Work Is Its Own Reward: Are Workfare Participants Employees Entitled to Protection under the Fair Labor Standards Act

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WORK IS ITS OWN REWARD: ARE WORKFARE PARTICIPANTS EMPLOYEES ENTITLED TO PROTECTION UNDER THE FAIR LABOR STANDARDS ACT?

Nan S. Ellis†

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INTRODUCTION

Fulfilling President Clinton’s campaign promise to “end welfare as we know it,”† the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)² substantially changed the delivery of welfare in this country. PRWORA replaced Aid to Families with Dependent Children (AFDC) with Temporary Assistance for Needy Families (TANF).³ Most importantly for the purposes of this article, PRWORA imposed work requirements by mandating state participation rates and by requiring work activity as a condition of welfare receipt after two years.

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¹ In a campaign pledge on October 23, 1991, Bill Clinton promised: “‘In a Clinton Administration, we’re going to put an end to welfare as we know it. . . . We’ll give them all the help they need for up to two years. But after that, if they’re able to work, they’ll have to take a job in the private sector, or start earning their way through community service.” Joel Handler, The Poverty of Welfare Reform 110 (1995).


Although touted as dramatic reform, work requirements are not a new phenomenon. In modern times, the Work Incentive Program (WIN) in 1967, modified in WIN II, and in the Job Opportunity and Basic Skills program (JOBS) of the Family Support Act of 1988 imposed work requirements on welfare recipients. In contrast to prior work requirements, however, PRWORA failed to specify whether welfare recipients fulfilling their work requirements were entitled to employment protections, such as minimum wage protections under the Fair Labor Standards Act (FLSA).

Under PRWORA's policy of devolution to the states, states were given discretion in how they would meet the statutory work requirements. Not surprisingly, most states have adopted a variety of approaches designed to ensure that welfare recipients meet the work requirements. One approach has been to institute programs that require work, typically in a public sector environment, in exchange for the welfare benefit. Such programs, often termed workfare, present a plethora of legal and moral questions. This article will address only the extent to which workfare participants are entitled to the protections that the FLSA offers, particularly minimum wage protections. When one compares the number of hours of work mandated by PRWORA to the dollar amount of

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4 Work requirements have been offered as a response to poverty since the 1472 Statute of Laborers. Handler, supra note 1, at 10.


6 Each state was required to submit its own plan to the Secretary of Health and Human Services detailing how the state would meet the goals of the statute.


8 By failing to specify the extent to which workfare recipients are afforded protection under employment laws, PRWORA also left unanswered the extent to which such participants are afforded the protection of Title VII of the Civil Rights Act, the National Labor Relations Act (NLRA), and worker's compensation statutes. See generally Nancy E. Hoffman, Workfare Implications for the Public Sector, 73 St. John's L. Rev. 769 (1999) (discussing the applicability of NLRA, Occupational Safety and Health Act, and various workers' compensation and anti-discrimination statutes to PRWORA); Terence O'Neil, Workfare from a Management Perspective, 73 St. John's L. Rev. 813 (1999) (looking at whether Title VII, the
the benefit, it has been estimated that many states are paying welfare recipients more than fifty percent below minimum wage.\textsuperscript{9} Moreover, as Congress considers reauthorization of TANF, it is likely that the work requirements will increase. If the work requirements are increased it becomes increasingly likely that more states and municipalities will turn to workfare-like programs to meet the stricter requirements.\textsuperscript{10} Moreover, if we are to require that greater numbers of welfare recipients work in exchange for their welfare checks, it is essential that we delineate the extent to which they are to be afforded the protections afforded to all workers, including minimum wage protections.

Whether or not states apply the minimum wage protections of the Fair Labor Standards Act (FLSA)\textsuperscript{11} to welfare to work recipients depends on whether or not such workers are considered covered "employees" under the FLSA. Only three states (Colorado, Minnesota, and Ohio) have statutorily provided workfare recipients with legal employee status.\textsuperscript{12} The Department of Labor's (DOL) position is that the FLSA applies to workfare participants.\textsuperscript{13} However, the DOL interpretation is not determinative. Resolution of the issue has been left largely to the courts. In \textit{Johns v. Stewart},\textsuperscript{14} the only federal case to have considered the question thus far, the court held that Utah's workfare participants were not covered employees and therefore not entitled to minimum wage.
The *Johns* case has not, however, decided the issue. Commentators criticize the case as unsound on both legal and public policy grounds.\(^{15}\) It has been argued that the *Johns* court ignored the economic realities test set forth by the Supreme Court in *Goldberg v. Whitaker House Cooperative, Inc.*\(^{16}\) and failed correctly to apply the totality of the circumstances approach from *Tony & Susan Alamo Foundation v. Secretary of Labor.*\(^{17}\) In addition, the holding has been criticized as inconsistent with prior case law which found that prison workers could constitute employees entitled to FLSA protection,\(^{18}\) that homeless individuals who worked in a work program were covered employees,\(^{19}\) and that former mental patients performing work at a hotel were employees.\(^{20}\)

This article will consider the extent to which workfare participants should be considered employees under FLSA entitled to the protections of the Act, such as minimum wage. In order to accomplish that goal, Part I provides an overview of PRWORA work requirements and describes the ways in which states have been moving to meet the requirements, including workfare. Part II discusses the relevant FLSA provisions, including the applicable definitions and the statute’s policy goals. In addition, this Part examines the various tests used by the courts to determine whether a worker meets the statutory definition of an employee entitled to FLSA protection. Part III applies these tests to the typical workfare placement and concludes that workfare participants should be afforded the protections of federal employment law, including minimum wage protections, from both a statutory and a public policy perspective. Part IV examines the public policy objectives of the FLSA, as well as of PRWORA, and concludes that extending FLSA coverage to include workfare participants can best achieve these objectives. This section also briefly examines the most recent Senate and House bills (under consideration as part of TANF reauthorization).\(^{21}\) Both bills

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\(^{17}\) 471 U.S. 290 (1985).

\(^{18}\) See Watson v. Graves, 909 F.2d 1549 (5th Cir. 1990).


\(^{20}\) Donovan v. New Floridian Hotel, 676 F.2d 468 (Fla. 1982).

\(^{21}\) This article will consider House Bill 4737 and the Senate Tri-Partisan Consensus provisions. Both bills were proposed during the Summer of 2002. Legislation reauthorizing TANF was not passed and the timetable was extended to March 31, 2003. National Immigration Center, *Congress Adjourns without Reauthorizing TANF*, 16 IMMIGR. RTS. UPDATE 7 (2002), at http://www.nilc.org/immspbs/TANF/TANF005.htm. The provisions outlined in any new proposals are not expected to differ dramatically from the prior House and Senate bills. Robert Greenstein asserts that President Bush’s most recent proposal appears to “recycle the requirements proposed last year.” *Center on Budget and Policy Priorities, Statement of Robert*
would increase the work participation requirements. To the extent that such increased work participation requirements are expected to lead to increased workfare programs and to require more hours to be worked to earn the TANF benefit, the problem this article outlines will be exacerbated. This article concludes by challenging Congress to address this issue in the reauthorization bills.

I. PRWORA OVERVIEW

In the early 1990’s, public policy attention focused on perceived problems surrounding the delivery of welfare in this country. Large numbers of people lived below the poverty line, a high percentage of whom were children. An increasing number of people received AFDC or welfare. In addition, government expenditures on welfare had grown steadily since its inception in 1935. Thus, proponents of welfare
reform argued that despite the growing amounts of money spent on welfare, the number of people living in poverty and on welfare was in fact increasing. More troubling to the general public was its perception of a welfare dependent populace and the attendant behavior problems that were thought to accompany welfare receipt. The rise of illegitimate births and the fact that one-half of families headed by women received welfare fueled the move to reform. Welfare was in “crisis” and the solution seemed to be welfare reform.

Welfare reform was achieved by way of PRWORA, enacted in 1996. PRWORA was designed to provide assistance to needy families, so that children could be cared for in their own home; end the dependence of needy parents on government benefits by promoting job preparation, work and marriage; prevent and reduce the incidence of out-of-wedlock pregnancies; and encourage the formation and maintenance of two-parent families. One of the central features of PRWORA was time-limited welfare and work requirements. Work requirements were imposed by the statute in two ways. First, PRWORA mandated state participation rates. In other words, in order to receive the full block grant, states were required to compel 25% of the families receiving assistance to engage in a “work activity” by the end of the 1997 fiscal year. The percentage rose to 50% in the year 2002. Work activities included such activities as unsubsidized employment, subsidized private and public sector employment, on-the-job training, job searches within specified limits, community service programs, vocational training, and attendance at secondary school. Second, one could not receive aid for longer than

AFDC costs was $12.2 billion, or 1.5% of all federal spending.” Id. “In 1995, $177 billion was spent on federal means-tested entitlement programs, with approximately $82 billion spend on Medicaid.” Epstein, supra note 24, at 22. The public perceives that budgetary cost have increased, despite the fact that real spending on AFDC fell between 1970 and 1983. Theodore R. Marmor et al., America’s Misunderstood Welfare State: Persistent Myths, Enduring Realities 84–86 (1990); see also Nice, supra note 7, at 341.

28 See Epstein, supra note 24, at 15–22 (discussing the rise of social problems and their link to economic disparity).

29 PRWORA § 601(a)(1).

30 PRWORA §§ 602, 607; see generally Handler, supra note 1, at 1–9 (arguing that there are three pillars of welfare reform: devolution of authority to the states, time limits and work requirements, and social behavioral provisions).

31 PRWORA § 407(a)(1).

32 PRWORA § 607(a)(1). These relatively high participation requirements are, however, offset by caseload reduction credits. The result therefore is considerably lower participation rates. See Framstad & Parrott, supra note 10; see also infra notes 139–40 and accompanying text.

33 42 U.S.C. § 607(d) provides that a welfare recipient can satisfy the work requirement by performing any one of the following work activities: “(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, in the case of a recipi-
two years unless engaged in a statutorily mandated work activity. Furthermore, PRWORA set an absolute time limit of five years upon the receipt of welfare.\textsuperscript{34}

PRWORA did exempt certain persons from the work requirement. For example, the state could choose to exempt single custodial parents of children under the age of 12 months from the work requirement.\textsuperscript{35} Similarly, single parents of children under the age of 6 years could meet the work requirements by working 20 hours a week.\textsuperscript{36} In addition, teen heads of households met the work participation requirement by maintaining satisfactory attendance in secondary school.\textsuperscript{37} Penalties were provided for failure to engage in work activities.\textsuperscript{38} If an individual refused to engage in work activities, the state could either reduce the amount of assistance or terminate the assistance altogether.\textsuperscript{39}

Although work requirements were the bedrock of the 1996 welfare reform, they were not an entirely novel idea.\textsuperscript{40} In modern times, work requirements had been imposed in the Work Incentive Program (WIN) in 1967, were modified in WIN II, and expanded significantly in the JOBS program of the Family Support Act.\textsuperscript{41} The work requirements under PRWORA differed, however, from previous requirements both in practice and in theory. First, the PRWORA work requirements were mandatory, and the Act imposed penalties for failure to meet the requirements. While requirements under JOBS, for example, were supposed to be mandatory, sanctions were rarely imposed; participation was, by and large, voluntary.\textsuperscript{42} Second, the theoretical approach had changed. Work

\begin{itemize}
\item[(11)] satisfactory attendance at a secondary school or in a course or study leading to a certificate of general equivalence . . . and (12) the provision of child care services to an individual who is participating in a community service program."
\end{itemize}

\textsuperscript{34} PRWORA § 602(a)(1)(A)(ii).
\textsuperscript{35} PRWORA § 608(a)(7).
\textsuperscript{36} PRWORA § 607(b)(5).
\textsuperscript{37} PRWORA § 607(c)(2)(B).
\textsuperscript{38} PRWORA § 607(c)(2)(C).
\textsuperscript{39} PRWORA § 607(e).
\textsuperscript{40} Some have argued that the provisions of PRWORA, including the work requirements, are merely incremental reform. \textit{See}, e.g., Nan S. Ellis, The Cycle of Welfare Reform: An Examination of Incremental Reform (1997) (unpublished working paper presented at the Annual Conference of the Academy of Legal Studies in Business).
\textsuperscript{42} \textit{See generally} Miller, \textit{supra} note 15, at 185–87 (discussing the general provisions and philosophy of TANF). \textit{See also} Kathryn R. Lang, \textit{Fair Work, not "Workfare": Examining the Role of Subsidized Jobs in Fulfilling States' Work Requirements under the Personal Responsibility and Work Reconciliation Act of 1996}, 25 Fordham Urb. L.J. 959 (1998). The author describes the work program under WIN as "largely symbolic, since states enrolled only a small
requirements under WIN and JOBS, for example, were based on a human capital investment theory. In other words, it was assumed that welfare recipients were poor because they lacked the skills necessary to find and keep a job. Therefore, the purpose of the work requirements was to train welfare recipients so that they could obtain the skills necessary to find and keep a job. On the other hand, the theoretical basis of PRWORA was a labor force attachment model. This approach, termed a work-first approach, assumed that welfare recipients lacked the necessary work ethic or work experience to enable them to get and keep a job. As the theoretical basis for work requirements changed, the nature of those requirements changed. In a tactic designed to foster a quick attachment to the workforce, most states moved from education and training programs to work activities, such as subsidized jobs.

43 Under a human capital theory, workers are viewed as "embodying a set of skills that can be 'rented out' to employers. The knowledge and skills a worker has—which come from education and training, including the learning that experience yields—generate a certain stock of productive capital. . . . [T]he value of this amount of productive capital is derived from how much these skills can earn in the labor market." Ronald G. Ehrenberg & Robert S. Smith, Modern Labor Economics: Theory and Practice 290 (7th ed. 2000).

44 See, e.g., Matthew Diller, Working without a Job: The Social Messages of the New Workfare, 9 Stan. L. & Pol'y Rev. 19, 21 (1998) ("This view assumes that job openings exist, but that employers are unlikely to hire welfare recipients unless they receive additional training."); Lang, supra note 42, at 967 (asserting that the JOBS program "shifted the emphasis . . . to a range of education, training and job-readiness programs for recipients.").

45 Under the labor force attachment model, getting welfare recipients into the workplace is of paramount importance. This model is designed to allow recipients to develop the work experience necessary to move into better paying jobs. Most importantly, experience is a way for recipients to develop the necessary work ethic. See Briskin & Thomas, supra note 3, at 563 ("PRA forwards a 'work first' philosophy . . . ."). See also Lang, supra note 42, at 972-73 (outlining the "'work ethic' deficiency"). Further, work has intrinsic value, as "it can help welfare recipients develop a sense of self-respect, self-confidence, and identity in our work-oriented society." Robert D. Reischauer, The Welfare Reform Legislation: Directions for the Future, in Welfare Policy for the 1990s 10, 26 (Phoebe H. Cottingham & David T. Ellwood eds., 1989).

Additionally, work is part of reciprocal arrangement, under which the welfare recipient works as part of her responsibilities under a social contract to receive government benefits. See generally Lawrence Mead, Beyond Entitlement: The Social Obligation of Citizenship (1986).

46 See Diller, supra note 44, at 25 ("The PRWORA’s approach assumes that there are jobs available to public assistance recipients, but that recipients choose welfare as a desirable alternative. Under this view, work requirements serve the purpose of making receipt of benefit unpleasant, thereby pushing reluctant recipients into the workforce.").

47 Lang, supra note 42, at 977 ("[M]any states have shifted away from the JOBS strategy of education and training, and now are focusing on work activities, such as subsidized jobs and work experience programs, for those who are unable to find unsubsidized employment.").
The PRWORA left it to each state to determine how they would meet the work requirement. Therefore, there was a great deal of variation from state to state. Most states tried to funnel welfare recipients into non-subsidized private sector employment whenever possible. Therefore, many states offered job search services, often coupled with more intensive job placement or job readiness programs. States often provided subsidized employment in the private sector. Importantly for the purposes of this article, some states and municipalities created public sector employment programs, often termed workfare programs. Although these programs vary dramatically from state to state, they typically provide low-skill employment, with little training, and little chance of a full-time job. Because such programs typically require welfare recipients to work in exchange for their welfare benefits, the question naturally arises as to whether such recipients are employees entitled to FLSA protection. To consider that question, Part II will first provide an overview of the FLSA, including a discussion of relevant definitions. Part II will also include a discussion of prior case law setting forth the tests used to determine employee status under the FLSA.

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48 See Kay P. Kindred, Of Child Welfare and Welfare Reform: The Implications for Children when Contradictory Policies Collide, 9 WM. & MARY J. WOMEN & L. 413, 413 (2003) ("Among the many changes effected . . . [was] increased authority of the states over cash- assistance programs for needy families, giving states flexibility in designing programs within the block grant scheme and significantly reducing federal oversight. . . .").

49 Monies are also made available pursuant to the Welfare-to-Work grants program, the Work Opportunity Tax Credit and the Welfare to Work Tax Credit to provide an incentive to private sector employers to hire welfare to work recipients. Tax Payer Relief Act of 1997, Pub. L. No. 105-34, §603, 111 Stat. 862. Tax credits are available for individuals that receive assistance from designated State programs relating to "needy families with minor children." I.R.C. § 51(d)(2) (Supp. III 1995–1998).

50 New York City, for example, runs one of the largest workfare programs in the nation. In its Work Experience Program (WEP), welfare recipients are required to work between 20 and 26 hours. Typical placements include work programs with the Departments of Parks and Recreation, Sanitation and Transportation. Mahmoudov, supra note 12, at 352. See also Bertelli, supra note 7, at 181 (describing the WEP program as including entry-level office jobs, jobs maintaining public property, janitorial and sanitation services); Patricia A. Quigley, Note, Protection of Existing Workers and the Implementation of "Workfare," 14 HOFSTRA LAB. L.J. 625, 636–37 (describing the work performed by workfare participants for the Department of Transportation and for the Department of Sanitation as clerical duties, office maintenance, or street-cleaning).

51 See generally Mahmoudov, supra note 12, at 352–355 (using the New York City WEP program as an example of a typical workfare program, including dangerous and unsanitary working conditions and a large numbers of participants that funnel through and have a dismal likelihood of finding employment after leaving the program). See infra note 108 and accompanying text for a discussion of the effectiveness of workfare programs at moving people into the workforce.
II. FLSA COVERAGE

A. Statutory Overview

Congress passed the FLSA in 1938 with a number of stated goals.\(^5\) First, the legislature designed it to protect low-end wage earners and to assure that their labor could earn them monies sufficient to maintain an adequate standard of living.\(^5\) Second, and of equal importance, the FLSA was meant to ensure that competition was protected—both in general, and specifically in the market for low-waged labor.\(^5\) To accomplish these goals, the FLSA required, among other provisions, that all employees be paid a minimum wage.\(^5\)

\(^5\) Congress described the purpose of the Act as follows: "[T]he existence ... , in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce." FLSA § 202(a).

\(^5\) See Luers, supra note 9, at 209–10 ("Congress established a balance of power between the employer and the employee by protecting certain groups of the population ... from 'substandard wages' and 'excessive hours' that were dangerous to the national health and well-being."); Reese, supra note 5, at 885 ("The FLSA's minimum wage and overtime provisions aim to protect low-end wage earners in particular from substandard wages and excessive hours ... The FLSA aimed to maintain the public's health by providing a minimum standard of living to American workers."). Legislative history makes it clear that "the prime purpose of the legislation was to aid the unprotected, unorganized and the lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." Miller, supra note 15, at 193 (quoting Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945)).

\(^5\) See Bruce Goldstein et al., Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment, 46 UCLA L. Rev. 983, 1003 (1999) ("This congressional program was designed to benefit not only workers but also reputable employers, who, prior to the FLSA, had operated at a competitive disadvantage vis-a-vis their sweatshop competitors ... "). Watson v. Graves, 909 F.2d 1549, describes an excellent example of an employer who was permitted, unfairly, to pay less than the minimum wage, a substandard wage benefit. In Watson, the local sheriff administered a work release program. Id. at 1551. Pursuant to that program, the sheriff assigned plaintiffs to a construction business owned by his daughter and son-in-law for $20 a day. Id. The construction business employed only two employees (the daughter and son-in-law), and prisoners or subcontractors did all the other work. Id. The court held that the effect on commerce is obvious—the daughter and son-in-law were able to offer cheaper services than their competitors. Id. at 1555 ("Obviously, construction contractors in the area could not compete ... because they had to pay at least minimum wage for even unskilled labor ... It takes little imagination to recognize that job opportunities for non-inmate workers in the area was severely distorted by the availability of twenty dollar per day workers from the parish jail."). The court found the situation "fraught with the very problems that FLSA was drafted to prevent—grossly unfair competition among employers and employees alike." Id.

\(^5\) The FLSA provides that "[e]very employer shall pay to each of his employees ... engaged in commerce" the statutory minimum wage." FLSA §206(a).
Congress intended FLSA coverage to be broad. The protections of the FLSA apply to all "covered employees." Therefore, whether or not any workers, including workfare participants, are entitled to FLSA protections like minimum wage guarantees depends on their ability to be classified as employees under the statute. In other words, only if one falls within the statutory definition of an employee is she covered by the FLSA. Unfortunately, the statutory definitions are decidedly unhelpful. The FLSA defines an "employee" as "any individual employed by an employer." An "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency." Last, the Act defines the term "employ" as "to suffer or permit to work." Commentators have noted the circuitous nature of this definitional scheme more than once. Given the ambiguous and circular language of the statutory definitions, the courts have been left to interpret FLSA coverage and the parameters of what constitutes an "employee."

Although the statutory definitions are unhelpful, legislative history and subsequent case law provide some guidance. It is clear, for example, that the legislature intended that the term employee be given a broad interpretation in favor of finding employee status. Furthermore, the Supreme Court defines the term employee more broadly than the definition resulting from traditional common law agency tests.

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56 Luers, supra note 9, at 210. "Today, the FLSA covers over 70 million people, or 85.6% of the American workforce." See also Goldstein et al., supra note 54, at 1004 (discussing the fact that broad coverage is essential to achieve the policy goals of the statute).

57 Because most welfare recipients are female and because the focus of this article is on the work protections afforded to working welfare recipients, the term "she" will be used throughout this article, instead of the more generic "he/she."

58 FLSA §203(e).

59 FLSA §203(d).

60 FLSA §203(g). See generally Goldstein et al., supra note 54, at 1003–15 (discussing the definition of "employ" and concluding that courts interpret that definition more narrowly than Congress intended).

61 See generally Marshall v. Baptist Hospital, Inc., 473 F.Supp. 465, 467 (Tenn, 1979) ("The definition of "employee" provided in the Act is virtually circular."); Richard R. Carlson, Why the Law Still Can't Tell an Employee When It Sees One and How it Ought to Stop Trying, 22 BERKELEY J. EMP. & LAB. L. 295, 296 (2001) ("An 'employer,' the Act continues, is a person 'acting . . . in the interest of an employer in the interest of an employee,' thus bringing the matter around full circle." (emphasis in original)).

62 Mahmoudov, supra note 12, at 358 ("Given such vague and circular language, the issue of employee status under the FLSA has been left to the courts to determine.").

63 See Reese, supra note 5, at 885. Senator Hugo Black, the principal sponsor of the FLSA, described the term "employee" as the "broadest definition that has ever been included in any one act." United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945) (citing 81 Cong. Rec. 7666-57 (daily ed. Jul. 27, 1937) (statement of Sen. Black)).

64 Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992); see also Mahmoudov, supra note 12, at 358–59; Goldstein et al., supra note 54, at 1004 ("The 'striking breadth' of the FLSA definition of 'employ' covers work relationships that were not within the 'employer-
Courts are constantly confronted with the question of FLSA coverage and have thus been forced to define an employee. Courts have also made clear that when determining employee status they are not bound by the labels used by the participants, but instead will examine the economic realities of the relationship. They have rejected a technical concept approach and instead use a case-by-case determination of employee status. Therefore, any court's attempt to determine whether an individual worker is an employee within the meaning of the FLSA requires an examination of the economic realities of the situation.

B. THE ECONOMIC REALITIES TEST

Under the economic realities test, courts consider the economic realities of the situation and inquire whether the worker should best be viewed as an employee entitled to FLSA protection. In attempting to determine the economic realities of a situation, some courts have used a four-factor test, the so-called Bonnette test, which investigates whether the alleged employer has:

1) the power to hire and fire 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.

Courts that have used the Bonnette test have found employee status when not all factors of the test have been met by applying the test rather loosely. Others have noted that this test seems more suited to determining employer status, or have rejected the Bonnette test entirely, substituting a more general review of the economic realities of the employee category at common law.

...
situation. Such courts have employed an alternative test, instead focusing on the totality of the circumstances. These courts look at the nature of the relationship between the parties, the nature of the work, and the policy goals of the FLSA. This obviously necessitates a case by case examination of the facts.

C. TOTALITY OF THE CIRCUMSTANCES TEST

The totality of the circumstances test has been employed in a variety of circumstances. Under this analysis, courts have found that prisoners were employees, as were former mental patients working at a hotel, while neither jurors nor student resident assistants were employees.

In using the totality of the circumstances test, courts typically look at the type of work being performed and at the nature of the relationship between the alleged employer and alleged employee. Furthermore, courts consider three additional factors to be relevant. Among the factors that are considered of paramount importance is whether the labor performed by the worker benefited the employer or the worker. More spe-

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71 See Danneskjold v. Haustrath, 82 F.3d 37, 41 (2d Cir. 1996) ("[W]e . . . reject [the lower court's] use of the four-part Bonnette test to make that determination."); Henthorn v. Department of Navy, 29 F.3d 682, 686 (D.C. Cir. 1994) (finding that the Bonnette test does not make sense when a "prisoner is legally compelled to part with his labor as part of a penological work assignment and is paid by the prisoner authorities themselves . . ."); Vanskike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992); Watson, 909 F.2d at 1554 (examining beyond the four prong test in Bonnette to consider the economic realities of the situation as well as the FLSA policy objectives); see also Goldstein et al., supra note 54, at 1010 (questioning the economic realities test, as the "analysis is not tied to the statutory definition, it is not tied to the congressional purpose in using such a broad definition, and it is not even tied to the concept of 'economic dependency' because it is not clear what that terms means").


73 Watson, 909 F.2d at 1553–56.

74 Donovan v. New Floridian Hotel, 676 F.2d at 468, 473–76 (Fla. 1982).

75 Brouwer v. Metropolitan Dade County, 139 F.3d 817, 819 (11th Cir. 1998) ("Jurors are completely different from state . . . employees. Jurors do not apply for employment, they are randomly selected from voter registration lists . . . . Jurors do not voluntarily tender their labor to the state, but are compelled to serve.").

76 Marshall v. Regis Educational Corp., 666 F.2d 1324, 1327 (Colo. 1981) (holding that though non-students perform some of the services that the resident assistants perform, "these are isolated aspects of a total program which must be considered within the full educational context." The students did not become resident assistants "to take jobs. [Rather t]hey enrolled as full-time students seeking growth and development. . .").

77 For example, the Henthorn court looked at the nature of the prison-prisoner relationship when the prison assigned a prisoner to janitorial and maintenance chores for the Navy. 29 F.3d at 684–87. The court held that when an "inmate's labor is compelled and/or where any compensation he receives is set and paid by his custodian, the prisoner" has no claim under the FLSA. Id at 686.

78 See Donovan, 676 F.2d at 471 ("[T]hese five mental patients did work which was of economic benefit to the appellants."). But see Marshall, 666 F.2d at 1327 ("The mere fact that the College may have derived some economic value from the [resident assistant] program does
cifically, in examining the extent to which the labor performed benefited the employer or the worker, courts consider the primary beneficiary of the labor.\textsuperscript{79} Courts apply these tests liberally. For example, in \textit{Marshall v. Regis Educational Corp.},\textsuperscript{80} the court found that student resident-hall assistant appointees were recipients of a form of student financial aid despite the college’s receipt of some benefits from their labor. A second factor that some courts consider is whether or not the worker plaintiffs displaced other workers.\textsuperscript{81} Lastly, courts look at the objectives the statute is meant to achieve and consider the extent to which the actions complained of frustrate those purposes. That is, courts consider the extent to which the facts of the case warrant a finding of FLSA coverage, and employee status, to protect the worker involved, or to protect the workers of competitors from unfair competition.\textsuperscript{82} For example, in the prison cases, most courts examine the extent to which the prisoners are being used to make goods or offer services that compete in the marketplace.\textsuperscript{83} To the extent that the alleged employer competes with others providing similar goods or services, the use of sub-minimum wage labor affords him an unfair advantage. Moreover, to the extent that other low-wage workers are competing with prisoners for jobs, the availability of sub-minimum wage labor depresses the cost of that labor.

D. Exemptions

Two statutory exemptions from employee coverage merit discussion in FLSA coverage cases. The language of the statute expressly excludes volunteers and trainees from FLSA coverage. Because one might argue that workfare participants are either volunteers or trainees, it is important to outline the circumstances under which both exemptions apply. First, one who volunteers his services is not an employee within the meaning of the Act.\textsuperscript{84} Courts have defined a volunteer as “[a]n individual who,

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\textsuperscript{79} Here the courts draw the trainee literature by analogy. \textit{See infra} notes 90–98 and the accompanying text.

\textsuperscript{80} 666 F.2d at 1327.

\textsuperscript{81} \textit{See id.} (holding that the resident assistants “did not displace other employees whom the College would otherwise have been required to hire.”).

\textsuperscript{82} \textit{See Briskin & Thomas, supra} note 3, at 569–70 (“Thus, a court considering FLSA coverage must look at not only the attributes of the work, but also the ramifications of protecting that work in order to sustain the welfare of workers as well as safe and fair commerce in the market.”). \textit{See supra} notes 59–62 and accompanying text where the policy objectives of FLSA are discussed.

\textsuperscript{83} \textit{See Danneskjold}, 82 F.3d at 42–44; \textit{Vanskike}, 974 F.2d at 811 (“The use of cheap prison labor to make such products . . . poses a risk of unfair competition.”); \textit{see also} Watson v. Graves, 909 F.2d 1549, 1555 (5th Cir. 1990).

\textsuperscript{84} \textit{Tony & Susan Alamo Found.}, 471 U.S. at 284–03; Rodriquez v. Township of Holiday Lakes, 866 F.Supp 1012 (Tex. Dist. Ct. 1994).
Work is its own reward

'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.'

Using this definition, courts have found police officers to be employees, rather than volunteers, when they were motivated to work for reasons other than charitable or humanitarian reasons; they have also found rehabilitated drug addicts and criminals working for a shelter to be employees when they work in exchange for food, clothing and shelter.

Second, although trainees are exempt from FLSA coverage, the Act provides little useful guidance to distinguish between trainees and employees. Using the factors first set forth in Walling v. Portland Terminal Co., the Department of Labor's Wage and Hour Division drafted a list of six relevant criteria to determine whether a worker is properly classified as an exempt trainee or as an employee. The DOL test provides:

- Whether trainees are employees under the Act ... will depend upon all the circumstances surrounding their activities on the premises of the employer. If all six of the following criteria apply, the trainees are not employees within the meaning of the Act:
  - 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;
  - The training is for the benefit of the trainee;
  - The trainees do not displace regular employees but work under close supervision;
  - 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;
  - The trainees are not necessarily entitled to a job at the completion of the training period; and

86 Rodriguez, 866 F.Supp at 1017–21.
87 Tony & Susan Alamo Found., 471 U.S. at 290–91.
The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.\(^9\)

This list of factors is not exhaustive; a court may find a worker to be a trainee non-employee even if all six factors are not met.\(^9\) Using this test, courts found that workers undergoing a licensed pilot apprenticeship program,\(^9\) homeless and jobless participants in an employment program,\(^9\) snack food distribution trainees,\(^9\) and trainees in a hospital's radiation department as part of a two year program were all employees,\(^9\) while fire-fighter trainees were not employees.\(^9\)

It is apparent that under either the \textit{Bonnette} test or under the more general totality of the circumstances test, whether a worker is afforded the protections of an employee under FLSA depends upon the individual facts of the case. The next section will attempt to apply both of these tests to the typical workfare situation.

III. ARE WORKFARE PARTICIPANTS EMPLOYEES?

A. APPLICATION OF TESTS

Given the above analysis, one can at least reasonably argue that workfare participants are employees within the meaning of the statute. To determine employee status and, therefore, FLSA coverage, courts apply either the four-part \textit{Bonnette} test or a more general totality of the circumstances analysis. First, let us apply the \textit{Bonnette} test to the typical workfare scenario. The \textit{Bonnette} test asks us to first focus on the whether the alleged employer has the power to hire and fire employees. While this will, of course, vary from program to program, the government agency or non-profit organization where the workfare participants are placed typically has at least the \textit{de facto} power to hire and fire. These workfare programs are somewhat similar to the facts in the \textit{Watson}\(^9\) case. There, the sheriff could overrule decisions made by the contractor-

\(^9\) Bailey v. Pilots' Ass'n, 406 F.Supp. 1302, 1307 (Penn. Dist. Ct. 1976) ("Though it appears that the parties in the instant action did not contemplate compensation for the apprenticeship period, the duties performed by the Plaintiff were of immediate benefit to the Defendant Association. There was evidence that the apprentices substituted for hired men... ").
\(^9\) Archie, 997 F.Supp. at 531.
\(^9\) Reich, 992 F.2d at 1029 ("Except for one area—the expectation of employment upon successful completion of the course—application of the six factor test indicates that the trainees were not employees.").
\(^9\) McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989).
\(^9\) Watson v. Graves, 909 F.2d 1549, 1555 (5th Cir. 1990).
employers and had actual authority to hire and fire. The *Watson* court found that the sheriff’s power was irrelevant, however, when compared with the crucial *de facto* authority of the contractor-employer. Under this reasoning, a court would consider the fact that the workfare placement offices have some say in placement to be irrelevant in determining if the supervisor at the government agency or non-profit organization is an employer. Thus, this prong of the test seems likely to be met in most workfare situations. The second *Bonnette* prong, supervision and control, is likewise easily satisfied in most workfare situations. The agency or organization where the participant is placed has the power to make work schedules and to control the behavior of the participant on the job. Whether the third *Bonnette* prong can be satisfied depends on the specifics of the placement, but this prong is not likely to be met in the typical workfare situation. If the state sets the benefit level and places the participant with a participating agency, it is the state and not the agency that sets the rate and method of payment. On the other hand, the agency may be allowed to determine how much it will pay participants for particular jobs, possibly meeting the requirements of the third prong. Similarly, whether the fourth prong is satisfied depends entirely upon the facts of the individual situation, but the agency is likely to maintain employment records on each participant. Therefore, it seems that whether a workfare participant will meet the definition of an employee under the *Bonnette* test depends on the nature of the placement and the administrative oversight of the particular workfare program.

Such workers seem to more typically fit the FLSA definition of an employee under the totality of the circumstances approach to the question of workfare participants’ status. In considering the totality of the circumstances, courts would note that workfare participants often work side-by-side with traditional employees.\(^9\) The only thing distinguishing them from the traditional employees is the fact that the traditional employees are being paid at least minimum wage. The nature of the work performed by workfare participants does not usually differ from that performed by regular employees. Furthermore, this work typically benefits the employer, rather than the workforce participant. The New York City WEP has been described as follows:

> WEP workers work side by side with city employees, performing the basic tasks required in various city agencies. WEP workers work with sanitation employees

sweeping garbage, picking up debris, and cleaning sanitation trucks. Moreover, WEP workers serve as office workers, filing documents, handling telephone inquiries, and assisting the public; as hospital employees, cleaning buildings, emptying bedpans, and serving meals; and as park employees, constructing fences and barricades, making repairs, and painting and maintaining park grounds.\(^9\)

In these situations, it would be impossible to conceive how the employer would fail to benefit from receiving all these services. Moreover, workfare participants often displace other workers. Estimates indicate that, from 1993 to 1997, approximately 22,000 public sector jobs were lost in New York City. During that same period, the city employed 38,000 WEP workers.\(^{100}\) These statistics make it clear that under a totality of the circumstances approach, workfare participants should properly be classified as employees within the meaning of FLSA.

B. Exemptions

Furthermore, workfare participants should not be classified as either volunteers or trainees. Recall that to be classified as a volunteer, one must work “without promise or expectation of compensation, but solely for his personal purpose or pleasure.” This does not describe a workfare situation; workfare participants are working in order to receive TANF benefits. They are working because if they fail to work they will be denied cash and non-cash benefits. This is work with the expectation of compensation in the form of a government benefit. This, in no way, is work solely for one’s “personal purpose or pleasure.”

Similarly, the typical workfare participant should not be classified as a trainee.\(^{101}\) Recall the six-part test set forth by the DOL, and en-

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\(^9\) Lauri Cohen, Free Labor in the Name of Workfare: New York’s Reaction to the Brukhman v. Giuliani Decision, 64 BROOK. L. REV. 711, 719–20 (1998); further, “[u]nions and advocates for welfare recipients contending that workfare workers should be viewed as employees state that it is readily apparent that workfare participants are performing similar tasks as unionized city workers, and that if they were not doing this work, then city employees would have to clean the streets, collect garbage, and dispose of medical waste.” Collins, supra note 9, at 258–59.

\(^{100}\) See Cohen, supra note 99, at 719–20, for evidence that WEP workers are replacing low-wage jobs. WEP workers in New York City’s WEP program are “doing exactly what the statute prohibits.” Id. at 728. See infra notes 110–11 for a discussion of other displacement examples.

\(^{101}\) Cf. Collins, supra note 9. Collins argues that “[b]ecause workfare is meant to be a temporary training program rather than a full-time career work assignment, workfare participants properly should be viewed as trainees and not as employees.” Id. at 259. Collins bases his argument on his belief that workfare workers may be less efficient than regular employees because they may need more supervision than regular employees. Id. Additionally, Congress designed workfare to teach “job skills such as discipline and responsibility to the participants.”
endorsed by the Court, used to determine trainee status. For one to be classified as a trainee, the training one receives must be similar to that taught in a vocational school. Far from the training typically given in a vocational school, the typical workfare assignment involves tasks needing little training. While hopefully not typical, one woman described the work she did in a New York City WEP program as follows:

I was forced to lift heavy, wet, urine-soaked mattresses into the back of a garbage truck. It looked like the mattresses had been dumped there a while ago, and they smelled very badly. When I picked up the mattress[es], the liquid from them soaked my shirt and pants, going through to my skin.\textsuperscript{102}

This is not the kind of training typical in a vocational setting, nor is it the kind of work likely to lead to advancement.\textsuperscript{103} Furthermore, if the participant’s work experience is coupled with any classroom training, it is typically of the job placement or job readiness type. Participants are taught how to dress, how to set their alarm clock, and how to prepare a job resume. This is hardly the type of training common in vocational schools.

Second, in order to be classified as a trainee, the training must be for the benefit of the trainee; the employer should obtain no immediate advantage from the trainee’s activities. Although workfare participants clearly gain some benefits from the typical workfare placement, that is not the issue. In order to be termed a trainee, the benefit of the work assignment must accrue to the trainee \textit{as opposed to} the benefit of the employer. Courts have found, for example, that only where the worker is the primary beneficiary of the training may the worker properly be classified as a trainee. By contrast, where the primary beneficiary of the training is the employer, the worker is classified as an employee rather

\textit{Id.} Unfortunately, Collins ignores the Department of Labor’s Wage and Hour Division’s six-prong test designed to distinguish a trainee from an employee, except in his acknowledgment “that the state does not truly benefit from the work performed by workfare workers due to the greater training and supervision needed when administering a workfare program.” \textit{Id.} at 261. This argument completely misrepresents the reality of the typical workfare assignment, which is totally devoid of training, see infra notes 105–06 and accompanying text, and ignores the real benefits conferred by the workfare participants’ labor.

\textsuperscript{102} Mahmoudov, \textit{supra} note 12, at 353 (quoting from a class action lawsuit brought against the City of New York). Mahmoudav relates a story of a plaintiff who was ordered to pick up dead animals with her bare hands. The plaintiff asserts: “The animals had been run over by automobiles and were oozing blood and entrails. When I picked up the animals with my bare hands to throw them into the garbage trucks, the guts splattered on my shoes and pants. My coworker vomited.” \textit{Id.} at 354.

\textsuperscript{103} See Gail Aska, \textit{Is Workfare Working?}, 8 J.L. & Pol’y 107, 149 (describing New York City’s Work Experience Program as follows: “It is not a program that offers training of any real caliber. We have people who have been put into WEP who spend an entire day changing the rolls of toilet paper in a bathroom. I do not see that as skill-building.”).
than a trainee. This describes the typical workfare situation. The benefits of an assignment to the workfare participant are negligible; the work is typically menial and rarely leads to advancement or to a full-time, paid job. The workfare assignment is perhaps best viewed as the workfare participant “working off” her welfare payment, rather than acquiring valuable skills and experiences that will help her obtain a full time job.

On the other hand, the employer clearly benefits from the workfare participant’s labor. The workfare participant may perform clerical work, janitorial work, or maintenance work along with regular employees. Moreover, workfare participants clearly displace regular employees in typical workfare situations. During the time period in which New York’s WEP program has been operating, New York City has been able to reduce its paid workforce significantly. This has been accomplished in part through the use of increasing numbers of workfare participants.

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104 See, e.g., McLaughlin v. Ensley, 877 F.2d 1207, 1209 (4th Cir. 1989) (“This court has concluded that the general test used to determine if an employee is entitled to the protections of the Act is whether the employee or the employer is the primary beneficiary of the trainees’ labor.”); Marshall v. Baptist Hospital, Inc., 473 F.Supp. 465, 468 (Tenn. 1979) (“It is . . . important in such cases to determine whether the primary benefit from the relationship flows to the learner or to the alleged employer.”).

105 Bertelli, supra note 7, 186 (“It appears that workfare has little chance of providing work experience that will lead to unsubsidized employment.”); see also Cohen, supra note 99, at 734–35 (“Despite the hope that national welfare reform, especially workfare, would be a panacea for many ills, it has not ever been particularly effective at taking participants off welfare and placing them into permanent jobs. . . . [E]vidence suggests that only about one-half of those leaving welfare rolls have jobs, a percentage no better than in periods of weaker economies and less stringent welfare rules.”); Mahmoudov, supra note 12, at 352 (“According to [New York] city records, fewer than one-tenth of the 125,000 people who have passed through the program have reported finding permanent jobs.”) (quoting David Firestone, Praising the Wonders of Workfare, Giuliani Finds a Campaign Theme, N.Y. TIMES, Mar. 20, 1997, at B3)); Aska, supra note 103, at 153 (finding that in a survey of 500 workfare workers, all those questioned had “no hope that their placement was going to lead to a job”).

106 Harsh criticism has been leveled against workfare programs: “These are make-work jobs requiring recipients to work off their grants. They rarely provide useful training . . . . Workfare has been utilized to sanction clients and the goal is not to develop a client’s skills, which is often promoted as its reason, but really to reduce clients’ payments or force them off the rolls.” Ruth Brandwein, Women’s Reality: Making Welfare Work and Making Work Pay, 21 SOC. JUST. 71, 75 (1994); see also Quigley, supra note 50, at 639 (“The emphasis is on job placement, not job training.”). On the other hand, those who oppose attaching employee status to workfare participants argue that workfare is “‘part work, part training,’ designed to prepare welfare recipients, victimized by ‘low IQ, substance abuse, [and] little discipline,’ to enter the competitive job market.” Mahmoudov, supra note 12, at 361–62 (citing Paul Offner, The Minimum Wage Debacle, WASH. POST, June 16, 1997, at A21). But this argument ignores the ineffectiveness of workfare programs in placing participants in full-time employment and the fact that participants perform the same labor as regular employees; it also misapplies the statutory requirement as interpreted in prior cases. Id. at 362–63.

107 See Briskin & Thomas, supra note 3, at 575 (“[T]here is a record of workfare workers displacing regular workers, . . .”). David L. Gregory, Breaking the Exploitation of Labor?: Tensions Regarding the Welfare Workforce, 25 FORDHAM URB. L.J. 1, 19, 25 (“Workfare has similarly altered the infrastructure of low wage employment by causing job displacement among the working poor.”).
This has, it should be noted, been accomplished despite the PRWORA’s anti-displacement provision. The displacement provision prohibits actually laying off or firing an employee to make room for a workfare participant. It does, however, allow the employer to replace employees lost through attrition with workfare participants. That is what is happening in New York City, and presumably in other states and municipalities that employ workfare programs.

While the typical workfare participant is not entitled to a job at the end of the placement period, this fact alone should not be sufficient to convert what is clearly a work experience into a training experience. Last, in order to be properly termed a trainee, both the employer and trainee must understand that the trainee is not entitled to wages for the time spent in training. This does not describe the typical workfare situation. While the employer might understand that he does not have to pay the workfare participant from his general payroll, the participant is working in expectation of receiving her government benefit check. The worker is working to receive compensation in return for that work. The label assigned to that compensation should be irrelevant. Sums paid in return for labor are termed wages.

C. FLSA Policy Objectives

Finally, it is important to consider the policy objectives of the FLSA when deciding whether or not a workfare participant is an employee. Policy objectives are an important part of the totality of the circumstances approach taken by the courts. It should be recalled that the FLSA has two major policy objectives. The first objective is to protect employees who are unable to protect themselves. Congress designed the Act to protect those most vulnerable, those least able to protect themselves, an objective that will clearly be served by extending FLSA coverage to welfare recipients. Welfare recipients are often women with children; they typically lack education or skills and are statutorily compelled to find

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108 PRWORA’s anti-displacement provision, § 607(f), provides:

No adult in a work activity[,] . . . which is funded, in whole or in part, by funds provided by the Federal Government shall be employed or assigned—

(A) when any other individual is on layoff from the same or any substantially equivalent job; or

(B) if the employer has terminated the employment of any regular employee or otherwise caused an involuntary reduction of its workforce in order to fill the vacancy so created with an adult [whose work activity is “funded in whole or in part with funds provided by the Federal Government].”

109 EHRENBERG & SMITH, supra note 43, at 32.

110 For example, over half of the welfare population has less than a high-school diploma. Donna A. Pavetti, Who is Affected by Time Limits?, in WELFARE REFORM: AN ANALYSIS OF THE ISSUES 31, 32 (Isabel V. Sawhill ed., 1995); see also K.H. Porter, Making Jobs Work: What the Research Says About Effective Employment Programs for AFDC Recipients, Center
work to continue to receive government benefits. They are obviously a group without the power to negotiate a living wage.

Extending FLSA coverage to workfare participants serves the second objective equally well. The second objective of FLSA relates to preserving competition, both with respect to the employer's competitors and labor competition. In other words, the FLSA is meant to prevent an employer from gaining an unfair advantage over his competitors by lowering labor costs through paying sub-minimum wage. Whether or not this occurs in the workfare situation depends on the placement specifics. Although this seems to be an unlikely concern in the typical public sector, public works placement, not all workfare placements are in the public sector. Some placements for example, are with non- or not-for-profit organizations which fund their charitable operations by selling goods or services in the marketplace. Here, the availability of sub-minimum wage labor might give these employers a competitive advantage in the marketplace. Moreover, the second objective also pertains to the market for low-wage labor. The FLSA recognizes the effect of allowing certain employees to sell their labor below minimum-wage levels on the market for low-wage labor. In this case, it is clear that paying workfare participants below minimum wage will have a deleterious effect on the low-wage labor market. Placement of workfare participants in New York's WEP program has been estimated to cause a decrease of $1.03 per hour in the existing wages of workers. Moreover, the fact that displacement has already occurred provides some evidence that this program will have such a negative effect.

Thus, it is my assertion that workfare participants should be considered employees within the meaning of the FLSA. Given the totality of

on Budget and Policy Priorities, Washington, D.C., 1990; Mildred Rein, Work in Welfare: Past Failures and Future Strategies, 56 Soc. Serv. Rev. 211, 219 (1982). Over half of teenage mother welfare recipients receive such low scores on tests of basic skills that they do not even qualify to enter many training programs. J. Lawrence Aber et al., Effects of Welfare Reform on Teenage Parents and Their Children, in The Future of Children 53, 58 (1995). Of those that graduate high school, only 7.6% read at a national average level. Loic J. D. Wacquant & William Julius Wilson, Poverty, Joblessness, and the Social Transformation of the Inner City, in Welfare Policy for the 1990s 70 (P. Cottingham & D.T. Ellwood eds., 1989). See Gregory, supra note 107, at 20 (citing a study by Employment Policies Institute that estimated 38% of welfare recipients as functionally illiterate). This creates a substantial mismatch between the relatively high skills required for many jobs and the low skill level of many welfare recipients and this disparity is likely to increase rather than decrease. See Sue E. Barry, The Economy, Literacy Requirements, and At-Risk Adults, in Literacy and the Marketplace: Improving the Literacy of Low-Income Mothers 22 (The Rockefeller Foundation, June 1989).

111 Cohen, supra note 99, at 731 ("A study of the impact of adding WEP workers to the workforce, based on an elasticity of demand analysis, shows that the effect is displacement of workers, depression of wages for the workers that remain, or a combination of both.").

112 Quigley, supra note 50, at 649–50 (citing Lawrence Mischel and John Schmitt, Cutting Wages by Cutting Welfare, BRIEFING PAPER (Oct. 3, 1995)).
the circumstances, the typical workfare assignment represents an employment relationship, one where the workfare participant is working in exchange for government benefits. Moreover, the policy objectives of FLSA are best served by characterizing the workfare participant as an employee.

D. **JOHNS v. STEWART: HOW DID THE COURT ERR?**

The only federal case, *Johns v. Stewart*,\(^{113}\) to consider directly the question of whether workfare participants are employees under FLSA found that they were not covered employees. In that case, the plaintiffs, recipients under Utah’s General Assistance (GA), were required to participate in 96 hours per month of community work, adult education or skills training activities through Utah’s Work Experience and Training Program (WEAT). In return, they were provided with $233 per month, GA benefits, and $45 per month WEAT work allowance. The plaintiff, Johns, was assigned to perform maintenance and painting duties at a local corporation.\(^{114}\) The Court refused to apply the four-factor *Bonnette* test, declaring that the test applied only in the independent contractor-employee situation.\(^{115}\) Instead, the court looked to the totality of the circumstances.\(^{116}\)

The *Johns* court relied heavily on *Marshall v. Regis Educational Corp.*,\(^{117}\) in which the court held that college resident hall assistants were not employees, calling RA assignment “only one circumstance in the whole activity of the college program.”\(^{118}\) Similarly, the *Johns* court concluded that focusing narrowly on the work component of the GA-WEAT program “fail[ed] to take into consideration the circumstances of the whole activity.”\(^{119}\) Just as the *Marshall* court found the work assignment to be one part of a larger whole education, the *Johns* court found the work assignment to be but one part of a larger whole, assistance. Additionally, the *Johns* court held that workfare employees differed substantially from other state employees.\(^{120}\) First, workfare “participants apply for public assistance, not for a state job.”\(^{121}\) Second, workfare participants “differ from state employees in that they do not receive the

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\(^{113}\) *Johns v. Stewart*, 57 F.3d 1544, 1544–45 (10th Cir. 19995).

\(^{114}\) *Id.* at 1551.

\(^{115}\) *Id.* at 1559 n. 21.

\(^{116}\) *Id.*

\(^{117}\) 666 F.2d at 1328.

\(^{118}\) *Id.*

\(^{119}\) *Johns*, 57 F.3d at 1558.

\(^{120}\) *Id.* at 1558–59.

\(^{121}\) *Id.* at 1558.
same salary, safe working conditions, [and other benefits] as do the actual employees.”

Commentators have unanimously criticized the *Johns* case, asserting that the court ignored the economic realities test set forth by the Supreme Court in *Goldberg v. Whitaker House Cooperative, Inc.* and failed to apply the totality of the circumstances approach from *Tony & Susan Alamo Foundation v. Secretary of Labor* correctly. In addition, the court has been criticized for not considering holdings in analogous situations, such as cases in which prison workers were found to constitute employees entitled to FLSA protection, homeless individuals participating in a work program were found to be covered employees, and former mental patients performing work at a hotel were found to be employees. These courts focused on such factors as whether the work duties actually performed were similar to those of regular employees and whether the workers expected any profit. Had the *Johns* court asked these questions, the result would likely have been different. Interestingly, the *Johns* court actually admitted that workfare participants “may perform the same functions as regular employees at some of the projects to which they are assigned,” but failed to give this fact the weight that it deserved.

Moreover, the *Johns* court’s reliance on the different treatment afforded to state employees and workforce participants is misplaced. “Such an argument is tantamount to blaming the victim. All of these differences should be reasons for according protections to workfare workers, not for denying them.” Moreover, the court’s analysis makes the employer’s classification and treatment determinative of coverage. That analysis leads to the nonsensical result that, because the employer treats a worker badly and refuses to afford her statutory protections, she is denied the protection of the statute. The Supreme Court has made it...
clear that employer classification is irrelevant to, not determinative of, employee status.\textsuperscript{132}

Finally, the court failed to take into account the public policy objectives of the FLSA and the fact that these objectives could only be served by finding employee status for Johns. This analysis should have considered both objectives of the FLSA, the desire to protect the most vulnerable, and the desire to protect competition. The court should have considered the extent to which workfare employees had displaced regular employees, among other factors.

CONCLUSION: PUBLIC POLICY GOALS

Both the FLSA and PRWORA are designed to achieve certain well defined public policy objectives. Congress adopted the FLSA to relieve the effects of the Depression, by protecting the most vulnerable, those unable to negotiate on their own behalf for a living wage, and by preserving competition.\textsuperscript{133} PRWORA, enacted nearly sixty years later, again focuses on the most vulnerable, women and children receiving welfare. PRWORA treats work as the solution to a host of perceived problems with the delivery of welfare. It was designed to end dependence on welfare by promoting work. Work can only lead to independence, however, if that work provides either a wage sufficient to live on or skills and experience that will lead to such future work. It is therefore clear that the public policy objectives of both PRWORA and FLSA can best be achieved by affording workfare participants a minimum wage.\textsuperscript{134}

Congress is currently considering reauthorization of TANF. On May 16, 2002 the House passed House Bill 4737: The Personal Responsibility, Work, and Family Promotion Act of 2002. The Senate also considered a number of proposed bills, specifically the Tri-Partisan

\textsuperscript{132} Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 301 (1985).

\textsuperscript{133} See Goldstein et al., supra note 54, at 988 (discussing lack of employment protections for farm workers: "some of America's hardest working, lowest paid laborers—those most in need of minimum-wage protection—are frequently left with legal recourse only against itinerant, judgment-proof labor contractors when they are not paid the $5.15 per hour to which they are entitled").

\textsuperscript{134} See generally Steve Savner, Center for Law and Social Policy, The Implications of Applying Federal Minimum Wage Standards to TANF Work Activities 10 (1997), available at http://m15080.kaivo.com/LegalDev/CLASP/DMS/Documents/10365300 76.68/fdolresp.pdf ("To the extent that one effect 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."). It should be noted that even if one is employed full time at minimum wage, she earns approximately $10,300 per year, which is significantly below the poverty level for a family of three, which was $14,269 in 2001. Bernadette Procter & Joseph Dalaker, U.S. Census Bureau, Poverty in the United: 2001 11, at http://www.census.gov/prod/2002pubs/p60-219.pdf.
Consensus Provisions which were approved by the Senate Finance Committee on June 26, 2002. Neither bill was passed in 2002; instead, TANF was extended and discussion of welfare reform postponed. TANF reauthorization is again be on the public policy agenda in 2003. Although the House and Senate Bills differ significantly, they have important similarities. Most importantly, both bills would substantially increase the number of families required to participate in welfare-to-work programs. First, both bills would require state participation rates to rise from 50% in 2002 to 70% by 2007. In addition, the current TANF law includes a "caseload reduction credit," under which a state's required participation rate can be reduced by 1 percentage point for each percentage point reduction in the state's TANF assistance caseload since 1995. Because welfare caseloads have declined so drastically since 1995, the caseload reduction credit has lowered required work participation rates to less than 10 percent in 42 states. The Senate bill would eliminate the caseload reduction credit entirely, and implement "employment credit" instead, which would reduce the required participation rates for families placed in jobs. The Senate bill would, however, cap this employment credit at 20 percentage points. The House bill, in comparison, does not replace the caseload reduction credit with an employment credit. Under the House bill's caseload reduction credit, states would be able to reduce their participation requirements if their TANF caseloads fell during the previous three years.

Second, the House bill would increase the number of hours that a participant would have to be involved in a work activity weekly to fulfill the state's participation requirement. Under the House bill, recipients would have to participate for 40 hours each week to qualify as being engaged in a work activity. Participants are required to spend twenty-four of these hours participating in a rather narrow set of direct work


137 FREMSTAD & PARROTT, supra note 10, at 5.

138 Id.

139 TANF ISSUES, supra 135, at 6.
activities, including paid and unpaid work. Under the Senate bill, the number of hours required weekly remains at 30, but the number of hours spent in priority activities rises from 20 to 24. Commentators predict that, by limiting the number of work activities that would count toward increased state work participation requirements, the proposed reauthorization bills—especially the House bill—would effectively compel all states to operate large workfare programs. If this prediction is true, increasing numbers of TANF recipients will be likely to participate in workfare programs; it thus becomes essential that Congress extend the protections of employment protection legislation, including FLSA, to all participants.

Neither bill, as proposed, addresses the employee status of workfare participants. If Congress insists on increasing the participation requirements and the hours that welfare recipients must work, it should explicitly extend the protection of employment legislation, including FLSA, to workfare participants. Prior law extended these protections to workfare participants and should be included in the TANF reauthorization bills. Although the position of this article is that, in most workfare situations, a well-reasoned application of the totality of circumstances test would result in a finding of employee status and FLSA coverage, that requires litigation and determination on a case-by-case basis. It is unreasonable to ask the most vulnerable to be strong and assertive in demanding their rights; it is unreasonable to demand the poorest of our citizens to litigate to achieve those rights. Therefore, it makes sense from a public policy, as well as from an equitable, perspective to explicitly afford workfare participants employee status under FLSA and the resulting employment protections, such as minimum wage.

140 Id. Paid work would include unsubsidized and subsidized employment and on-the-job training; unpaid work would include workfare. Id.
141 FREMSTAD & PARROTT, supra note 10, at 7
142 Id. at 1. The minority view against the passage of H.R. 4090 was concerned with the fact that “more than half of the States could not fulfill the bill’s work requirement without violating the current minimum wage protection (in the case of a two-person family).” H.R. COMM. ON WAYS AND MEANS, 107TH CONG., PERSONAL RESPONSIBILITY, WORK, AND FAMILY PROMOTION ACT OF 2002, H. REP. 107–460, at 150 (2002). House Member Maxine Waters stated that “[w]orkfare is a program where people are herded like cattle into unskilled labor, where they are paid low wages and not given protections that non-welfare recipients have, such as minimum wage, OSHA protections, and civil rights regulations.” 148 Cong. Rec. E638 (daily ed. Apr. 26, 2002) (statement of Rep. Waters). See generally HEIDI GOLDBERG, CENTER ON BUDGET AND POLICY PRIORITIES, RECENT TANF PROPOSALS WOULD HINDER SUCCESSFUL STATE EFFORTS TO HELP FAMILIES OVERCOME BARRIERS TO EMPLOYMENT AND FIND BETTER PAYING JOBS (2002), at http://www.cbpp.org/5-9-02tanzf.pdf (arguing that proposed legislation would decrease state flexibility and force states to replace current strategies with subsidized jobs or workfare program).