CO-OP MEMBER LABOR PROGRAMS

UNDER THE FAIR LABOR STANDARDS ACT:

A MATTER OF ECONOMIC REALITY

by

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The Fair Labor Standards Act ("FLSA"),[i] commonly referred to as the wage and hour law, regulates minimum wage, overtime pay, and recordkeeping requirements as to those who are considered employees under the Act. The FLSA makes an "employer" one who "employs" an individual as an "employee," the only defined phrase "employ" meaning to "suffer or permit to work."[ii] The U.S. Supreme Court has noted that although this definition "is quite broad, it does have its limits."[iii]

If applicable, the FLSA would be disruptive to or prohibitive of a member labor program of a consumer co-op. Such programs vary widely as their specifics, but in general they comprise arrangements pursuant to policy whereby member-workers provide labor services to the co-op and receive discounts on their purchases of food or other merchandise. To assure that discounts taken would at least equal the minimum wage as to hours worked would be a significant administrative burden and would put a premium on minimizing patronage. Under such circumstances most co-ops would prefer to abandon their member labor program.

I. "Volunteer" services: an untenable proposition

Many co-ops have been proceeding on the assumption that their member labor programs can avoid the FLSA, if at all, only under the theory that member labor constitutes "volunteer" services. But volunteer services that are considered to be outside the scope of the FLSA have long been limited to persons who provide services without any express or implied compensation arrangement.[iv]

As to whether discounts on merchandise would constitute

compensation, the FLSA defines "wage" as including board, lodging, or other facilities customarily furnished by the employer to his employees.[v] Since consumer co-ops, like retail stores generally, customarily provide discounts to their employees on merchandise which they sell, such amenities would clearly constitute wages to member-workers. Indeed, the Supreme Court has so held.[vi]

Furthermore, the Department of Labor interprets the exemption for volunteers as applying only to persons who donate their services "for public service, religious or humanitarian objectives" to "religious, charitable and similar nonprofit corporations."[vii] This would exclude a co-op even as to labor services that were genuinely uncompensated.

The compensation permitted to volunteers was liberalized by amendments to the FLSA in 1985 with respect to services provided to units of state or local government,[viii] and again in 1998 as to services to nonprofit food banks.[ix] But, obviously, these amendments are of no help to a co-op.

Thus, the exception for volunteer services is not and never has been a tenable theory by which to exclude member-workers from the purview of the FLSA.

II. The common law factors and their uncertain significance

It is well established that the basis for determining whether an individual is an employee for purposes of the FLSA is the "economic reality" test.[x] Common law factors are of some relevance to this inquiry. The common law factors that are considered relevant include: (1) the degree of control exerted over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill required to perform the work.[xi] No one factor is

dispositive,[xii] not even the issue of control that is of overriding importance in other contexts.[xiii]

These common law factors are routinely applied in the typical situation of distinguishing employees from independent contractors but seldom in evaluating atypical work relationships. There is thus virtually no legal guidance available as to the topic at issue. Nonetheless it is instructive to speculate as to how a member labor program might fair in relation to these five factors:

> As to (1), with member labor tasks tending to aggregate around the simple and the highly skilled, the control exerted over member-workers need only be modest to minimal or none at all. The test here being exertion of control--distinguished from the usual "right of control"--is more advantageous and within the control of the co-op. The issue of control is also complicated, again advantageously, by workers also being owners of the co-op who work as matter of right.[xiv]
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> As to (2), in the usual situation where the worker discount was not limited in amount, member-workers would have considerable opportunity for profit or loss in that the savings realized on their purchases would be entirely within their control.
>
> As to (3), member-workers individually have an investment in the co-op which is not insubstantial in relation to their status as consumer-owners. And the membership group of which member-workers are a part and to which rights under a member labor program apply generally are typically the sole providers of the co-op's capital funds. This differs substantively from the usual situation where the issue of investment relates only to tools, supplies, etc. purchased by workers.
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> As to (4), the permanence of the relationship with

member-workers tends to vary so widely within any program that it is unlikely to be considered very relevant.

As to (5), the skills required for member labor would typically vary from minimal to highly specialized with considerable opportunities to enhance the latter.

The foregoing factors are not exhaustive.[xv] The time or mode of compensation has been considered relevant and even, in light of the circumstances of the whole activity, highly relevant.[xvi] It is therefore of some significance that member-workers are compensated at a time and in a way which is quite unlike the compensation provided to co-op employees. And there is another more favorable compensation possibility as described in section III below.

It has also been held that consideration must be taken of the extent to which a purported employer may hire and fire a worker.[xvii] Member-workers are not hired in any sensible meaning of the term. They have a right to work that proceeds from a provision of the bylaws or a resolution of the board which is typically limited at most by the ability of the co-op to effectively utilize their services. But this is not a selection process, much less a hiring. Neither are member-workers fired or discharged as those terms are commonly understood. They may certainly be suspended or excluded for cause. Since this would derogate a right of membership it would probably require cause that is more serious than the minimum grounds for termination of employment. It has been held that the absence of a power to freely terminate worker status is a decisive element in making the relationship other than one of employment.[xviii]

The foregoing evaluations, if valid, suggest that a preponderance of the common law factors would indicate non-employment status of member-workers. In any event these factors are not absolute,[xix] are not of controlling or conclusive significance,[xx] and, as mentioned above, are seldom applied in

evaluating atypical work relationships. The situation is further complicated by the controlling criteria being the economic reality test and by the common law factors being merely aids in assessing economic reality.[xxi]

III. Court cases applying the FLSA to working members of co-ops

There are several cases of two basic types involving working members of co-ops under the economic reality test. Although none involved a member labor program, they are at least somewhat instructive in that they entail atypical work arrangements in co-ops, and display two radical extremes of circumstances and results.

In a Supreme Court case that was representative of a line of cases the cooperative was organized for the production of knitted and crocheted goods by its homeworker-members.[xxii] The Court found from the record that the homeworkers were regimented as to the articles produced, compensated by fixed piece rates, and could be hired and fired by management and, in general, were "work[ing] in the same way as they would if they had an individual proprietor as their employer."[xxiii] Patronage dividends were authorized but never distributed. There was minimal substance to the cooperative structure, which the Court described as a transparent device. Under the economic reality test the homeworker-members were held to be employees for purposes of the FLSA.[xxiv] Although the Court made no explicit reference to common law factors, most of the factors that it emphasized could be said to correspond to selected common law factors.

A lower court decision of the very opposite character involved an unincorporated cooperative operating as a "closely-knit partnership" of surveyors.[xxv] Worker-members functioned with a high degree of autonomy. Each member had an equal voice

in management, and all operational, management and policy decisions were made by unanimous consent at general membership meetings. Workers received no fixed compensation but were compensated through an allocation of earnings applied to their investment of labor and interrelated with a merit rating system. Looking to the economic realities of the situation, and again without any reference to common law factors despite workers functioning as "independent craftsmen," the court found the co-op's "genuinely synallagmatic" character to compel a holding that its worker-members were not employees under the FLSA. The court described the co-op's structure as designed explicitly to be "antithetical to the wage and hour system of production"--certainly a device, but in this case a substantive and salutary one.

Member labor programs certainly lie somewhere within the extremes of these two cases, but are so different from both of them as to be advantaged or disadvantaged by neither of them. Both cases do, however, suggest the rather startling proposition that there may be advantages to compensating member-workers solely through patronage dividends.[xxvi]

IV. Programs having non-employment purposes

In assessing economic reality account must be taken of the circumstances of the whole activity.[xxvii] There are several reported court decisions that are particularly relevant in this regard in that they involved, much like member labor programs, atypical work arrangements under programs having purposes other than to provide employment.

One such case was brought by a group of students who challenged their being required by the board of education to perform cafeteria duties without compensation.[xxviii] In part they claimed that they were required to be paid minimum wages under

the FLSA. The students were held to not be employees within the meaning of the FLSA. The holding was based upon the state's assertion that the students' duties served educational goals not having been demonstrated to be "inarguably frivolous." No common law factors were even considered by the court.

A similar case involved student resident-hall assistants in a private college.[xxix] The RAs participated in the development and implementation of programs designed to enhance the quality of resident-hall living and performed various administrative tasks. Participants were provided a reduced room rent, free telephone use, and a $1,000 tuition credit. The court quoted with approval the lower court's decision that the RAs "did not come to Regis to take jobs." The program was viewed as furthering educational objectives, the students' participation being a component of their educational experience, and the monetary benefits provided to the students being "only one circumstance in the whole activity." Participating students were determined not to be employees for purposes of the FLSA under the economic reality test.[xxx] Again, the court did not even consider any common law factors.

There are several other reported decisions of the same character and to the same effect involving participants in a state "workfare" plan the overall character of which was found to be "assistance, not employment,"[xxxi] fire fighter trainees attending an academy for obvious educational purposes,[xxxii] and state inmates assigned to commercial work for rehabilitative purposes.[xxxiii] The whole range of such cases is highly relevant to member labor programs whose purposes are to further cooperative principles and values and not to provide employment.

V. Economic dependency: the ultimate criterion

The most definitive and specific statement about the

economic reality test is that "employees are those who as a matter of economic reality are dependent upon the business to which they render service."[xxxiv] This has been termed the touchstone[xxxv] and the focal point[xxxvi] of the economic reality test. One court has emphatically stated the matter this way:

> No one of [the common law factors] can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor--economic dependence. The five tests are aids--tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind. More importantly, the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of FLSA or are sufficiently independent to lie outside its ambit [citations omitted].[xxxvii]

As indicated in this quotation, the matter of economic dependency is most frequently interpreted as addressing the question as to whether workers are dependent upon a particular business for their continued employment.[xxxviii] In addition to addressing the more typical case as to whether purported independent contractors are dependent upon the business to which they render services (in which cases it is treated as a guiding or overriding principle), the issue of economic dependency can also have significance in its own right.

Member labor, being a very atypical situation, raises the issue as to whether its level of work activity and related compensation are so low as to negate any economic dependency on that basis alone. Not surprisingly, there are few reported cases of this character. Member labor is quite different from the situation of full-time seasonal workers,[xxxix] or full-time workers in a business with extremely short operating periods.[xl]

The few remaining cases can be viewed as establishing a spectrum of non-employment. At the lowest end of the spectrum is "few" and "occasional" uncompensated acts comprising "a minimal amount of work."[xli] Still within the spectrum of non-employment is the situation of members of a band hired for limited engagements, almost all being one-night stands and some few being for several successive nights, which was held to not constitute economic dependency.[xlii] Member labor is certainly not described by either case, but it would seem to lie somewhere between these two situations, certainly more towards the latter than the former, and thus within the spectrum of non-employment.

While member labor in relation to economic dependency would present a case of first impression, the argument is rather simple and direct. Other than in a few atypical situations of extreme poverty of member-workers,[xliii] a work commitment of a few hours per month for in-kind remuneration that at most merely provides a minor subsidy to a household budget should not reasonably be viewed as making member-workers economically dependent upon that arrangement, or upon its continuation.

VI. Recommendations

In light of the foregoing, the following are offered as recommendations for member labor programs in something approximating their relative importance:

1. Never refer to the program or its participants as volunteers. Member-workers are compensated, and the program cannot meet the required eleemosynary purpose. Using volunteer terminology thus prejudices the co-op's legal posture by suggesting a basis for exemption that is clearly bogus.

2. Categories of member-workers involving a high level of work commitment, sometimes referred to as "superworkers," should be avoided. To the extent that these are suggestive of part-time employment they are likely to fail the economic reality

test and could jeopardize the whole of the program. To maintain the substance of such a category, participants may be treated as part-time employees.

3. The co-op should have a carefully thought out statement of the purpose of its member labor program that is at least evidenced in a policy resolution of the board and stated in any promotional literature describing the program.

4. Member-workers should be minimally regimented, i.e., to no greater extent this is necessary. Gratuitous regimentation should be avoid, certainly in written policy materials.

5. The member labor program should explicitly be open and available to all members as a matter of right, subject only to the Co-op's ability to utilize such services. The co-op's ability to "suspend" or "exclude" member-workers, never to terminate or fire, should be stated as something like serious or grave cause.

6. The discount should be open-ended, i.e., not limited to a set dollar amount or made applicable to a maximum amount of purchases. This permits a substantive opportunity for member-workers to realize a profit or loss through their labor. Any increased discounts taken will to some extent be offset by administrative efficiencies and its tendency to increase patronage.

7. The unique skills and interests of individual member-workers should be well utilized rather than just fitting them into established work routines. In addition to enhancing some of the common law factors, this tends to enhance the value of member labor to the co-op and its attractiveness to member-workers.

8. It may be helpful to increase the portion of member labor that is devoted to activities that are outside of the normal course of business, such as educational materials and programs, outreach projects, public service activities,

committee service, newsletters, etc. This is of less legal advantage than is commonly thought, but it tends to direct focused attention to matters that are important but outside operational imperatives.

9. Some consideration might be given to compensating member-workers through patronage dividends. There are some complications to such a system, but, in addition to enhancing the legitimacy of member labor with respect to wage and hour laws, it offers advantages that are analogous to the reasons why many co-ops have dropped discounts at the register and adopted a patronage dividend system with respect to consumer transactions.

Conclusions

The foregoing has demonstrated that there is a considerable body of legal authority in four different aspects of the FLSA--predominantly of the highest courts and of remarkably consistent content--that supports the nonapplicability of the FLSA to a properly structured and limited member labor program. This should be welcome news to consumer co-ops.

But the foregoing is not well documented in the literature or well recognized. Furthermore, this body of law does not involve simple mechanical tests or formulaic standards. Rather it consists of broader and more general propositions that require the exercise of judgment--the kind of approach with which federal courts are well equipped to deal and to which appellate divisions within labor departments are at least somewhat receptive. Audit agents tend more towards simplistic propositions--labor furnished to a business operation for valuable remuneration evidences an employment relationship, end of inquiry. For a co-op this means that a member labor program must not only be worth doing for its own sake, it must be worth defending if it should come under scrutiny. But at least the means of such defense are herein shown to be available.

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i. 29 U.S.C. secs 201-219.

ii. 29 U.S.C. sec. 203(e)(1) & (g).

iii. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 295 (1985).

iv. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947) (the FLSA was not intended to cover persons who, "without any express or implied compensation agreement, might work for their own advantage on the premises of another"); Rogers v. Schenkel, 162 F.2d 596 (2d Cir. 1947) (person who intends his services to be voluntary and without any compensation was not an employee under the FLSA).

v. 29 U.S.C. secs. 203(m).

vi. Tony & Susan Alamo Found. v. Sec'y of Labor [U.S. 1985], supra at 301 (food, shelter, clothing, transportation, and medical benefits provided in exchange for services that were not otherwise compensated held to be "wages in another form").

vii. "Employment Relationship under the FLSA" at 6, WH Publ. 1297, Rev. 5/80. This policy appears to be based upon 29 C.F.R. sec. 553.101(b) (1996) (which states that "Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes") which itself appears to be based upon S.Rep. No. 1744, 86th Cong., 2d Sess., 28 (1960) (which states that the "common business purpose" language of 29 U.S.C. secs. 203(r) "would not include eleemosynary, religious, or educational organizations not operated for profit"). See discussion in Tony & Susan Alamo Found. v. Sec'y of Labor [U.S. 1985], supra at 295-298. It could certainly be argued that an issue as to the intended coverage of the FLSA is misapplied as a limitation upon volunteer services but, in view of member labor being compensated and thus not volunteer, this is largely an academic issue for co-ops.

viii. 29 U.S.C. secs. 203(e)(4)(A).

ix. 29 U.S.C. sec. 203(e)(5).

x. Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 (1947); Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28, 33

(1966).

xi. U.S. v. Silk, 331 U.S. 704, 716 (1947); Bartels v. Birmingham, 332 U.S. 126, 130 (1947); Rutherford Food Corp. v. McComb [U.S. 1947]. Some courts have added a sixth factor--the extent to which the work is an integral part of the business of the purported employer. Baker v. Flint Engineering & Const. Co., 137 F.3d 1436, 1440 (10th Cir. 1998); Martin v. Selker Bros., Inc., 949 F.2d 1286, 1293 (3d Cir. 1991); Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754 (9th Cir. 1979).

xii. U.S. v. Silk [U.S. 1947], supra at 716.

xiii. Id. at 713.

xiv. In Goldberg v. Whitaker House Cooperative, Inc. [U.S. 1966], supra at 32, the Court stated that there is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship and held that worker-members of the cooperative at issue were employees under the FLSA. But, in that case, the proprietary substance was minimal and there was a strong suggestion that the members were not in control of the cooperative. The carefully circumscribed tenor of this opinion certainly preserved the likelihood of a holding to the contrary on different facts. See further discussion of this issue in section III below.

xv. U.S. v. Silk [U.S. 1947], supra at 716.

xvi. Johns v. Stewart, 57 F.3d 1544, 1558-59 (10th Cir. 1995) (noting in particular recipients receiving financial assistance checks from a source other than state payroll, the absence of withholding, and ineligibility for sick or annual leave); Klaips v. Bergland, 715 F.2d 477, 483 (10th Cir. 1983) (noting in particular differences from regular employees as to basic compensation, job security, career development, benefits, and grievance procedures); Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983) (whether the alleged employer determined the rate and method of payment was one of four factors used as guidelines in applying the economic reality test).

xvii. Sims v. Parke Davis & Co., 334 F.Supp. 774, 783 (E.D. Mich. 1971), aff'd 453 F.2d 1259, cert. den. 405 U.S. 978; Bonnette v. California Health & Welfare Agency [9th Cir. 1983], supra at 1470.

xviii. Walling v. American Needlecrafts, 46 F.Supp. 16, 22 (W.D. Ky. 1942), rev'd on other grounds 139 F.2d 60 (6th Cir. 1943).

xix. Courts have variously but similarly referred to the common law factors as something to "generally look at," Baker v. Flint Engineering & Const. Co. [10th Cir. 1998], supra at 1440, or that "may be useful," Real v. Driscoll Strawberry Associates, Inc. [9th Cir. 1979], supra at 754, or even to "throw but little light on who are to be deemed employees," McComb v. Homeworkers' Handicraft Cooperative, 176 F.2d 633, 636 (4th Cir. 1949).

xx. Walling v. Portland Terminal Co. [U.S. 1947], supra at 150; Real v. Driscoll Strawberry Associates, Inc. [9th Cir. 1979], supra at 754.

xxi. Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1043-44 (5th Cir. 1987), cert. denied, 484 U.S. 1924 (1987); Reich v. Circle C. Investments, Inc., 998 F.2d 324, 327 (5th Cir. 1993); Aviles v. Kunkle, 765 F.Supp. 358, 363 (S.D. Tex. 1991).

xxii. Goldberg v. Whitaker House Cooperative, Inc. [U.S. 1966], supra.

xxiii. Id. at 32.

xxiv. Of the same general character and to the same effect, see Fleming v. Palmer, 123 F.2d 749 (1st Cir. 1941) (worker-members not in fact having any control over the cooperative, despite being compensated by a share of the profits, were held to be employees of their former employer who actually controlled the cooperative); McComb v. Homeworkers' Handicraft Cooperative [4th Cir. 1949], supra (worker-members who merely inserted draw strings on bags on a piece work basis were employees of the bag manufacturers, the economics of the arrangement being that the cooperative functioned as a mere instrumentality of the bag manufacturers).

xxv. Wirtz v. Construction Survey Cooperative, 235 F.Supp. 621 (D. Conn. 1964).

xxvi. The major difficulty in compensating member-workers with patronage dividends would be in objectively describing the portion of realized net earnings to be used for this purpose. It cannot be at the discretion of the board because that would violate the pre-existing legal obligation from which patronage dividends must proceed. Other than this the procedure would be rather simple.

xxvii. Bartels v. Birmingham [U.S. 1947], supra at 130; Rutherford Food Corp. v. McComb [U.S. 1947], supra at 730.

xxviii. Bobilin v. Board of Education, 403 F.Supp. 1095 (D. Haw. 1975).

xxix. Marshall v. Regis Educational Corp., 666 F.2d 1324 (10th Cir. 1981).

xxx. The court noted that its decision was contrary to that of a lower court involving similar facts, Marshall v. Marist College, 82 CCH Lab. Cas. 33,561 (S.D.N.Y. 1977), but concluded that the latter was wrongly decided.

xxxi. Johns v. Stewart [10th Cir. 1995], supra.

xxxii. Reich v. Parker Fire Protection District, 992 F.2d 1023 (10th Cir. 1993).

xxxiii. Sims v. Parke Davis & Co. [E.D. Mich. 1971], supra at 787.

xxxiv. Bartels v. Birmingham [U.S. 1947], supra at 130.

xxxv. Brock v. Mr. W Fireworks, Inc. [5th Cir. 1987], supra at 1043-44.

xxxvi. Henderson v. Inter-Chem Coal Co., Inc., 41 F.3d 567, 570 (10th Cir. 1994).

xxxvii. Usery v. Pilgrim Equipment Co., Inc., 527 F.2d 1308, 1311-12 (5th Cir. 1976), cert. denied 429 U.S. 826 (1976).

xxxviii. See also Donovan v. DialAmerica Mktg., Inc., 656 F.2d 1368, 1370 (3d Cir. 1985); Halferty v. Pulse Drug Co., Inc., 821 F.2d 261, 267 (5th Cir. 1987).

xxxix. Aviles v. Kunkle [S.D. Tex. 1991], supra (migrant pickle harvesters working on a sharecropper basis for a harvesting season held to be economically dependent upon farm owners). But to the contrary is Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984) (migrant pickle harvesters held to be independent contractors with respect to farm owners).

xl. Brock v. Mr. W Fireworks, Inc. [5th Cir. 1987], supra (full-time labor in a business legally restricted to operating only over

one 13-day and one 11-day period within each year).

xli. Patel v. Wargo, 803 F.2d 632, 635 (11th Cir. 1986).

xlii. Bartels v. Birmingham [U.S. 1947] (under the Social Security Act), supra at 132 (explicitly under the test of economic dependency, the band members were held to not be employees of the dance hall operators, as to whom their relationship was "transient," but to be employees of the band leader as to whom their relationship was "permanent").

xliii. In most member labor programs, situations of extreme poverty would be very limited in number. Where it was more common, such as in a co-op operating in a low-income neighborhood, it could, as discussed above, most reasonably be viewed as a program having a purpose of assistance rather than employment.