Workfare from a Management Perspective

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Prior to the welfare reforms, the New York City welfare workforce system was perceived by many as atrocious. Although there were many problems with the system, it was not atrocious. Ireland, for example, had for many years a much larger portion of its population on the dole than New York City.¹

The present reforms have been somewhat successful. The welfare rolls have shrunk by a third. That is a tremendous reduction. Some have attributed this decrease to people who committed infractions and were taken off the rolls. Supposedly it is easier to get people off the rolls now.² There is, however, some concern over where the people who have been cut have gone.

Some individuals in the system were working off the books. Some received welfare and led lives of crime. Today those individuals are not allowed to do both. Those engaged in crime did not care to do both. Once they got jobs, they could not. Some people can certainly be accounted for in that way.

¹ Compare MEL COUSINS, THE IRISH SOCIAL WELFARE SYSTEM: LAW AND SOCIAL POLICY 9 (1995) (discussing the importance of the Irish social welfare system, which provides income support payments to about one and half million people out of a population of three and half million and child benefits to almost half a million families), with Joe Sexton, Welfare Rolls Show Fewer Recipients, N.Y. TIMES, Apr. 14, 1997, at B6 (discussing the decline in the number of New Yorkers on welfare from about 1.2 million in 1995 to about 930 thousand in early 1997).

² See David L. Gregory, Br(e)aking the Exploitation of Labor, 25 FORDHAM URB. L.J. 1, 21 (1997) (stating that workfare has reduced the city's welfare rolls by 240,000 people between 1996 and 1997 and that, nationwide, a 7.1% decline in the welfare rolls has been realized since 1995); see also David Firestone, Praising the Wonders of Workfare, Giuliani Finds a Campaign Theme, N.Y. TIMES, Mar. 20, 1997, at B3 (stating that the 24,000 reduction in the welfare roles is both a product of workfare and a tougher screening process); Rochelle Sharpe, Welfare to Work: A Special New Report About Life on the Job—and Trends Taking Shape There, WALL ST. J., Jan. 21, 1997, at A1 (stating that the drop in New York's welfare roles began in part because of a new finger printing system that prevents recipients from receiving double benefits).
The new system is not a perfect system. There is a tremendous need for childcare, and there has to be more emphasis on training and schooling. Though the current system is certainly far better than the previous system, it is still not adequate.

An example of someone who challenged the system is illuminated in a recent case. It was not a single mother; it happened to be a white male. He felt that the prevailing wage, as opposed to the minimum wage, should be used to determine how much he was required to work each month. He was required to work forty-four hours a month to remain eligible for the amount he was receiving from the welfare system. It is difficult for people who work long hours, because they are involved in different kinds of businesses and trades or are self-employed, to appreciate the hardship of having to put in twenty, twenty-five, or thirty hours a month for welfare.

Displacement of workers is a legitimate issue. The framework to protect organized workers is already present in the law. Regular workers are not supposed to be laid off, or replaced by workfare people. Is workfare going to affect overtime? It absolutely will. This, however, is not necessarily a bad thing. It affects workers and their paychecks, but those affected are earning a living wage. If this displacement helps a different segment of the population to earn a living as well, it may not be so awful.

There are protections built into the law with regard to not utilizing welfare workers when there are strikes or lockouts.

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4 See Enzian v. Wing, 670 N.Y.S.2d 283 (4th Dep't 1998) (holding that a WEP participant's benefits should be calculated at a rate comparable to the wages paid to regular employees for performing comparable work).

5 See id. at 284.

The language in the displacement portions of the statutes is quite strong. There is no problem with the system. The only issue may be with enforcement.

There has been talk about tailoring the work programs so that people who have already developed skills are given the opportunity to pursue jobs before they are placed on them. There has to be more credit given for those who are involved in education, and more time given under the system to credit training.

Probably one of the most basic issues is the adequacy of childcare. This is not a problem that is limited to the poor. It is a difficult issue for everyone.

The legal issues involved in workfare come down to the issue of who is an employee? There is a relevant Second Circuit Court of Appeals decision, O'Connor v. Davis where the court had to decide whether plaintiff was an employee as defined under Title VII. Plaintiff was an intern from Marymount college and was assigned to Rockland Hospital on a work-study arrangement, problems arose when she alleged sexual harassment.

The definition of an employee under Title VII is circular. It says that an employee is an individual employed by an employer. That is a classic dilemma and was at issue here. In this case, the Second Circuit was guided by a Supreme Court case that advocated using a traditional master-servant definition of employers and employees, as a basis for determining whether such workers were employees. Using this guidance, the court said that an employee is a hired party. The court said this was an antecedent question that had to be addressed before reaching the "right to control" test, the test normally used to decide whether someone is an employee or independent contractor.

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7 See id. § 336-c(2)(e)-(f).
8 126 F.3d 112 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998).
9 See id. at 115 (noting that in order for the plaintiff to recover damages for sexual harassment under Title VII, she had to prove, as a prerequisite, that she was an employee within the meaning of Title VII).
12 See O'Connor, 126 F.3d at 115.
13 See id.
14 See Reid, 490 U.S. at 751–52. Some of the factors deemed relevant to the "right to control" inquiry by the Supreme Court are the work required, the source of the instruments and tools, the location of the work, the duration of the relationship between the parties, the extent of the hired party's discretion over when and how to
The O'Connor court said that if the person is not hired, or their services are not engaged for money, they are not considered an employee.\textsuperscript{15} Instead, there is a different kind of relationship. The engagement for money was viewed as an essential condition of the employment relationship by the court.\textsuperscript{16} This seems to be the correct analysis, particularly in light of the supposedly temporary nature of the public assistance program.

There is another case in the 10th Circuit, Johns v. Stewart,\textsuperscript{17} where the court basically agrees with the O'Connor court's definition of employees for Fair Labor Standards Act ("FLSA") purposes. The Johns decision discussed the relationship between the people in these work programs and the government as not an employment relationship, but as more of an assistance relationship.\textsuperscript{18} In New York, however, notwithstanding whether the FLSA applies, at least the minimum wage is applied to compute the rates.\textsuperscript{19}

With this premise, if an employer does not have employees under the law, then discrimination statutes are not applicable. Of course one wants to protect people in workfare from discrimination. The issues are how should this be accomplished and whether Title VII's general anti-discrimination provisions, the Americans with Disabilities Act, and the Age Discrimination and Employment Act apply. It appears that this legislation does not apply. There is an anti-discrimination provision in Title VII, however, that specifically includes these training programs.\textsuperscript{20} The question then becomes whether, if that provision is violated,

\textsuperscript{15} See O'Connor, 126 F.3d at 116.
\textsuperscript{16} See id.
\textsuperscript{17} See Johns v. Stewart, 57 F.3d 1544 (10th Cir. 1995).
\textsuperscript{18} See Johns, 57 F.3d at 1557–58.
\textsuperscript{19} See Brukhman v. Giuliani, 678 N.Y.S. 45 (1st Dep't 1998) (holding § 336-c(2)(b) constitutional and reversing the lower court's determination that workfare rates are to be computed based on the prevailing wage). It is worthwhile to note that the New York legislature amended § 336-c(2)(b) immediately following the lower court's decision in Brukhman v. Giuliani, 662 N.Y.S.2d 914 (Sup. Ct. New York County 1997) that recipients of public assistance who participated in the Work Experience Program were entitled to have their hours calculated by using a comparable rate of pay of persons employed in similar work. See Cohen, supra note 3, at 717–25.
it is appropriate to allow the individual discriminated against to bring a private cause of action.

The defense of alleged discrimination claims is a growing field for labor lawyers. Management attorneys are now allocating 40% to 50% of their practice defending discrimination claims. Though the system is broken, lawyers are doing well. Insurance companies are doing well. It is producing a system so litigious that one sensationally frivolous case was settled for $100,000 because the insurance company said it could not afford to conduct the depositions. The insurance company thought it was a wonderful settlement.

An analogous situation is suppression of evidence in the criminal field. Everyone is troubled when a criminal is set free because evidence was illegally seized. The criminal is turned loose on the premise that this is the best way to prevent police from illegally seizing evidence. I suggest the best way to prevent the illegal seizure of evidence, however, is to prosecute the cops who do it. Fire them for engaging in that kind of activity and that activity will stop. This will get rid of the police who do act that way and keep the criminals who belong in jail, in jail.

In the context of workfare, supervisors engaged in discrimination prohibited by the Title VII training provisions\(^\text{21}\) should be disciplined according to the applicable statutes. That should remedy discrimination and avoid private causes of action. It hopefully would mean less litigation.

A safe work environment should also be provided for these individuals. Even though the Occupational Safety and Health Act does not apply, state laws and social services laws do. There are instances where these laws may be violated. There is a statute in place that provides that workfare workers can be assigned to jobs only if the appropriate federal and state standards of health and safety are maintained\(^\text{22}\). The language protects these workers. It also means that workfare workers can not be assigned to potentially hazardous jobs without the proper training, supervision, and protective equipment\(^\text{23}\).

\(^{21}\) See id.

\(^{22}\) See N.Y. SOC. SERV. LAW § 336-c(2)(a) (McKinney 1998).

\(^{23}\) See N.Y. LAB. LAW § 886 (McKinney 1999) (providing for the training and education of employees concerning the prevention of occupational diseases and injuries).
Regarding the issue of worker's compensation, there is a Third Department decision that says that worker's compensation does cover people engaged in workfare. That is probably a correct policy decision.

Workfare is not an area of great concern in the private sector and certainly not in the metropolitan area. Under the National Labor Relations Act, workfare workers would be entitled to organize, but they should not be placed in the same bargaining unit with regular employees. Workfare workers have different issues to bargain about, and there would be no community of interest with regular workers. To find otherwise would do a disservice to the regular bargaining unit members, as workfare workers would start to dominate the union. Workfare workers would vote for contracts even though they were not the primary beneficiaries.

The New York City Office of Collective Bargaining has ruled that workfare workers cannot belong to municipal or public employee unions. That is the correct decision.

Under the Comprehensive Employment and Training Act ("CETA"), CETA workers were provided with the same benefits and conditions, including collective bargaining rights, as non-CETA workers. In the context of workfare, however, there are no such rights, because the statute is not written that way.

The O'Connor decision is more analogous to the cases related to prison workers. There is not an employment relationship

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24 See Kemp v. City of Hornell, 672 N.Y.S.2d 537 (3d Dep't 1998) (holding that both Steuben County and the City of Hornell were equally liable for Workers' Compensation benefits paid to workfare participants); see also Hughes v. Steuben County Self-Ins. Plan, 669 N.Y.S.2d 716 (3d Dep't 1998) (holding that the Steuben County Department of Social Services was plaintiff's sole employer and was, therefore, liable for payment of Workers' Compensation Benefits); Quick v. Steuben County Self-Ins. Plan, 662 N.Y.S.2d 608 (3d Dep't 1997) (holding that Steuben County retained sufficient control over a workfare participant to be deemed a general employer for Workers' Compensation benefits although the participant was supervised by the Salvation Army).


26 The statute only provides that a collective bargaining representative is to be notified monthly by the employer of a WEP participant's duties, assignments, and hours worked. See § 336-c(3).

27 See, e.g., Coupar v. U.S. Dep't of Labor, 105 F.3d 1263 (9th Cir. 1997) (holding that a prisoner who performed work for Federal Prison Industries was not an "employee" within the meaning of the whistle-blower provisions of the Clean Air Act and the Toxic Substances Control Act); Danneskjold v. Hausrath, 82 F.3d 37 (2d Cir. 1996) (holding that involuntary performance of labor in prison is not employment).
sufficient to allow the workers to organize. To say prison workers should organize and negotiate over issues that are not related to money, which has been suggested by a number of individuals, is a scary thought.

In collective bargaining situations, contracts are settled 98% of the time by money. Raises settle other issues. If money is taken out of the mix and only other issues are left, there will be perpetual bargaining. This is a dreaded result.

The privatization issue worsened when there was a chairman in PERB who was a former union lawyer. Privatization is a difficult issue, which must be bargained over with the union. Unless the union agrees to privatization, it is not easy to accomplish. Privatization, however, is a concern that may be overstated. The issue that is of most concern is the way in which the discrimination statutes\(^2\) are presently being applied. There will be a lot more money going to lawyers, rather than being used in places where it could do much more good.

The system, in its present state, is making it harder for people to get on welfare and easier to remove them. That is acceptable provided due process is applied in all situations. Is it a perfect system? Certainly not. Is it a swing back from what there was? Yes, and hopefully it will enable society to reach a good and fair middle ground soon.

Presently, New York City is a better place to live. The perception is that the system is being changed for the good. Many of the people going off the welfare rolls had to be milking the system. Many of them had to be people who had jobs off the books. As they get off welfare, more money will be left to take care of the truly needy. That is where the money should be utilized.

The money Mayor Giuliani is saving by the rolls dwindling should not be spent somewhere else. It should go back into the system. If the system is at a point where the people who are being served by it are the truly needy, then justice certainly is realized for everyone.
