and 29 U.S.C. 494(b).

Aid to Families with Dependent Children, Social Security Act (Title IV-A), as amended by the Social Security Act Amendments of 1939, section 401, on August 10, 1939; 42 U.S.C. 602(a)(6).

Aid to the Blind, Social Security Act (Title X), as amended by the Social Security Act Amendments of 1939, section 701, on August 10, 1939; 42 U.S.C. 1202(a)(5)(A).

Aid to the Permanently and Totally Disabled, Social Security Act (Title XIV), as amended by the Social Security Act Amendments of 1950, section 1402, on August 28, 1950; 42 U.S.C. 1852(a)(5)(A).

Aid to the Aged, Blind or Disabled, Social Security Act (Title XVI), as amended by the Public Welfare Amendments of 1962, section 1602, on July 25, 1962; 42 U.S.C. 1382(a)(5)(A).

Medical Assistance (Medicaid), Social Security Act (Title XIX), as amended by the Social Security Amendments of 1965, section 1902, on July 20, 1965; 42 U.S.C. 1396(a)(4)(A).

State and Community Programs on Aging (Older Americans), Older Americans Act of 1965 (Title III), as amended by the Comprehensive Older Americans Act Amendments of 1978, section 307 on October 18, 1978; 42 U.S.C. 8027(a)(4).

¹Pub. L. 92-603 repealed Titles I, X, XIV, and XVI of the Social Security Act, effective January 1, 1974, except that "such repeal does not apply to Puerto Rico, Guam, and the Virgin Islands."

Office of Personnel Management

Adoption Act of 1980; 42 U.S.C. 1988a
Part II: The statutory requirements and maintenance of merit basis.

Program, Legislation

Occupation Safety and Health Act of 1970; 29 U.S.C. 2331-2333
Occupational Safety and Health Act of 1970, May 1, No. 15A

Child Welfare Act (Title IV), Developmental Disabilities Consolidation Act, November 6, 1978

Emergency Defense Act of 1950; 42 U.S.C. 3025

Comprehensive Act of 1971
Part III: The personnel requirements for Merit Administration

Comprehensive Act of 1971
Part III: The personnel requirements for Merit Administration

Comprehensive Act of 1971
Part III: The personnel requirements for Merit Administration

Comprehensive Act of 1971
Part III: The personnel requirements for Merit Administration

Program

Disability Security Act of 1950; SSA Dis. Part IV, § 425

Health Insurance Social Security Act, as amended
Aged Act. of 1950; 42 U.S.C. 1382(a)(5)(A)

Subpart C of the Federal Personnel Manual

AUTHORITY SOURCE: 48 CFR 900.605, otherwise not

§ 900.701

The part that relates to the Act of 1973.

Office of Personnel Management

§ 900.703

tion Assistance and Foster Care, Job Assistance and Child Welfare Act of 1973, 42 U.S.C. 671(a)(5).

II: The following programs have a regulatory requirement for the establishment and maintenance of personnel standards on a permanent basis.

III. Legislation, and Regulatory Reference

Occupational Safety and Health Standards, Occupational Safety and Health Act of 1970; Occupational Safety and Health State Plans for the Development and Implementation of State Standards; Department of Labor, 29 CFR 1902.9(h).

Occupational Safety and Health Statistics, Occupational Safety and Health Act of 1970; BLS Grant Application Form, May 1, 1973, Supplemental Assurance

A. Federal Welfare Services, Social Security Act (Title IV-B); 45 CFR 1552.49(c).

Development Disabilities Services and Facilities Construction, Developmental Disabilities Services and Facilities Construction Act, as amended by Pub. L. 95-602, on October 6, 1978; 45 CFR 1336.21.

Agency Management Assistance, Civil Service Act of 1950 (Title II), as amended; 44 CFR 102.5.

Comprehensive Employment and Training Act of 1973; 29 CFR 96.14(a).

III: The following programs have permanent requirements which may be met by a system which conforms to the Standard Merit Systems of Personnel Administration.

Program, Legislation, and Reference

Disability Determination Services, Social Security Act (Titles II and XVI), as amended; SSA Disability Insurance State Manual, IV, § 425.1.

Health Insurance for the Aged (Medicare), Social Security Act (Title XVIII), especially amended by the Health Insurance for the Aged Act, on July 20, 1965; SSA State Operations Manual, Part IV section 4510(a).

Part G—Nondiscrimination on the Basis of Handicap in Federally Assisted Programs of the Office of Personnel Management

AUTHORITY: 29 U.S.C. 794.

REG. 45 FR 75569, Nov. 14, 1980, unless otherwise noted.

§ 900.701 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, to eliminate discrimination

on the basis of handicap in any program or activity receiving Federal financial assistance from the Office of Personnel Management (OPM).

§ 900.702 Applicability.

This subpart applies to each activity, program or project receiving Federal financial assistance from the Office of Personnel Management from the date this subpart is approved. The duration of the applicability is the period of time for which the assistance is authorized.

§ 900.703 Definitions.

Unless the content requires otherwise, in this subpart:

(a) *Recipient* means any State or its political subdivisions, any instrumentality of a State or its political subdivisions, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(b) *Federal financial assistance* means any grant, loan, contract, (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(c) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(d) *Handicapped person* means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a

Discussion Draft
December 16, 1996

COVERAGE OF WELFARE-TO-WORK PARTICIPANTS
UNDER THE FAIR LABOR STANDARDS ACT

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 replaced the Aid to Families with Dependent Children program with a new "Temporary Assistance for Needy Families" (TANF) block grant program to the states, and imposed strict requirements that TANF recipients work as a condition of receiving TANF funds. Under the new law, states must demonstrate that 25 percent of TANF recipients are engaged in work for at least 20 hours per week, or 35 hours in two-parent households.¹ Permissible "work activities" include: (1) unsubsidized employment; (2) subsidized private sector employment; (3) subsidized public sector employment; (4) work experience; (5) on-the-job training; (6) job search and job readiness assistance; (7) community service programs; (8) vocational educational training; (9) job skills training directly related to employment; (10) education directly related to employment; (11) attendance at secondary school or GED program; and (12) provision of child care to an individual participating in a community service program.

A number of the above-listed "work activities" contemplated by TANF are just that — work. Others are more education or training oriented. However, because many of the categories of "work activities" permitted under TANF are vague and undefined, evaluation of Fair Labor Standards Act coverage cannot be done on a categorical basis, but rather will depend on the substance of the "work activities" being performed, analyzed under DOL's traditional tests. The TANF law does not exempt TANF recipients performing work from FLSA coverage. Exemptions by implication are disfavored under the FLSA. Thus, when TANF recipients engage in "work activities" that meet the traditional tests for FLSA coverage, they will be entitled to the FLSA's protection.

Our experience to date with workfare programs makes clear that the activities to which workfare participants typically are assigned (e.g., cleaning parks, janitorial services, clerical work) are jobs that unquestionably qualify as work under the FLSA. We believe, therefore, that substantial numbers of TANF recipients will be performing work, and will be entitled to the Fair Labor Standards Act's minimum wage and other protections.

¹ The percentage of TANF recipients who must be engaged in work increases by 5 percent each year until it reaches 50 percent in the year 2002. In addition, the number of required work hours increases to 25 in fiscal year 1999 and 30 hours in fiscal year 2000.

The FLSA's Purposes and Coverage

The Fair Labor Standards Act was enacted to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" and the unfair competition caused by such practices. 29 U.S.C. § 202(a). The Act's coverage is extremely broad, and protects all workers whom an employer "suffer[s] or permit[s] to work." 29 U.S.C. § 203(g). As the Supreme Court has observed, "a broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." U.S. v. Rosenwasser, 323 U.S. 360, 362 (1945). Senator Hugo Black, the FLSA's principal sponsor, characterized the FLSA's term as "the broadest definition that has ever been included in any one act." *Id.*, citing 81 Cong. Rec. 7657 (1937).

Unlike other statutes, where common law tests of employment are utilized, the "economic realities" of a situation govern whether an employment relationship exists for purposes of coverage under the FLSA. This bedrock principle was set forth by the U.S. Supreme Court in Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961), and has been consistently utilized since.² Under social welfare legislation such as the FLSA, "employees are those who as a matter of economic reality are dependent upon the business to which they render service." Bartles v. Birmingham, 332 U.S. 126, 130 (1947). The determination depends "upon the circumstances of the whole activity." Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947). Relevant factors include, but are not limited to: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).

Although broad, the FLSA's definition is not all-encompassing. "An individual who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit," is not an employee. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947). Still, the overriding consideration is the economic realities of the situation,

² Indeed, in Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992), although reverting to the common law test for interpreting the term "employee" for purposes of ERISA, the Supreme Court expressly distinguished the FLSA and noted that the FLSA's "striking breadth . . . stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." 503 U.S. at 326.

under which an employment relationship may be found even where no cash payments are made and the participants themselves do not consider themselves employees. Tony and Susan Alamo Foundation v. Sec'y of Labor, 471 U.S. 290 (1985).

Proposed Guidance for Evaluating FLSA Coverage for TANF Recipients

Based on experience to date with workfare programs, and the strong emphasis in the new welfare law on work, we believe that substantial numbers of workfare participants under TANF will be employees performing work and will be entitled to coverage under the FLSA. A fact-based analysis of the "economic realities" of the situation will make the employment nature of the relationship clear. We suggest that the Department of Labor articulate guidance, based on existing tests, for determining FLSA coverage under TANF work programs, and that DOL include such guidance in its Field Operations Handbook and other appropriate sources. The following principles, gleaned from current law, should be included in DOL's guidance as to whether an employment relationship, and FLSA coverage, exists.

1. "Striking Breadth" of FLSA's Coverage. Congress intended the FLSA to have broad coverage in order to achieve its remedial purposes of protecting a minimum standard of living and eliminating unfair competition caused by sub-standard wages. Courts have consistently affirmed the FLSA's "striking breadth." See, e.g., Darden, 503 U.S. 318; Tony and Susan Alamo Foundation, 471 U.S. at 296. DOL should promote this principle of broad FLSA coverage in its analysis of welfare-to-work programs.

2. Economic Realities Test. DOL's guidance should emphasize the applicability of the "economic realities" test in analyzing FLSA coverage under workfare programs. The test is not mentioned in DOL's current guidance. Field Operations Handbook (Oct. 20, 1993) at 10b40(a). Inclusion of the "economic realities" test is important to reinforce the point that as in all FLSA cases, the economic realities of the workfare situation should be analyzed to determine whether an employment relationship exists. The absence of the economic realities test in DOL's guidance could result in a mistaken view that TANF work arrangements should follow a different analysis from other types of work.

We believe the economic realities test will be satisfied in the vast majority of cases, given that TANF recipients "as a matter of economic reality are dependent upon the business to which they render service" for their subsistence income. Bartles v. Birmingham, 332 U.S. 126, 130 (1947).

3. Employer as Beneficiary of Services. A relevant factor in determining whether an employment relationship exists is whether the services being performed primarily benefit the employer or the individual. Employers may argue that work being performed by workfare participants benefits the participant and not the employer, because the participant is performing the activity as a condition of receiving government benefits aimed at building economic self-sufficiency. They may also argue that workfare is akin to rehabilitation programs sponsored by the Salvation Army and others, which some courts have found to be "solely rehabilitative," and outside the purview of the FLSA. See Williams v. Strickland, 87 F.3d 1064 (9th Cir. 1996). However, a better approach is to focus on whether the employer is primarily benefitting from the work participant's activities. In this regard, a relevant consideration should be whether the employer has assigned the TANF recipient to perform work or produce products similar to the employer's other employees.

4. Expectation of Compensation. Courts have found the issue of whether the employee has an expectation of compensation for his/her services relevant to the question of FLSA coverage. TANF participants will fully expect compensation, i.e., at least their TANF payment, for the services they perform, providing strong evidence of their status as employees.

5. Tax Considerations. DOL should consider whether an employer has availed itself of the Targetted Jobs Tax Credit (or similar benefits) for the TANF recipient or similarly-situated workers. These programs typically reward employers for employing hard to place individuals, including, in the case of the federal law, welfare recipients. Employers should not be permitted to claim tax breaks based on employer status but avoid employer status for purposes of paying the minimum wage.

6. Functions vs. Labels. As previously noted, the "work activities" permitted under TANF are broad in scope, ranging from vocational education to community service and employment. The categories of work activities contained in the law are not defined and are not useful in distinguishing between activities that do and do not constitute work for purposes of the FLSA. Accordingly, the focus should be on the functions a TANF recipient performs, and not the label that the state or employer attaches to those activities.

7. Training vs. Work. The stated purpose of the new welfare law is to help individuals make the transition from government assistance to self-sufficiency. Equipping TANF recipients with the knowledge and skills needed for good jobs at good wages will in many cases require extensive training and education. To the extent TANF training programs meet DOL's traditional criteria for excluding such programs from

FLSA coverage, DOL's standard rules should govern. However, DOL should be vigilant in not permitting employers to use "training programs" as a subterfuge for engaging TANF recipients to perform work without the protections of the FLSA.

Under DOL's traditional test for distinguishing between training and employment, trainees are not employees if all six of the following factors are met:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. The training is for the benefit of the trainees;
3. The trainees do not displace regular employees, but work under close observation (Note: TANF does not permit employers to displace current employees with TANF recipients)
4. The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the completion of the training period; and
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.³

When confronted with employer arguments that TANF recipients are trainees and not employees, DOL should review the nature of the activity being performed and consider whether such an activity typically is considered work. In addition, DOL should consider the typical duration of training for such work. Given past experience with workfare programs, it is likely that in most cases, TANF recipients will be placed in low-level, entry-level work, and training will be of a limited nature and duration. Thus, the nature and duration of TANF worker training will differ markedly from the training DOL has excluded from FLSA coverage.

8. Who is the Employer? The FLSA defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). In determining who is the TANF worker's employer, the traditional indicia of employer control should factor into the analysis, including:

³ Similar criteria were recently set forth by DOL for purposes of distinguishing when activities under the recent School-to-Work Act count as work vs. schooling. Courts often utilize the above criteria as guidance, but do not necessarily find them determinative. Reich v. Parker Fire Protection District, 992 F.2d 1023 (10th Cir. 1993); McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989).

- a. Whether the employer has the ability to hire, discipline or fire the employee;
- b. Whether the employer determines the rate or method of payment;
- c. Whether the employer has the right to supervise and control the employees' work schedule, conditions of employment, or type or manner of work being performed;
- d. Whether the employer maintains employment records for the employee

Bonnette, 704 F.2d at 1470.

In reviewing the above factors, DOL should bear in mind that in some cases, a joint employer relationship may exist between the state agency supplying TANF payments and the entity for which the participant is working. Under FLSA joint employer doctrine, a determination of whether a joint employer situation exists depends on "all the facts in the particular case." 29 CFR § 791.2(a). The joint employer analysis will obviously be influenced by how a state elects to structure its program. While we do not know a great deal at this point about how states will be structuring their workfare programs under TANF, e.g., will states utilize employment agencies to place workfare participants, will states divert TANF checks to an employer or continue to make TANF payments on their own, etc., it is quite possible that a joint employment situation will exist. The state agency will, at a minimum, be responsible for the payment of "wages" in the form of a TANF grant, and may in many cases have a level of involvement and control over a TANF work participants' assignment. The employing entity will have control over the work to be performed and the conditions under which it is performed. Thus, both the state and the other employer may be jointly and severally liable for payment of the minimum wage.

Conclusion

DOL should prepare and circulate guidance stating that the economic realities test will be used to determine whether a TANF recipient is engaged in a "work activity" that meets the definition of work under the FLSA. This guidance should be incorporated into the Field Operations Handbook and other appropriate sources.

"REGULAR" MINIMUM WAGE WORKER	WOULD MOST LIKELY QUALIFY FOR:	BECAUSE INCOME BELOW:
Single parent with 2 kids employed 40 hrs/wk at minimum wage makes income < 100% of poverty	o Food Stamps	130% of poverty
\$5.15/hour x 40 hrs week x 52/wks = \$10,712	o Medicaid for: - kids under 6 - kids born after 9/1983	133% of poverty 100% of poverty
100% of poverty in 1996 for family of 3 = \$12,980	o Earned Income Tax Credit	\$11,610/year
	o Some subsidized child care	State-set formulas
	o Free school lunches for kids	130% of poverty
	o WIC supplemental food for kids < 5	185% of poverty
	o Home heating aid	150% of poverty
	o Housing/rental assistance	50% of median income in metropolitan area
	o Job training thru JTPA Title II-A	100% of poverty or 70% of BLS living standard
	o Unemployment Insurance	Because wages and hours worked would qualify in most states
	o Workers Comp	Because an "employee"

Note: Since the automatic link between AFDC and Medicaid eligibility has been broken, Medicaid coverage could be available to the single working parent as well as the children if eligibility meets state-set standards that were in place 7/16/96. The median of all states in 1996 was gross income of \$8,640 or less. Therefore, the single parent working 30 hours a week at minimum wage for 52 weeks a year (\$8,034) would most likely qualify for coverage in most states, regardless of whether they receive TANF or not.

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"TANF WORKER"	WOULD MOST LIKELY QUALIFY FOR:	IF GROSS INCOME BELOW:
Single parent with 2 kids employed in workfare situation Assuming income = < 100% poverty	o Food Stamps	130% of poverty
	o Medicaid for - kids under 6 - kids born after 9/1983	133% of poverty 100% of poverty
	o Earned Income Tax Credit	\$11,610/year
	o Some subsidized child care	State-set formulas
	o Possibly transportation expenses	State-set formulas
	o Free school lunches for kids	130% of poverty
	o WIC supplemental food for kids < 5	185% of poverty
	o Home heating aid	150% of poverty
	o Housing/rental assistance	50% of median income in metropolitan area
	o Job training thru JTPA Title II-A	100% of poverty or 70% of BLS living standard
o Unemployment Insurance	If wages and hours worked would qualify in most states	
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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.

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1/6/97**

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**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

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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

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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

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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?

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

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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.

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(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

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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

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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?

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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.

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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 ONLYFLSA 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.