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WORKFARE IMPLICATIONS FOR THE PUBLIC SECTOR

NANCY E. HOFFMAN

I. INTRODUCTION

The federal Welfare Reform Law of 1996 has presented striking new challenges to New York State's public administration. The program provides a generous amount of freedom to the state's allocation of its welfare resources, but it challenges the entitlement guidelines of the 1938 state constitution so that either legislative action or a constitutional convention might be necessary to effect the program's proper implementation.

The establishment of a welfare workforce is perhaps the most complex aspect of this federal policy. New York State is a relative pioneer in the implementation of workfare, and with one of the largest welfare workforces in the country, it is at the forefront of the welfare controversy. New York State will be monitored carefully by the nation, and its progress may determine a great deal about the future of the 1996 welfare reform initiative.

Workfare was implemented to change the perception of dependency created by the welfare system. Integral to the success of the workfare program is the management of labor law issues. Just as New York's constitution could not anticipate the welfare workforce, neither could state and federal employment and labor

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This material was compiled from several sources, acknowledging the research of Daren Rylewicz, CSEA Associate Counsel, as well as the research of New Yorkers for Fiscal Fairness (Guide to Federal Welfare Reform), and of the National Employment Law Project (Employment Rights of Workfare Participants and Displaced Workers) for the basic source material relied on herein. This paper was originally presented at the Annual Fall meeting of the Labor and Employment Law Section of the New York State Bar Association, Sagamore Hotel, Lake George, New York, September, 1997. Ms. Hoffman was unable to attend the April 23, 1998 on-site Colloquium, however, she made her paper available for distribution to the Colloquium attendees.

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statutes. This article focuses primarily on the resolution of the labor issues that the welfare workforce creates, giving particular attention to the protections and benefits that workfare participants are entitled to receive. The resolution of these issues will be instrumental in shaping the entitlement programs of the future.

II. WELFARE MANDATES OF THE NEW YORK CONSTITUTION

Article 17, Section 1 of the New York Constitution states: “The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the Legislature may from time to time determine.”\(^1\) This 1938 amendment is premised on the belief that the State has an obligation to care for its sick and needy.

As New York proceeds with the implementation of welfare reform, this legal responsibility to provide for the “aid, care and support of the needy” may be in jeopardy. Questions will arise as to the legality of cutting off benefits to legal immigrants, ending some federal welfare grants, and imposing a five-year time limit on benefits for adults. In addition, there will be contrary opinions on the definition of who is “needy” and on what constitutes minimum “care” and “aid” under the New York constitution. There may also be issues regarding the private delivery of welfare services and the level of accountability that may be lost as a result of such privatization.

The state constitution could be changed through one of two approaches. Either a constitutional convention may be called to place amendments on the ballot for voter approval or the legislature may take action. First, constitutional changes are possible because the New York constitution requires New Yorkers to vote on whether they would like to call a convention every twenty years. This question was on the ballot in 1997, but the voters decided that a convention was not desirable. Second, in order for a legislative change to the constitution to be successful, the proposal must pass the legislature in two successive terms separated by an election, and then be put on the ballot as a popular referendum. As such, this process takes a minimum of two years.

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\(^1\) N.Y. CONST. art. XVII, § 1 (McKinney 1987).
III. THE 1996 LAW

The present changes in welfare law seem to suggest the need for, or at least the possibility of, a complementary change in New York's constitution. Federal control over welfare grants has been decreased. While the decrease allows the state greater freedom in tailoring its welfare program, it presents complications as well. The budgeting flexibility given to New York makes it apt to breach Article 17, which was written in 1938 and does not meet the complexities of the contemporary welfare state.

One change in New York that causes such difficulty is the replacement of the Aid to Families with Dependent Children ("AFDC") program with a block grant system called the Temporary Assistance for Needy Families ("TANF") program. Under TANF, grant money is not guaranteed for New York's poorest children as it was under the AFDC, but instead is used at the discretion of the state. Should New York choose not to allocate this money to the poor, it may be violating Article 17. Furthermore, under the new law, an individual can only receive welfare benefits from the federal fund for five years, subject again to New York's discretion, should it seek a shorter limit. Such a choice by the state might also constitute a violation of Article 17.

Similar inconsistencies between the state's guarantees and the federal law may arise with respect to TANF's allowances for state management of benefits for the needy. Public health care facilities are likely to see increases in the amount of uncompensated care they provide, since federal money can now be allocated away from them by the state. Federal nutritional programs, which work to meet the needs of poor families, senior citizens, and the disabled, may also face budgetary constraints in lieu of TANF allowances. Furthermore, children receiving Social Security Income must be re-evaluated and may lose their benefits unless they qualify for Medicaid or TANF. Depending on one's interpretation of Article 17, this decrease in benefits may violate New York's constitutional guarantees to its citizens.

Further problems arise because some programs under TANF were not anticipated by the state's constitution. States must now create work-based assistance programs using federal block grants, and complex new issues result from such a program. One problem is that the New York labor market is experiencing significant unemployment difficulties, exacerbated by an influx of cheap workfare laborers who displace those already employed.
Workfare workers have no workplace protections, and OSHA, social security, and unemployment benefits must be mandated for them if a two-tier labor market is to be avoided in New York City. Work requirements for food stamp entitlement, along with other developments, jeopardize the spirit and language of Article 17.

A. Work Requirements Under the New Law

The Welfare Reform Law requires New York State to increase participation in work activities for TANF recipients. Unfortunately, the private sector’s low-wage labor market is unlikely to generate the number of necessary jobs for the millions of welfare recipients. To meet the work requirements, New York will likely turn to the public sector, flooding government agencies with welfare recipients who are allowed under the new law to fill regular job vacancies. The federal law does not mandate minimum wage payments for welfare recipients who work, and their coverage under various state labor laws is in question.

Recently, the Appellate Division of the Fourth Department noted that “an AFDC recipient may be assigned to participate in a [Work Employment Program] only if ‘the number of hours a participant is required to work in any month does not exceed the number of hours which would result from dividing the household’s monthly grant amount . . . by the highest of: (i) the Federal minimum wage; (ii) the State minimum wage; or (iii) the prevailing rate of pay for persons employed in the same or similar occupations by the same employer at the same or equivalent site.’”

The court stated that New York is required to obtain “a determination of the prevailing rate of pay from the Department of Labor [DOL] before making [an] assignment.”

B. What New York Must Do Under TANF

TANF is a demanding program. It requires that adults receiving assistance be working within two years. Mandatory work participation requirements are part of the program. The requirements provide that, in each social service district, 25% of adults in all families must be in an acceptable work activity


3 Id.
during 1997, with the rate ultimately increasing to 50% by 2002. For two parent households, the minimum work participation requirements are 75% in 1997 and 1998, and 90% in 1999 and thereafter.

In order to count a TANF recipient as working, that individual must work a minimum of twenty hours a week during 1997. This number will increase to thirty hours per week by fiscal year 2000 and thereafter. Parents in single family homes with children under age six need only work twenty hours per week to meet the federal requirements, but for a two parent household to be counted as working, one adult in that household must work for at least thirty-five hours per month. The state is required to provide the equivalent of the minimum or prevailing wage to all workfare participants.

Though the Welfare Reform Act provides no specific parameters for welfare jobs, certain positions, including community service programs and childcare in community service, seem acceptable to recipients in the community service programs. Workfare participants must not be placed in a currently occupied job or in a position where another individual is on layoff from the same or any substantially equivalent job. Laying off a regular employee in order to accommodate a workfare participant is also prohibited.

To enforce this rule, the state is required to set up a grievance procedure for anti-displacement complaints. Sanctions permit the state to disqualify from aid those individuals who do not meet the program work requirements, refuse an offer of employment, or voluntarily quit a job without good cause. Parents of children under age six, however, cannot be punished for not complying with work requirements if their reason for noncompliance is lack of childcare. New York must also limit food stamp

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4 See N.Y. SOC. SERV. LAW § 335-b(1)(a) (McKinney 1992). This will require the creation of 81,000 jobs for 1997 alone.
5 See id.
6 See id. § 335-b(1)(b).
7 See id. § 335-b(1)(d)(i).
8 See id.
9 See id. § 335-b(3).
10 See id. § 335-b(1)(d)(ii).
11 See id. § 336. Other acceptable jobs include: unsubsidized employment, subsidized private and public sector employment, work experience, on-the-job training, job search and job readiness for up to six weeks, and vocational education.
benefits for childless adults between eighteen and fifty years of age to three out of thirty-six months, unless they are working twenty hours per week or participating in a work program, or unless New York receives a waiver from the federal government.

C. What New York May Do Under TANF

The law also provides more flexible options. New York may fill vacant positions with workfare participants, though it does not have to. The state and local governments may provide greater displacement protections than those provided in federal law. New York may also exclude single parents with children six years old or younger from meeting the work requirements if acceptable childcare is not available.

The state may also opt out of the requirement that adults receiving TANF participate in community service programs within two months of receiving assistance. It may satisfy the work requirements by choosing jobs from the list of options that are least disruptive to the wage labor market. To this extent, the state can try to find those positions most likely to lead to real jobs for recipients. In areas of high unemployment, the state can ask for a waiver from the United States Department of Agriculture's requirement that childless adults between the age of eighteen and fifty be limited to three months of food stamps in any three-year period, unless they are working or participating in a job program.12 New York may also reduce the exemption from the work requirements under the Food Stamp program for parents of children under age six. Furthermore, it can "cash out" food stamps to use as a wage supplementation for employees. If New York chooses to "cash out" food stamps, it must devise a plan for moving recipients from subsidized to unsubsidized employment within a specific period of time.

IV. MANAGERIAL AND STATUTORY ISSUES

There are a number of important labor issues broadened by the creation of a welfare workforce and the new welfare law.

A. Privatization

There is serious concern that there will be an increased risk of privatization and loss of merit system civil service protections

under the new TANF program. Under the new law, the state may contract out the administration of the TANF program and choose to have Medicaid eligibility determined by the TANF agency. The state may contract with charitable, religious, or private organizations to administer all or part of the TANF program. The state may also contract with these organizations to provide TANF service. Private job placement agencies may be contracted with, and vouchers can be used to pay for job placement services for TANF recipients. The administration of childcare funds and foster care maintenance can also be contracted to private institutions.

B. Standards for Being an “Employee” Under the Taylor Law

The term “public employee” means “any person holding a position by appointment or employment in the service of a public employer, except . . . judges and justices of the unified court system, persons . . . in the organized militia . . . and persons who may . . . be designated . . . as managerial or confidential.” The term “public employer” means:

(i) the state of New York,

(ii) a county, city, town, village or any other political subdivision or civil division of the state,

(iii) a school district or any governmental entity operating a public school, college or university,

(iv) a public improvement or special district,

(v) a public authority, commission, or public benefit corporation, or

(vi) any other public corporation, agency or instrumentality or unit of government which exercises governmental powers under the laws of the state.

The New York State Public Employment Relations Board (“PERB”) standard to determine whether employees are “public employees” was set forth in State University of New York v. Pub-

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13 It is unclear at this time, given the choice New York has under the new law to use the TANF agency to administer Medicaid eligibility, whether Medicaid eligibility functions can be contracted out. It seems that conflicting language exists both allowing and prohibiting Medicaid eligibility functions to be administered outside of a merit-based system (civil service).

14 N.Y. CIV. SERV. LAW § 201(7)(a) (McKinney 1983).

15 Id. § 201(6)(a).
The court found that PERB's standard in determining whether graduate students were public "employees" within the meaning of the Act was a rational interpretation and not subject to reversal. The standard requires that the employment relationship between worker and employer be regular and substantial in nature and that no evidence exist showing that the legislature intended to exclude that employment relationship from coverage. These principles were reiterated in University of the State of New York v. Newman, where the court upheld a PERB ruling that employees operating Regents college degree programs were "public employees" within the meaning of the Act.

Additional standards were articulated in In re Local 1170. There, PERB found that the town's receiver of taxes was not a public employee within the meaning of the Taylor Law, because the town did not possess authority to discipline or discharge the employee, and thus lacked any cognizable degree of control over that worker.

In a case in which the labor union sought to accrete New York City workfare participants into existing bargaining units, the arbitration panel ruled as a matter of law that they were not "municipal employees" or "public employees" under the New York City Collective Bargaining Law. The panel relied upon the legislative history of the workfare program, which it believed showed no legislative intent for the workfare participants to enjoy "employee" status. The panel also viewed the "compulsion" to work as a factor that distinguished workfare participants from workers in traditional employment relationships.

This may not be the deciding factor in workfare worker status, however, because it may not be necessary for a union to wait until employees are classified before petitioning to represent

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17 See id. at 664.
18 585 N.Y.S.2d 235, 237 (App. Div. 1992) ("The vestiges of antiquity retained by petitioner's unusual structure during its evolution to its current status cannot change its decidedly public function.").
20 In re District Council 37, No. RU-760-80 (Office of Collective Bargaining, June 20, 1981); see also NAT'L EMPLOYMENT L. PROJECT, EMPLOYMENT RIGHTS OF WORKFARE PARTICIPANTS AND DISPLACED WORKERS 44 (1996) [hereinafter NELP].
PERB's Declaratory Ruling procedures can be used to obtain a jurisdictional determination as to whether an employer or employee is public, and this may be important to the future of workfare participants.

C. National Labor Relations Act ("NLRA") Standards

The NLRA defines "employee" as "any employee" not explicitly excluded. Exclusions include agricultural and domestic workers, individuals employed by their parents or spouse, independent contractors, supervisors, and persons employed by an entity that is not an "employer" under the statute. State and local governments are excluded from the definition of "employer," as are employers subject to the Railway Labor Act.

Because an "employee" is defined as a worker not explicitly excluded by the statute and because workfare participants do not seem to be encompassed by any of the exclusionary terms, workfare participants working for private employers appear to be covered by the NLRA. They may, however, face difficulty in being included in a bargaining unit with paid workers. In the workfare context, the primary difficulty with this incorporation will be the struggle to have the participants included within the definition of the relevant bargaining unit. The NLRB applies a "central test" of whether the workers share a community of interests on issues such as wages, hours, and other conditions of employment. Factors that are considered include the employees' skills, duties, and working conditions, the employer's organization and supervision, and bargaining history. When new employees are added to an existing bargaining unit, it is called "accretion," and the Office of Collective Bargaining applies a similar "community of interests" test. Factors such as integration of operations, geographic proximity, working conditions, skills and functions, centraliza-

21 See In re Town of Massena, 15 N.Y. PUB. EMP. REL. BD. ¶ 15-4064 (1982) (holding that Union petition was not premature since employees covered by instant petition already had a substantial and continuing relationship that warranted representation, and there was already sufficient information available, such as employees' work hours, work week, salaries, benefits, job duties, etc., to permit unit determination).


24 See id. § 152(2).

25 See Power Inc. v. NLRB, 40 F.3d 409, 420 (D.C. Cir. 1994).
tion of management, and interchange of employees are examined.  

In *Mon Valley United Health Services*, the NLRB asserted jurisdiction over a non-profit corporation that provided programs and facilities throughout a four-county area for treatment of mentally ill and mentally retarded persons. The Board found that although the corporation's activities were funded by the state, neither the state nor the counties that actually disperse funds exerted control over the manner in which the corporation utilized funds. Also, the corporation hired and fired employees within the various programs without any intervention by the counties and did not seek prior approval for any personnel action it wished to take. Since the state did not exert the necessary controls, the Board did not exempt the company from its jurisdiction.

In most cases dealing with welfare recipients, the government argues that they are not employees because they are "compensated" by their grant or entitlement from the state. The Board, however, is usually hesitant to grant exemptions to its jurisdiction. In *M.S.C. of East St. Louis*, the Board had to decide whether a pharmacy employer was engaged in a retail enterprise. The Board found that it was, despite the fact that a large percentage of the consumers utilizing the employer's store were welfare recipients whose prescription bills were ultimately paid by a third party, making the source of the funds received by the store irrelevant to the finding of jurisdiction. The Board found that this funding arrangement did not change the essential nature of the retail enterprise. It also analogized this arrangement to other common third party prescription payment plans, such as insurance carrier provided plans. This hesitancy to grant exemptions to NLRB jurisdiction may factor into the possibility of organizing workfare workers.

**D. Applying CETA By Analogy**

Due to the programs' similarities, it may be possible to rely upon cases brought on behalf of Comprehensive Employment and Training Act ("CETA") workers in the 1970s and 1980s to prog-

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nosticate accurately about the future for workfare participants. One should be aware, however, of the statutory language in CETA, which provided that its workers should basically be accorded the same benefits and conditions as non-CETA workers:

All persons employed in public service jobs shall be provided workers' compensation, health insurance, unemployment benefits, and other benefits and working conditions at the same level and to the same extent as other employees working a similar length of time, doing the same type of work and similarly classified. Any such classification must be reasonable and must include nonfederally financed employees.\(^29\)

This provision may limit the usefulness of some CETA precedent in the workfare context.

In *Civil Service Employees Association v. County of Nassau*,\(^30\) the court held that a collective bargaining agreement ("CBA") included within the term "employees" persons who held CETA-funded positions prior to being placed in regular positions. The court reasoned that the CBA had treated CETA workers as municipal employees. Again, this decision may have limited applicability in the workfare context because the CETA legislation expressly required CETA to be included in collective bargaining.\(^31\)

In *Evergreen Legal Services*,\(^32\) the Board found a sufficient community of interest between CETA and non-CETA workers for all to be included in a single bargaining unit. The Board distinguished previous decisions excluding CETA workers on their facts. The Board did exclude, however, work-study students, who received different wages and benefits. Significantly, this was the class in which most workfare participants were likely to find themselves.\(^33\)

In *In re Amityville Public Schools*,\(^34\) the Board found that part-time reading teachers were public employees entitled to representation despite the fact that the program was federally funded. The implications of federal funding for the New York State Department of Labor, Division of Employment, was also considered in *Matter of State of New York*.\(^35\) During extensive

\(^31\) See NELP, supra note 20, at 44.
\(^32\) 246 N.L.R.B. 964 (1979).
\(^33\) See NELP, supra note 20, at 46.
\(^34\) 5 N.Y. PUB. EMP. REL. BD. ¶ 5-3043 (1972).
\(^35\) 7 N.Y. PUB. EMP. REL. BD. ¶ 7-3077 (1974).
hearings, it was argued that there was a conflict of interest between employees who are paid from funds raised directly by the employer and employees who are paid from funds allocated for such purpose by the federal government. The source of funding was not deemed significant in either decision.

In Somers Central School District, the Board found that amendments to the CETA legislation that imposed an eighteen-month limitation on employment of any individual did not preclude CETA personnel from representation rights under the Taylor Law. The prospect of employment for eighteen months was found sufficient to create a substantial interest in terms and conditions of employment warranting coverage under the law. This determination was made particularly in light of the United States Department of Labor regulation implementing the amendments, which provided that CETA personnel engaged in public service shall receive the same wages, benefits, and working conditions as those received by similarly employed employees at the employing agency. The Board determined that this provision recognized CETA employees' interest in the terms and conditions of their employment to be equal to that of other employees. CETA employees had long-term temporary status, and this was recognized as a sufficient basis for representation eligibility.

IV. APPLICABILITY OF STATUTES & STANDARDS TO WELFARE WORKERS

A. In Civil Service

In Gotbaum v. Sugarman, a union official, civil service employees, and persons on the civil service eligibility list argued that the employment of welfare recipients in a demonstration project, where funding from the welfare department was paid in the form of wages by the employing agencies, violated Article V, Section 6 of the Constitution of the State of New York. They contended that the welfare recipients were not appointed from com-

37 See Weedsport Cent. Sch. Dist., 12 N.Y. PUB. EMP. REL. BD. ¶ 12-3004 (1979); see also Village of Nassau, 14 N.Y. PUB. EMP. REL. BD. ¶ 14-4022 (1981) (holding Village's CETA-funded police officer was entitled to inclusion in an unit comprised of one other full-time officer and two part-time officers).
38 358 N.Y.S.2d 635 (Sup. Ct. N.Y. County 1974).
petitive civil service lists. The court rejected this argument on the ground that the workers acquired no civil service status, were temporary employees, and were paid from relief funds.

A similar contention based upon Article V, Section 6 of the Constitution of the State of New York was raised by civil service employees and their union in Ballentine v. Sugarman. The claim was also rejected on the grounds that, based upon the nature of their compensation, the workfare placements did not constitute "appointments and promotions" under the Civil Service Law.

In Connell v. Utica City Board of Education, a lower court decision finding that petitioner was not an employee of the school district was reversed. The higher court stated that though a guidance counselor's position was financed primarily by federal grants, this was not determinative of whether she was an employee of the school district and entitled to protection under the tenure statutes.

B. FLSA Status of Workfare Workers

Under the FLSA definition, an "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." An "employee" is "any individual employed by an employer." Recently, the Tenth Circuit issued the first reported decision addressing in the negative the question of whether FLSA applied to workfare participants. In Johns v. Stewart, plaintiffs challenged the compensation of participants in two Utah workfare programs, which required a number of hours of participation that did not permit the recipients to earn their benefits at the level of the minimum wage. The court indicated that the decisive question was whether the participants

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43 Id. § 203 (e)(1).
44 57 F.3d 1544 (10th Cir. 1995).
were "employees" for purposes of FLSA. The court relied heavily on two of its prior decisions, Marshall and Klaips.

In Marshall v. Regis Educational Corp., college resident hall assistants were not "employees" under the FLSA, but were recipients of financial aid. Alluding to "the totality of the circumstances," the court focused on the education aspects of the program, rather than the economic benefit of the students' efforts to the college. In Klaips v. Bergland, the court ruled that none of the Utah workfare program participants had an employment relationship with the state, in the context of denying an employment-related food stamp deduction. The court noted that the participants did not receive the same benefits and working conditions as employees and that service in the program was a condition for public benefits eligibility, not a service to be directly compensated.

The Johns court indicated that the proper perspective was to "focus 'upon the circumstances of the whole activity,' " or the overall relationship of assistance, or employment to determine which workers were employees. It criticized "[p]laintiffs' narrow focus on the work component" of the programs, and it contrasted the treatment of state employees to that of workfare participants. Accordingly, the court concluded that the workfare participants were not employees for FLSA purposes.

A New York court invalidated a workfare statute that required three days of work per week regardless of the amount of the grant and resulted in many recipients working for less than $1.00 an hour. It did this on the ground that it violated a provision in the New York constitution requiring that "[n]o laborer, workman or mechanic, in the employ of a contractor or subcontractor engaged in the performance of any public works ... shall ... be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where

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45 Id. at 1557.
46 666 F.2d 1324 (10th Cir. 1981).
47 Id. at 1328.
48 See id. at 1327–28.
49 715 F.2d 477 (10th Cir. 1983).
50 See id. at 483.
51 Johns v. Stewart, 57 F.3d 1544, 1558 (10th Cir. 1995) (quoting Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947)).
52 Id.
53 See id. at 1558–59; see also NELP, supra note 20, at 23.
such public work is to be situated, erected or used.' \(^{54}\) This decision may set the balance for calculating benefit eligibilities for workfare participants.

C. Occupational Safety and Health of Workfare Workers

The standards of the Occupational Safety and Health Act (the "OSH Act")\(^{55}\) apply only to non-profit and private for-profit workfare placements. State occupational safety and health laws may also apply for placements with public employers. The OSH Act imposes on "employers" two duties. First, there is a general duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."\(^{56}\) Second, there is a specific duty to comply with all standards promulgated under the OSH Act.\(^{57}\) The OSH Act defines "employee" as "an employee of an employer who is employed in a business of his employer which affects commerce."\(^{58}\) An "employer" is defined as "a person engaged in a business affecting commerce who has employees."\(^{59}\)

The OSH Act's definition of "employer" has been construed broadly to extend coverage to persons not directly employed by the entity found responsible, usually in the context of general contractor/subcontractor relations. Employers with little or no control over the operations of others at the worksite (subcontractors) have the duty to exert reasonable efforts to protect their own employees. General contractors, with supervisory capacity, have a duty to protect all employees engaged at the worksite, not just their own employees.\(^{60}\)

Explanations of the OSH Act definition of "employee" are rare. A regulation indicates that "the existence of an employment relationship . . . is to be based upon economic realities rather than upon common law doctrines and concepts."\(^{61}\) In ad-

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\(^{56}\) Id. § 654(a)(1).

\(^{57}\) See id. § 654(a)(2).

\(^{58}\) Id. § 652(6).

\(^{59}\) Id. § 652(5).


dition, the OSH Act does not apply to an independent contractor who is not an employee.62

To pursue a violation of the OSH Act, one must make a complaint to the Occupational Safety and Health Administration. There is no private right of action under the OSH Act. Consistent with these holdings, New York State, in a letter to the American Federation of State, County and Municipal Employees D.C. 37 NYC, indicated that it would consider workfare participants as public employees covered under the state's occupational safety and health law.

D. Anti-Discrimination Statutes and Their Applicability to Workfare Workers

Application of anti-discrimination principles to workfare placements may be particularly important. For instance, if the worker has a physical or mental impairment that interferes with his or her successful performance of the assigned job, the applicability of a "reasonable accommodation" under the ADA may prevent termination of the worker's public benefits. A workfare participant who is entirely reliant on her benefits may be especially vulnerable to an exploitative work environment including sexual harassment, which will be exacerbated if laws prohibiting sex discrimination in employment do not apply.

The standard employment anti-discrimination statutes include Title VII.63 Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act also bar racial and handicap discrimination, respectively, in federally funded programs, although the focus in those contexts will be on the other statutes that are more directly applicable to employment discrimination. New York's Human Rights Law64 parallels much of the federal law.

The general Title VII ADEA and ADA definition of "employee" is "an individual employed by an employer."65 Title VII defines "employer" as "a person engaged in an industry affecting

64 N.Y. EXEC. LAW § 296 (McKinney 1993).
commerce who has fifteen or more employees for each working
day in each of twenty or more calendar weeks in the current or
preceding calendar year, and any agent of such a person.\textsuperscript{66} The
ADEA’s definition is similar, except that it requires employment
of twenty employees and does not mention agents.\textsuperscript{67} The ADA’s
comparable definition was reduced from twenty-five to fifteen
employees in July 1994, and it also lacks a reference to agents of
an employer.\textsuperscript{68}

There are not yet many cases on the discrimination aspect of
welfare worker protections.\textsuperscript{69} The New York anti-discrimination
statute does have a broad “aid and abet” clause, which may help
to extend liability to non-employers for involvement in an unlaw-
ful discriminatory practice,\textsuperscript{70} but this is not conclusive. A federal
statute also exists that prevents race discrimination in the mak-
ing and enforcing of contracts.\textsuperscript{71} While this provision reaches
employment relationships covered by Title VII, its scope is
broader and may provide useful to protect workfare workers
where Title VII fails.\textsuperscript{72}

\textbf{E. Unemployment Compensation for Workfare Workers}

Unemployment compensation is a joint federal-state pro-
gram which provides income replacement for workers connected
to the labor market who have lost their employment through no
fault of their own. In general, workers will be eligible if: (1) they
have an adequate earnings history to establish financial eligibil-
ity (showing earnings over about a year-long period of time); (2)
they lost their jobs for reasons which were not their fault; (3)
they are able and available for work; and (4) they will accept
suitable work.

\begin{footnotes}
\item[67] See 29 U.S.C. § 630(b) (1994).
\item[69] See, e.g., Dumas v. Mount Vernon, 436 F. Supp. 866, 872–73 (S.D. Ala. 1977),
aff’d in part on other grounds, 612 F.2d 974, 979–80 (5th Cir. 1980) (holding that
CETA workers were not counted as “employees” for jurisdictional purposes under
Title VII).
\item[70] N.Y. EXEC. LAW § 296 (McKinney 1993).
that “when Congress chose to protect the right to make and enforce contracts, it
meant to provide a sweeping remedy against racial discrimination”).
\end{footnotes}
The Federal Unemployment Tax Act ("FUTA") permits an exception to unemployment compensation coverage requirements for services performed as part of a work relief or work training program.\textsuperscript{73} Unemployment Insurance Program Letter ("UIPL") No. 16-86 similarly provides that if a work relief program was assisted or financed in whole or part by any federal agency, state agency, or political subdivision, unemployment compensation coverage will not be required. States, however, were not precluded from providing coverage.

The statutory exclusions for work relief and work training programs contained in many state unemployment compensation statutes have been used in practice to deny benefits to workfare participants. Several courts have rejected the argument that welfare benefits received under such programs requalified a claimant for UC benefits under a new claim. With the expansion of workfare to new types of placements that more resemble private employment, however, exclusions written in state unemployment compensation law cannot be taken for granted. This area is ripe for new developments.

\textbf{F. Workers' Compensation for Workfare Recipients.}

Workers' compensation programs typically provide medical coverage and income replacement for work-connected injuries, illnesses, and deaths. These programs typically use a form of strict liability (negligence and related defenses are irrelevant) and resolution of claims through an administrative system. In exchange for these employer "concessions," workers' compensation benefits provide the exclusive remedy for workplace health claims.\textsuperscript{74}

Workers' compensation is a uniquely state benefits program, with virtually no federal involvement. Therefore, workers' compensation eligibility is determined by reviewing the workfare and workers' compensation statutes and state law cases on workers' compensation coverage. Some workfare statutes provide for workers' compensation coverage, and New York decisions are also applicable.\textsuperscript{75}

\textsuperscript{74} See 82 AM. JUR. 2D Workers' Compensation §§ 6, 62 (1992).
\textsuperscript{75} See Allen v. City of New York, 554 N.Y.S.2d 789 (Sup. Ct. Bronx County 1990); see also Maiceo v. City of Yonkers, 32 N.Y.S.2d 349 (App. Div. 3d Dep't), aff'd, 43 N.E.2d 84 (N.Y. 1942).
CONCLUSION

In sum, organized labor in the public sector recognizes the opportunities for enhanced labor solidarity with the welfare workforce, and is optimistic about transforming today’s challenges into tomorrow’s promise, for better working lives for everyone.