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FYI
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Minimum Wage

MEMORANDUM

TO: AFL-CIO

FROM: Guy Molyneux and Geoffrey Garin

DATE: June 10, 1997

SUBJECT: Minimum Wage Coverage for Workfare Recipients

Peter D. Hart Research Associates has just completed a national voter survey that includes two questions measuring support for extending minimum wage and other workplace legal protections to welfare recipients in workfare programs. The survey was conducted by telephone June 6 through 9 among a representative sample of 800 registered voters who participated in the 1996 elections. The margin of error on these results is +/-4%.

Strong voter support for minimum wage coverage. The survey results reveal that American voters strongly believe that minimum wage laws and other basic legal workplace protections should apply to those in state workfare programs. The survey question reads as follows:

As you may know, Congress passed a law last year requiring able bodied welfare recipients to work in state workfare programs. Do you believe that the people who are required to work in these workfare programs should be covered by basic legal protections, including the minimum wage law, or do you believe that the states should not have to pay the minimum wage to welfare recipients in workfare programs?

Fully 69% agree that workfare participants should be covered, while just 25% believe that states should not have to pay participants the minimum wage.

We would note that workfare participants are clearly identified in this question wording (twice) as still being "welfare recipients," making the strong

favorable response that much more impressive (and meaningful). The breadth of support for minimum wage coverage is also striking, including two-thirds of those with incomes over \$50,000 (67%), professionals (67%), and white voters (67%). Even college-educated men (71%) and Republican voters (62%) favor minimum wage coverage by large margins.

Wage impact argument for coverage is strong. Voters' initial support for coverage doubtless arises from a fundamental sense of fairness. Since other workers receive this protection, they reason, why shouldn't workfare participants in similar jobs? However, organized labor has another, less immediately obvious reason for believing that coverage is needed -- namely, the corrosive effect that sub-minimum-wage workfare programs could have on the jobs and wages of low-wage workers *outside* of workfare programs. The survey tested the appeal of this argument for coverage against a powerful opposition case that focuses on the cost of coverage to taxpayers, and finds the wage impact argument prevails by a decisive two to one margin.

Supporters of paying the minimum wage to people in workfare programs say that many employees who currently work at the minimum wage would lose their jobs if workfare participants could be forced to work for less, and also say that exempting one group of workers from minimum wage protections opens the door to undermining the minimum wage for others. (59% agree.)

Opponents of paying the minimum wage to people in workfare programs say that the taxpayers would have to support higher welfare budgets if states are forced to pay the minimum wage, and also say that welfare recipients who want better pay should get off welfare and find a job on their own. (31% agree.)

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NOTE TO ELENA KAGAN

FROM: SEITH HARRIS 
DATE: FEBRUARY 10, 1997
SUBJECT: MATERIALS YOU REQUESTED

WR - Minimum Wage

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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*Background on
today's 5:30*

Elena

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1/6/97

This document is an internal, confidential communication containing materials that would not otherwise be disclosed to the public under the Freedom of Information or Privacy Acts. Release of this document could significantly impede the deliberative process within the government. Consequently, this document is labeled "Confidential" and no additional copies should be made except those needed by Federal employees involved in the decisional process.

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 FRWORA?

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).

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FLSA AND WELFARE REFORM

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

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

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

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

employer will not pay the trainee wages or other compensation.

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

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

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

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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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Mass 45 of 17,000

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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.

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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*

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. 3, 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 606.
Encyclopedias
Compacts and agreements between states in general, see C.J.S. States §§ 31, 32, 143.

WESTLAW ELECTRONIC RESEARCH

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

§ 4728. Transfer of functions

(1) 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

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)(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.

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(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 be designed to promote diversity on the part of personnel in the execution, and management, of personnel administration.

(g) Interpretation of

Nothing in this section shall be construed to—

(1) authorize the Office to exercise any authority over the assignment, advancement, or personnel action of any State or local employee;

(2) authorize the Office to exercise merit basis to the extent of any State or school system;

(3) prevent the Office from imposing conditions of the terms and conditions of the finances of the State;

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

(5) require the Office to disclose, or any personnel of the government to disclose, his national origin or to take any action which is designed to discriminate on the basis of personal relationships, blood or marriage, or consanguinity, or concerning sexual matters;

(6) require the Office to participate in such activities as

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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 (26 FR 6465).

[39 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. 4723, 4753; E.O. 11829, 3 CFR part 157 (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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lly required merit personnel systems: 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

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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 19801, 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.

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; 16 U.S.C. 3020(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. 300m-1(b)(4)(B).

Old-Age Assistance, Social Security Act (Title II), as amended by the Social Security Act Amendments of 1939, section 301, 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. 513(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. 602a(b).

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 1960, section 1402, on August 28, 1960; 42 U.S.C. 1352(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. 3027(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."

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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 welfare 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 welfare 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 $\$5.15/\text{hour} \times 40 \text{ hrs week} \times 52/\text{wks} = \$10,712$ 100% of poverty in 1996 for family of 3 = \$12,980	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 Free school lunches for kids	130% of poverty
	o WIC supplemental food for kids < 5	165% 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	165% 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	
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.