The Implications of Applying Federal Minimum Wage Standards to TANF Work Activities

The applicability of the Fair Labor Standards Act (FLSA) minimum wage provisions to participants in work activities under state Temporary Assistance for Needy Families (TANF) block grant programs has prompted concerns that FLSA coverage will inappropriately restrict state flexibility in designing work activities, and impede states' ability to meet the participation requirements established under TANF. The application of FLSA minimum wage requirements to TANF work activities will help to ensure that individuals who must perform work in order to receive welfare assistance receive protections available to those who work for wages in more traditional settings. While the minimum wage requirement will limit the intensity of work activities that some states may require, it will not interfere with effective and appropriate employment preparation activities, and need not unduly hamper states' ability to comply with the TANF participation rates.

Background

As increasing numbers of welfare recipients are placed into work activities as a result of the new welfare law, they may face many of the problems confronting other workers, including health and safety hazards and discrimination on the job. Under the former statutory provisions that authorized the JOBS program, welfare recipients engaged in the community work experience programs (CWEP) were expressly protected against being required to work more hours than would be allowed under the federal minimum wage. They were also entitled to workers' compensation, and protection against health and safety violations and discrimination on the job.[1] The new law is silent with regard to the protections to be afforded TANF recipients who participate in work activities. Therefore, the Department of Labor and other federal agencies charged with enforcement of federal laws that protect workers are all now faced with the need to determine the applicability of independent employment laws to work programs established for welfare recipients.

Under existing legal standards and precedents, it is likely that the FLSA, the Occupational Safety and Health Act, Title VII of the Civil Rights Act of 1964, and other workplace protections would be found to be applicable to recipients participating in many welfare work programs. This includes the right under the FLSA to be paid at the minimum wage, so that participants' hours of work could not exceed their cash benefits divided by the minimum wage.[2] The purpose of the FLSA is to

[1] See, "Welfare Reforming the Workplace: Protecting the Employment Rights of Welfare Recipients, Immigrants, and Displaced Workers," Dietrich, Emsellem, and Yau, Clearinghouse Review, January-February, 1997, p.943.

[2] The standards applicable to determine whether an individual is an employee focus on the "economic realities" of the work rather than the label, such as "trainee" or "volunteer", assigned by the employer or the state program. The required analysis centers on whether the employer is the primary beneficiary of the participant's activities, or whether those

protect individual workers as well as to prevent the downward pressure on wages for other workers.[3] To the extent that welfare recipients participating in a TANF work program are engaged in activities that primarily benefit the employer and, therefore, qualify as employees under traditional FLSA standards, the policy goals served by the minimum wage are equally applicable and important.

Two concerns have been raised about the application of minimum wage protection to TANF work programs. First, it has been suggested that work experience programs designed to assist those who are not ready for regular, unsubsidized employment will be precluded. However, the FLSA contains a specific exemption for training activities, and such training can include work experience activities provided that the program is consistent with Department of Labor standards concerning the distinction between training and employment.

Second, it has been suggested that limiting the number of hours that an individual can be required to work in exchange for welfare assistance will significantly hamper states' ability to meet the TANF participation requirements. The application of the minimum wage may limit the number of hours an individual can be required to work to less than the number required to be considered countable toward meeting the TANF participation rate, if the only "compensation " provided is the welfare grant. However, as discussed below, there is a significant array of countable activities into which recipients may be placed in order for a state to meet the new participation rates. More importantly, although unsubsidized employment and work experience activities count equally in calculating a state's participation rate, unsubsidized employment is the principal goal of those who receive assistance, Congress and the public. Application of FLSA standards sends an important signal concerning the need to focus attention and resources on helping recipients prepare for, find, and keep unsubsidized employment, and not simply to operate programs designed to satisfy TANF participation rates.

Impact of Minimum Wage Obligation on State Strategies to Meet TANF Participation Requirements

The TANF participation rates impose significant new requirements on states. If participants in work programs are found to be "employees" under the FLSA, they will have to be compensated at a

activities are undertaken primarily for the participant's benefit. For a complete discussion of the legal standards and precedents, see "Coverage of Welfare-to Work Participants Under the Fair Labor Standards Act," (AFL-CIO, Office of General Counsel, January 1997), "Employment Rights of Workfare Participants and Displaced Workers," (National Employment Law Project, 1996).

[3] For example, the U.S. Supreme Court, in Tony & Susan Alamo Foundation v. Sec. Of Labor, 471 U.S. 290, 302 (1985), found that rehabilitating drug addicts working for a non-profit agency were not “volunteers” as argued by the agency, and that such “exceptions would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses.”

rate that equals the minimum wage. In a number of states, if the only compensation provided is the welfare assistance generally available under the state's program, the compensation may be too little to allow a state to require participation for the number of hours necessary to be able to count a participant when calculating the state's participation rate. However, states have substantial latitude to engage participants in countable work activities, including work experience programs that may be subject to FLSA coverage, and still meet the new participation requirements.

Under TANF, states must meet two new participation requirements, the "all-families" participation rate and the "two-parent families" participation rate. The applicable rates and hourly thresholds are as follows:[4]

All-Families and Two-Parent Families Participation Requirements Under TANF Block Grant				
Fiscal Year	All-Families Participation Rate	Hours Required to Count as Participant Toward All-Families Rate[5]	Two-Parent Families Participation Rate	Hours Required to Count as Participant Toward Two-Parent Families Rate
1997	25%	20	75%	35
1998	30%	20	75%	35
1999	35%	25	90%	35
2000	40%	30	90%	35
2001	45%	30	90%	35
2002 and after	50%	30	90%	35

Many states will likely have lower "effective" required participation rates than the rates specified in the statute and shown in the Table above. Under the statute, HHS is required to prescribe regulations for reducing a state's participation rate based on the state's caseload reduction. The participation rate reduction for a year will be the number of percentage points equal to the number of percentage points by which the number of families receiving assistance under the state program funded under the block grant during the immediately preceding fiscal year is less than the number of families who received aid in FY 95.[6] While HHS has not promulgated regulations that will govern the

[4] Sec. 407(a), (c)(1).

[5] A single-parent with a child under the age of six will not be required to participate in excess of 20 hours per week in 1999, and thereafter, in order to be counted as a participant when calculating a state's participation rate.

[6] More precisely, the reduction is by the number of percentage points by which "the average monthly number of families receiving assistance during the immediately preceding fiscal year under the State program funded under this part" is less than "the average monthly number of families that received aid under the State plan approved under Part A (as in

calculation of the "caseload reduction credit," there have been significant caseload declines since 1995 in many states, and it is expected that the effective participation rates in many states for 1997 and 1998 will be significantly below the 25% and 30% stated in the statute. It is difficult to predict the impact of the caseload reduction credit on states' effective participation rates in 1999 and subsequent years.

Whether a state's effective participation rate is the rate set forth in the statute, or is lower based upon application of the caseload reduction credit, states have a number of options for structuring activities that will be countable in meeting the applicable rate.[7] To count toward the all-families rate, at least 20 hours of participation per week[8] (and to count toward the two-parent rate, at least 30 hours per week) must be attributable to the following activities:

- Unsubsidized employment;
- Subsidized private sector employment;
- Subsidized public sector employment;
- Work experience, if sufficient private sector employment is not available;
- On-the-job training;
- Community service programs;
- Job search and job readiness assistance, but only for 6 weeks;[9]
- Vocational educational training, not to exceed 12 months for any

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effect on September 30, 1995) during fiscal year 1995." Sec. 407(b)(3). However, the rate shall not be reduced to the extent that: the Secretary determines that the reduction in the number of families receiving assistance had been required by federal law; or the Secretary proves that the families were diverted from receiving assistance under a State program funded under the block grant as a direct result of differences in State eligibility criteria from the criteria in effect on September 30, 1995.

[7] A number of states had received waivers from HHS under Section 1115 that modified the former JOBS rules regarding the duration of job search, and participation in a range of education and training activities. Under TANF, states are authorized to continue these waivers, and to the extent that waiver provisions are inconsistent with provisions of TANF, states are not required to comply with the TANF provision until the expiration of their waivers. There remains much uncertainty about the interpretation of the TANF waiver provision. However, it may be that in some states, prior receipt of a Section 1115 waiver will result in a much broader set of countable activities than those listed below. See "Waivers and the New Welfare Law: Initial Approaches in State Plans" (Center for Law and Social Policy, November 1996)

[8] For the all-families rate, hours in excess of 20 (and for the two-parent rate, hours in excess of 30) may also be counted when an individual participates in: job skills training directly related to employment; education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency; or satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate.

[9] Not more than four of the six weeks can be in succession. Job search will be countable for 12 weeks if the state's unemployment rate is at least 50% greater than the unemployment rate of the United States.

individual, subject to the 20% cap (described below);

- For the all-families rate, a single head of household under age 20 can be counted if the recipient either maintains satisfactory attendance at secondary school or the equivalent, or participates in education directly related to employment for at least the number of hours required for the applicable year, subject to the 20% cap (described below); or
- Provision of child care services to an individual who is participating in a community service program.

- **20% Cap**
  Not more than a total of 20% of all individuals in all families (and in all two-parent families) may be counted as engaged in work by reason of participation in vocational educational training or by being a single, head of household under age 20 attending school.[10]

As discussed below, there are a number of significant alternatives to the creation of work experience programs in which participants work in exchange for their welfare grants. Expansion of these alternatives will diminish the need for work experience programs. In addition, there are several ways in which even in states that provide for low or moderate grant levels, work experience programs can operate in compliance with the FLSA.

Unsubsidized Employment

During the past several years, there have been two policy trends that can be expected to result in significant numbers of recipients working in unsubsidized jobs for 20 or more hours per week and therefore being countable toward the "all-families" rate. These trends include: 1) increased disregards for earned income in calculating eligibility and benefit levels for cash assistance, which allow families with higher earnings to receive a supplemental cash assistance grant; and 2) "work first" programs that emphasize job search as the initial activity for many recipients. It is less clear whether these policies will significantly impact participation toward the two-parent participation rate, because even with enhanced earnings disregards, in many families when one of the parents in a two-parent family works 30 or more hours per week as will be necessary to be countable toward the new rate, they are likely to be ineligible for a supplemental cash grant.

[10] There continue to be unresolved issues about how to interpret the cap on vocational educational training. The statute provides that a limit of “not more than 20 percent of individuals in all families and in 2-parent families” may count toward the participation rates by participating in vocational educational training or by being single heads of households under age 20 engaged in education. Conference Report language suggests that the intent of the Conferees was to apply the 20% cap to those counting toward the participation rate rather than to the entire caseload. However, given the plain language of the statute, and in the absence of federal regulations, states would appear to have the discretion to interpret the provision consistent with its plain language, i.e., to allow 20% of individuals in all families to count through vocational educational training.

Subsidized Employment - Private Sector

In recent years, a number of states have initiated programs to provide wages subsidies to private employers who hire recipients. States now have more flexibility to structure such programs under TANF, and an explicit option under the Food Stamp Act[11] to include Food Stamp benefits in a wage subsidy program. In this model the employer would typically be expected to contribute a portion of the employee's wage, and might as well be expected to pay some or all of the costs for Unemployment Insurance, Worker's Compensation, and payroll taxes. While wage subsidy programs have historically operated on a small scale, it is expected that efforts in this area will continue to spread and may involve larger number of participants in coming years.

Subsidized Employment - Public and Non-Profit Sectors

Most current wage subsidy programs focus on placement in the private, for-profit sector. Another option would be to focus such efforts on public sector or non-profit sector positions, where, particularly in the former case, it may be easier to create positions on a broader scale than in the private, for-profit sector. As noted above, employers in such programs could reasonably be expected to pay a portion of the costs of wages, payroll taxes, etc, and Food Stamp benefits might also be used as necessary in addition to TANF benefits, and an employer contribution.

On-the-Job Training

On-the-Job Training (OJT) has been little used during the past several years in states' JOBS programs. However, encouraging results regarding the impacts of OJT identified in the National JTPA study may lead to greater experimentation in this area.

Job Search

As noted above, as states have moved to "work first" employment models, increasing use of job search as an initial and ongoing activity have marked many JOBS programs. However, the TANF provision that limits countable job search (and job readiness assistance) to six weeks for any individual will limit the extent to which such activities will provide substantial numbers of the participants needed in countable activities.

Vocational Educational Training

As noted above (and in footnote 10), states may reasonably interpret the statute to allow them to count up to 20% of the families receiving assistance toward the applicable participation rate if they include an adult participating in "vocational educational training," or if a family headed by an

[11] 7 U.S.C. Section 2025(b)

unmarried parent under age 20 is attending secondary school or the equivalent, or participates in education directly related to employment.[12] This option would allow states to meet up to 80% of the 1997 "all-families" rate, and up to 40% of the "all-families" rate specified for the years 2002 and beyond. For purposes of meeting the "two-parent" rates, a state that took full advantage of the vocational educational training option could meet nearly 27% of the statutory rate in 1997 and 1998, and a little over 22% of the required rate in 1999 and thereafter. Greater portions of the required participation rate might be met through vocational educational training and teen education activities if the effective participation rate is reduced as a result of the caseload reduction credit.

Work Experience/Community Service

Work experience programs in which participants are assigned to jobs in the public or non-profit sector and are required to work in exchange for their benefits have, until recently, been little used under the JOBS program. Under TANF, work experience placement at private, for-profit employers will also be allowed. Unlike subsidized employment models in which the participants are paid wages like other workers, participants in work experience programs receive welfare benefits in exchange for their work. The application of FLSA standards to determine whether a particular work experience or community service program falls within the definition of employment for purposes of minimum wage coverage is likely to involve, at least initially, consideration of the circumstances of each program. It remains uncertain the extent to which, if at all, some programs within this general category may be exempt from coverage. However, it is clear that the FLSA minimum wage requirements will apply to many such programs, and will limit to some degree the number of individuals who can be required to work 20 hours per week, or in the case of two-parent families, 30 hours per week. However, as discussed below, there will, in the vast majority of states, continue to be substantial numbers of recipients upon whom such requirements may be imposed.

In September, 1997, when the minimum wage increases to $5.15 per hour, a family will have to receive a benefit of at least $443 per month in order to be required to participate in a work experience program for 20 hours per week. (For two-parent families in which an adult must participate for 30 hours per week, benefits would have to equal $664 per month.) In states in which cash assistance is not provided at the requisite level, one solution, of course, is to raise assistance levels to the amount necessary in order to require 20 (or 30) hours of work per week. One example of a state that may be taking this approach is Wisconsin. The Wisconsin Works (W-2) program will require virtually all participants who are not engaged in unsubsidized, or subsidized, private sector employment to participate in work experience programs. After considerable debate, the administration in Wisconsin has recently decided to seek an increase in the monthly benefits payable to participants in

[12] In FY95, roughly 6% of all families receiving aid were headed by teen parents.

work experience components to comport with the newly established federal minimum wage.[13] In any event, particularly for states where benefits are not far below $443, (or $664), benefit increases may be the most appropriate course.

One alternative strategy for operating a work experience program consistently with the FLSA would be to require entities - "employers" - with whom participants are placed to provide a payment to make up the difference between the amount provided by the TANF benefit, and the amount needed to comply with the FLSA. For example, the median state maximum AFDC benefit for a family of three in July, 1996 was $383 per month.[14] In order to allow for participation for 20 hours per week - 86 hours per month - the employer would have to provide a supplement of $60 per month, 70 cents per hour, in order to provide a combined payment of $443 per month. The median state maximum benefit for a family of four in July, 1996 was $450 per month.[15] An employer in a state paying a $450 benefit would have to provide a supplement of $214, $1.66 per hour, to bring compensation for 30 hours per week up to the minimum wage. This supplement could be provided as a stipend that would be treated as noncountable income for purposes of calculating the TANF grant. Alternatively, TANF benefits and an employer stipend could be combined in order to pay a regular hourly wage for the hours worked, transforming this model into a subsidized employment situation as discussed above. Either way, a contribution from the employer may be an appropriate resolution of the problem facing states which pay monthly benefits below $443 for three (or $664 for four) insofar as services are being provided by the participant that benefit the employer.

Another alternative available to states is to operate a Food Stamp Workfare program[16] in tandem with a TANF work experience program. This would allow a state to combine the hours of work that may be required in exchange for TANF assistance with the hours of work that may be required for Food Stamp benefits. Using this approach, in every state but Mississippi, the combined value of AFDC maximum benefits and typical Food Stamp allotments provide sufficient benefits to

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[13] Notwithstanding the proposed benefit increase, there continue to be controversies about the W-2 program because while the benefits are intended solely as compensation for work performed, an additional 10-12 hours of other work related-activities may be required for which no compensation is provided, and because failure to comply with this latter requirement can result in benefit reductions that would bring benefits below the amount necessary to equal the minimum wage rate multiplied by the actual number for hours worked.

[14] See, Table 1, p.4, "Aid to Families With Dependent Children (AFDC): Program Benefit Rules, July 1, 1996," (Congressional Research Service, January 1997).

[15] Id., Table 2, p.7.

[16] 7 U.S.C. Section 2029. Although families that include a child under the age of six, are in most states exempt from participation in Food Stamp work programs, under the recently enacted Simplified Food Stamp program option (7 U.S.C. Section 2035) a state could align the Food Stamp work program exemptions with its TANF exemption policies.

require 20 hours of work for families of three or more;[17] 40 states provide combined benefits sufficient to require 20 hours of work for families of two. For two parent families, 43 states provide combined benefits for a family of four that exceed the $664 per month that would be required for 30 hours of work per week.[18] [19] This approach could also be coupled with more modest employer contributions or increases in cash assistance levels to bring the combined benefit up to required levels when necessary.

Although most families receive the maximum available AFDC benefit, some do not. Approximately 15% of all families receiving aid in 1995 had some source of countable unearned income that resulted in the families receiving less than the maximum benefit available.[20] For example, a family receiving unearned income from Social Security might only be receiving a monthly grant of $100, even thought the maximum benefit for the family if it had no other income might be $350. In determining the number of hours the parent could be required to participate in a work experience program, application of the FLSA would appropriately limit the number of hours based on the actual benefits paid to the family. Absent a requirement that states comply with FLSA, a parent in a family receiving only $100 of assistance per month could be required to work for 20, or 30, hours per week for that assistance.

Another factor that may affect the number of hours that might be required of a participant is the payment of child support on behalf of children in the family. In 1995, child support payments were made on behalf of children in about 20% of all families receiving aid.[21] A portion of these payments go to reimburse the state for the cost of the benefits provided to the family. For example, a family might be receiving $350 per month in assistance, while the absent parent of the children in that family makes monthly child support payments of $250 that are retained by the state and federal governments. The net benefit the family is receiving, above and beyond the absent parent's contribution, is $100 per

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[17] In 1995, 56% of all families who received AFDC had two or more children. (See, Table 8, "FY1995 Characteristics and Financial Circumstances of AFDC Recipients" (HHS))

[18] In 1995, 73% percent of all two-parent families who received AFDC had two or more children. (See, Table 9, "FY1995 Characteristics and Financial Circumstances of AFDC Recipients" (HHS))

[19] Information concerning the combined value of maximum AFDC benefits and typical Food Stamp allotments for the states is from unpublished data prepared by the Center on Budget and Policy Priorities, and from "Aid to Families With Dependent Children (AFDC): Program Benefit Rules, July 1, 1996," (Congressional Research Service, January 1997).

[20] See, Table 42, "FY1995 Characteristics and Financial Circumstances of AFDC Recipients" (HHS)). An additional 9.5% of all families had earned income that may have reduced their benefit payments, but those families also would have had some number of hours in unsubsidized employment that would be countable toward the 20 (or 30) hours required to be countable toward the state's participation rate. See, Table 36, "FY1995 Characteristics and Financial Circumstances of AFDC Recipients" (HHS)).

[21] See, Table 9-10, pp.593-594, "1996 Green Book," Committee on Ways and Means, U.S. House of Representatives.

month. Under the JOBS program, when calculating the number of hours of CWEP activities that could be required, only the portion of the grant paid to a family that was not reimbursed by child support collections could be counted. This policy was intended to prohibit a parent from having to participate in a work activity to "earn" child support payments made by a non-custodial parent on behalf of the children. Assuming the same policy were to be applied under TANF when calculating the number of hours a parent could be required to participate in a work experience activity, this would limit the number of hours that could be required consistent with the requirements of FLSA.

Penalties for Failure to Meet TANF Participation rates

Section 409(a)(3) of the Act specifies financial penalties HHS is to impose on states which fail to meet the new participation rates. Section 409(b) specifies that HHS may not impose a penalty if it determines that a state has "reasonable cause" for failing to comply with the particular requirement at issue.[22] To date HHS has not issued any guidance with regard to its interpretation of the reasonable cause language. It would be appropriate for HHS to consider including among the factors that might lead to a finding of reasonable cause for failing to meet the participation rates, that a state has made full use of other work activity options, and has required participation in work experience programs as permissible given the state's benefit levels and the requirements of the FLSA.

Conclusion

For all of the reasons why the federal minimum wage requirement represents sound public policy, its application to welfare work programs is equally justified and appropriate. Its application will have, in some states, the effect of limiting the number of hours recipients may be required to participate in work experience activities. However, states have significant latitude to structure other activities to meet the effective participation rates, and can require participation in work experience for less than 20 hours per week to the extent they believe such activities are an important part of their overall welfare strategies. To the extent that one affect of FLSA coverage is to increase states' focus on helping recipients secure unsubsidized employment as opposed to participation in work experience programs, such emphasis is appropriate and consistent with the desire of most recipients to secure unsubsidized jobs as opposed to working in exchange for welfare assistance.

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[22] While there are certain penalties to which the reasonable cause exception does not apply, the exception is available for penalties resulting from failure to meet the participation rates.