APPLICATION OF THE MINIMUM WAGE ACT TO WORK ACTIVITIES PERFORMED BY INDIVIDUALS WITH DISABILITIES

This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona administrative procedure act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under Arizona Revised Statutes § 41-1033 for a review of the statement.

In the context of the issues presented, we reviewed the work relationship and work activities performed by disabled individuals to determine if those individuals meet the definition of "employee" under the Arizona Minimum Wage Act ("Act"). We considered work activities performed in a "traditional" work setting, as well as those performed in a "non-traditional" work setting, in which work activities may be performed as part of, or for, an evaluation, training, or therapeutic process or purpose. Based on our review, which included consideration of applicable legal principles (see attached), we determined the following as it applies to work activities performed by disabled individuals:

A. An individual meets the definition of "employee" and is entitled to be paid at least $6.75 per hour if, after meeting the minimum qualifications for a position, with or without public or privately provided assistance such as a job coach or reader, the individual is hired by an employer to perform work for the employer.

   This individual is an employee under the Act because there is an expectation of a wage for services rendered (implied or express) and the services rendered are for the primary benefit of the employer.

B. An individual does not meet the definition of employee, and therefore is not an employee covered under the Act, if that individual performs work activities for the primary or personal benefit of the individual (as opposed to the employer) without an agreement for compensation. The work activities are performed as a component of the following:

   1. Vocational training program.

      In this program, an individual has received an independent evaluation of their physical, mental, cognitive, and functional abilities, and is determined to be temporarily incapable of employment, even with assistance. However, with training, this individual may be capable of meeting the minimum qualifications for a position in employment. Work activities are performed as part of the vocational training program and there is no expectation of the payment of compensation, though the individual may receive a stipend for the work performed.

      For purposes of this Section:

      a. The independent evaluation shall be an individual support plan (ISP) developed, implemented, and monitored under Title 36 of the Arizona Revised Statutes or other similar plan developed, implemented, and monitored under the authority of Arizona law that documents vocational training or employment related services provided to the individual. Whether in the form of an ISP or other similar plan, the plan shall:

i. Be developed by an interdisciplinary planning team that includes the individual and the individual's parent or guardian (if any);

ii. Be in the best interests of the individual served;

iii. Be based upon formal and informal evaluations and assessments;

iv. Consider and include the input and preferences of the individual and individual's parent or guardian (if any);

v. Include a statement or description of the individual's vocational goals, outcomes, and training or services recommended;

vi. Include supporting documentation; and

vii. Be reviewed and revised as necessary by the team at least annually, when each cycle of training ends (2,520 consecutive service hours) or a training program (7,560 consecutive service hours) ends, and whenever there are changes in the individual's preferences under subsection (a)(iv) of this Section or circumstances that require a change in the plan.

b. The vocational training shall be provided under a program administered by a certified provider with the ultimate goal of equipping the individual with skills that lead to integrated employment at a salary that meets or exceeds the minimum wage, with long-term support, if necessary. A "certified provider" means an entity providing rehabilitative or employment related services to individuals with disabilities under contract with:

i. The State of Arizona ("State");

ii. A political subdivision of the State; or

iii. An agent of the State or political subdivision of the State.

c. The duration of training shall be measured by consecutive service hours. A training program shall consist of no more than three cycles of 2,520 consecutive service hours for a total of 7,560 consecutive service hours. The duration of training may, however, be shorter.

d. A training program shall end when any of the following occurs:

i. The individual is offered at least one job in integrated community employment that the individual is qualified to accept by meeting the minimal qualifications of the job, with or without support;

ii. The individual completes 7560 consecutive service hours in a training program and moves into a service recipient program as described below; or

iii. The individual elects to participate in a new training program or service recipient program* that is developed under an amended ISP or other similar plan that identifies new goals, outcomes, and training. Subject to the development of an ISP or other similar plan, participation in a new training program may occur at any time, including after placement into integrated community employment that ultimately fails or is considered unsuccessful.

*For example, in accordance with subsection (B)(1)(a)(iv), the individual or individual's guardian may elect to temporarily cease a training program and revert to the service recipient program because there are personal or medical circumstances that interfere with the individual's ability to be trained. Upon the resolution of those issues, the individual or individual's guardian may elect to re-enter a training program.

2. Service recipient program.

This program is, by its very nature, a long-term program providing work activities from a certified provider that are primarily therapeutic, but which assist, as well, in the development of job skills. Participants in this program ("service recipients") are individuals with disabilities who have received vocational training under an ISP or other similar plan as described above but have not reached the goal of successful integrated employment. While the work activities primarily serve a therapeutic purpose, the ultimate goal of this program is to continue to develop job skills for integrated community employment. In this program, work activities are performed for the benefit of the service recipient. While there is no expectation of compensation, there may be a stipend for work performed.

In this program, an individual continues to receive an independent evaluation of their physical, mental, cognitive, and functional abilities through an ISP or other similar plan that meets the requirements stated in subsection (B)(1)(a),

except that the ISP or other similar plan shall be reviewed and revised as necessary by the team at least annually and whenever there are changes in the individual's circumstances that require a change in the plan. By amendment to an ISP or other similar plan, a service recipient and/or their guardian may elect to start a new vocational training program.

Legal Analysis

The entitlement to receive $6.75 under the Arizona Minimum Wage Act ("Act") applies to all employees. A.R.S. § 23-363. The Act defines "employee" to mean "any person who is or was employed by an employer," but does not include a person employed by a parent or a sibling, or someone who is babysitting in the employer's house on a casual basis. A.R.S. § 23-362(A). The Act does not condition the payment of minimum wage on an employee's level of productivity or efficiency at work. Nor does it provide an exemption for trainees, beginners, apprentices, learners, or workers with a disability if they otherwise meet the definition of employee. In other words, an employer who hires a trainee, beginner, apprentice, learner, or worker with a disability, and expressly or impliedly agrees to pay that individual compensation, is required to pay that individual the prescribed minimum wage of $6.75.

Not every individual who performs work-related activities, however, comes within the definition of an employee. The United States Supreme Court has stated that the definition of employee under the Federal Labor Standards Act ("FLSA"), which is similar to the Act, "was not intended to stamp all persons as employees, who, without any express or implied compensation agreement might work for their own advantage on the premises of another." *Walling v. Portland Terminal Co.* 330 U.S. 148 (1947). In that case, the Court considered whether a person being trained to fill a position was an employee under the FLSA, when the course was a prerequisite for employment, the trainees did not displace any paid workers, and the employer received no immediate advantage from their work. In holding that these "trainees" were not employees, the Court stated that a contrary construction would sweep under the Act each person who, 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." The Court further noted that the FLSA was not intended to penalize employers for instruction that greatly benefits trainees.

Over the years, the courts have relied upon the benefit test set forth in *Walling* to determine whether work performed by a trainee (or similar learner or apprentice, etc.) was covered under the FLSA. [1] In short, if the principal purpose of the relationship was

[1] The Federal Wage and Hour Administrator subsequently developed the following six-part test to determine whether a trainee is an employee under the FLSA:

1. 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;

2. The training is for the benefit of the trainees;

3. The trainees do not displace regular employees, but work under close observation;

to benefit the individual performing the work, then the individual was not an employee under the FLSA. See e.g. *Donovan v. American Airlines, Inc.,* 686 F.2d 276 (5th Cir. 1982) (individuals attending flight attendant and reservation agent training provided by American Airlines were not employees under the FLSA); *Isaacson v. Penn Community Services, Inc.*, 450 F.2d 1306 (4th Cir. 1971) (conscientious objector who performed work (for a small stipend) for nonprofit corporation for 24 month period in lieu of military service was not an employee under the FLSA) In contrast, if the principal purpose of the relationship was for the benefit of the employer, then the individual was an employee covered under FLSA. See e.g. *Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 105 S.Ct. 1953 (1985) (associates who received food, shelter, and clothing, but no cash wages and who were rehabilitated drug addicts and criminals were employees under the FLSA); *McLaughlin v. Ensely, 877 F.2d 1207* (4th Cir. 1989) (snack food trainees, who accompanied and assisted experienced routeman during week-long orientation period, were employees under the FLSA)

The *Walling* benefit test was considered, as well, in the case of a worker participating in a rehabilitation program provided by the Salvation Army who sued the Salvation Army alleging that he was an employee under the FLSA. In *Williams v. Strickland*, 87 F.3d 1064 (9th Cir. 1995), the worker participated in a six-month rehabilitation program operated by the Salvation Army. The program included work therapy on a full-time basis. For a period of six months, this work therapy consisted of working in the Salvation Army's furniture restoration shop and later working at its loading dock. In addition to this work therapy and counseling, the worker also received food, clothing, shelter and a small stipend of seven to twenty dollars per week. In holding that the worker was not an employee under the FLSA, the court considered as relevant that the work was performed for the benefit of the worker. In the court's view, the work was performed, not in exchange for "in-kind" benefits, but rather to give the worker a sense of self-worth, accomplishment, and to enable him to overcome his drinking problems and reenter the economic market place. Moreover, because the purpose of the employment was "solely rehabilitative" (he was not hired for employment, but rather admitted to the rehabilitation program), the court declined to consider the monetary benefits received to be an express or implied agreement for compensation. Instead, the court considered the benefits to have been provided to enable the worker to pursue his rehabilitation. As such, the court believed that this case was controlled by the principle set forth in *Walling* that the FLSA does not cover a person "who, without promise or expectation of compensation, but

---

4. 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;

5. The trainees are not necessarily entitled to a job at the completion of the training period; and

6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit." *Id* at 1053 citing *Walling,* 330 U.S at 152.

The Commission has been given the authority to implement and enforce the Act. This will necessarily require the Commission to make decisions regarding whether work is performed by an "employee" that is covered under the Act. In the context of defining whether an individual is an employee under the Arizona Minimum Wage Act, the Commission will interpret the definition of "employee" consistent with the principles set forth in the foregoing cases. The Commission will consider as relevant whether a worker, who without an implied or express agreement for compensation, performs work for the worker's own personal purpose as opposed to the employers'. [2]

The Commission's opinion and current approach to defining an "employee" as set forth in this opinion is advisory only. This opinion constitutes a substantive policy statement of the agency and will be submitted to the Secretary of State for publication as authorized under A.R.S. § 41-1091.

[2] Finding that an individual receiving vocational training may not meet the definition of "employee" is consistent with the Arizona Worker's Compensation Act. See A.R.S. §§ 23-901.07 and 23-901(6)(f).