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PRISONER LABOR

Perspectives on Paying the
Federal Minimum Wage

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PERSPECTIVES ON PAYING
PRISONERS MINIMUM WAGES

SUMMARY OF STATEMENT OF
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GAO's testimony is based on its report--Prisoner Labor: Perspectives on Paying the Federal Minimum Wage (GAO/GGD-93-98, May 20, 1993). Inmate work is a major part of the corrections system's effort to operate prisons safely. Inmate labor also reduces prison costs. Generally, sentenced inmates are expected to perform some type of institution maintenance work (e.g., cooking inmate meals, laundering inmate clothing, and maintaining the grounds) or industrial work (e.g. manufacturing office furniture and automobile tags) for sale to government agencies and sometimes to the private sector. According to an American Correctional Association survey, about 8 percent of the federal and state prisoners had industry type jobs.

The Fair Labor Standards Act, which generally requires employers to pay at least the statutorily-mandated minimum hourly wage to employees, does not specifically address whether prisoners performing work are "employees" entitled to the minimum wage. However, the courts have generally held that prisoners working in prison are not entitled to the minimum wage.

For the most part, inmates in the five prison systems--BOP, Arizona, Florida, Nevada, and Virginia--GAO visited either were not paid or were paid at rates that were substantially less than the federal minimum wage of \$4.25 an hour. For example, BOP generally pays its maintenance inmates 12 to 40 cents per hour and its industry inmates 23 cents to \$1.15 per hour. Our analysis of data from the Justice Department and others indicated that the nation's other prison systems had similar pay rates for their inmate workers. For example, a nationwide survey done by the Justice Department indicated that prison industry inmates were generally paid a regular rate of less than \$1 an hour during 1991.

If the five prison systems GAO visited were required to pay minimum wage to their inmate workers and did so without reducing the number of inmate hours worked, they would have to pay hundreds of millions of dollars more each year for inmate labor. Consequently, these prison systems generally regarded minimum wage for prisoner work as unaffordable, even if substantial user fees (e.g., charges for room and board) were imposed on the inmates. Officials from the 20 prison systems GAO contacted consistently identified large-scale cutbacks in inmate labor as a likely and, in their view, dangerous consequence of having to pay minimum wage. They believed that less inmate work would mean more idle time and increased potential for violence and misconduct.

On the other hand, some of the organizations GAO visited had a different perspective on inmate pay, based on the idea that prison work experiences should be more like those in the general public. Some organizations also believed that by not paying inmates minimum or prevailing wages, prison industries gain an unfair competitive advantage and/or displace workers who are not imprisoned.



Mr. Chairman and Members of the Committee

I am pleased to be here to discuss our recent report to Senator Reid entitled Prisoner Labor: Perspectives on Paying the Federal Minimum Wage (GAO/GGD-93-98, May 20, 1993).

Senator Reid requested information on potential effects on prison work programs and potential fiscal impacts if the nation's prisons were required to pay minimum wage for prisoner work. His request was prompted by a decision of a three-judge panel of the U.S. Court of Appeals for the 9th Circuit which held that certain prisoners were subject to the minimum wage provisions of the Fair Labor Standards Act (FLSA).¹ This decision was subsequently reversed by the full court.²

In response to Senator Reid's request, we (1) compared inmates' labor wages to minimum wages; (2) obtained views of federal and state prison officials on how the minimum wage would potentially affect prison systems; and (3) obtained views of organized labor and other organizations likely to have perspectives on paying prisoners the minimum wage. To do this, we (1) visited five prison systems--Federal Bureau of Prisons (BOP), Arizona, Florida, Nevada, and Virginia--to obtain information on inmate work and pay policies, actual hours worked and wages paid, what existing work would cost if paid at the minimum wage, and potential effects of payment of the minimum wage on prison work and operations; (2) surveyed 15 other prison systems on potential effects of payment of the minimum wage on prison work and operations; and (3) contacted selected organizations representing various groups likely to have perspectives on the issue of payment of the minimum wage for inmate work. In each of the four states we visited, we also visited a state and a federal prison. Our data are not projectable to all prison systems. The opinions we obtained on impact are subjective and projections for cost impacts are approximations.

If the federal and four state prison systems we visited were required to pay the minimum wage to their inmate workers and did so without reducing the number of inmate hours worked, they would have to pay hundreds of millions of dollars more each year for

¹Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201-19).

²The three-judge panel held, in Hale v. Arizona, 967 F.2d 1356 (1992), that the inmates, who worked for a component of Arizona prison industries, were "employees" of the state and thus were subject to FLSA requirements. However, this case was reheard en banc by the Ninth Circuit in November 1992. Subsequent to the completion of our work, the full court reversed the three-judge panel and affirmed the decision of the lower court that the state prisoners were not entitled to the minimum wage under FLSA. Hale v. Arizona, 993 F.2d 1387 (1993).

inmate labor. Consequently, these prison systems generally regarded minimum wage for prisoner work as unaffordable, even if substantial user fees, such as charges for room and board, were imposed on the inmates.

Prison systems officials consistently identified large-scale cutbacks in inmate labor as a likely and, in their view, dangerous consequence of having to pay minimum wages. They believed that less inmate work would mean more idle time and increased potential for violence and misconduct. They also noted other potentially adverse consequences for prison operations, such as routine maintenance being performed less frequently.

On the other hand, some of the organizations we visited had a different perspective on inmate pay, based on their view that prison work experiences should be more like those in the general public. Some organizations also believed that by not paying inmates minimum or prevailing wages, prison industries gain an unfair competitive advantage and/or displace workers who are not imprisoned.

BACKGROUND

Inmate work is a major part of the corrections system's effort to operate prisons safely and constructively and to reduce prison costs. Prison work (1) reduces inmate idleness and thus the potential for prison security problems; (2) provides opportunities for inmates to improve or develop job skills, work habits, and experiences that can assist in postrelease employment; and (3) helps to ensure that maintenance necessary for day-to-day operation of the prison is performed. Inmate labor also reduces prison costs. For example, inmates perform functions such as cooking that would otherwise have to be performed by higher-paid civilian staff.

Generally, sentenced inmates are expected to perform some type of institution maintenance or industrial work on a full-time (6 to 8 hours a day, 5 days a week) or part-time basis.³ Maintenance work includes cooking inmate meals, laundering inmate clothing, repairing boilers, performing clerical work, and maintaining the grounds and buildings as well as many other functions necessary for the day-to-day operation of the prison. It also sometimes

³Some inmates work in the community under a work-release program, where they typically are employed during the day and return to the institution at night. These inmates are employees of private or public sector organizations outside of the prison system and thus their entitlement to minimum wage would depend on whether their work for these organizations meets the criteria for FLSA coverage. Consequently, these inmates were excluded from our review.

includes public works projects such as assisting local communities in repairing roads and assisting forestry departments in clearing land and planting trees. Inmates may also do industrial work for the prison or private companies. This work may include manufacturing products (e.g., office furniture, mattresses, and automobile tags) and providing services (e.g., data entry and automobile repair) for sale to government agencies and sometimes to the private sector.

Most inmates who work are assigned to maintenance rather than prison industries jobs. A nationwide American Correctional Association survey in 1991 reported that about 8 percent of the federal and state prisoners had industry type jobs.

Whether inmates are paid or the amount paid varies among the individual federal or state systems. For example, BOP and the states generally provide some compensation to prisoners for their maintenance and industry work. However, some states (e.g., Texas) do not pay for any inmate work, while some states (e.g., Florida) generally pay only those inmates doing industry jobs. Inmate pay may be based on a rate per hour; cover a specific time period (e.g., monthly); or be based on piece work. Under some systems, inmates may also earn extra pay for overtime work and length of time employed (longevity), receive paid vacations and holidays (remain in prison but do not work), and receive payments under a workers compensation program. Some prison systems may also pay inmates for their participation in vocational training programs and in literacy or other educational programs.

Under federal law, 18 U.S.C. 1761(c), 50 nonfederal prison work pilot projects may produce products for sale in interstate commerce, provided that, among other things, inmates employed in these projects are paid the prevailing wage for their work. These projects, referred to as the Prison Industry Enhancement (PIE) Program, are approved by the Bureau of Justice Assistance. The Bureau requires that PIE industries pay at least the minimum wage if a prevailing wage cannot be determined. As of December 1992, PIE industries employed about 1,000 inmates nationwide.

Under FLSA, employers are generally required to pay employees at least the minimum hourly wage set by federal law for up to a 40-hour workweek. The overtime rate for all hours worked over the 40 hours is set at one and one-half times the employee's regular rate of pay. While the vast majority of employers, including state governments, are subject to the requirements of FLSA, there are a number of workers who are not covered by the law's minimum wage and overtime provisions. Prison inmates are not specifically excluded from the definition of "employee" under FLSA. However, the courts have generally held that prisoners performing work behind prison walls for prison-operated industry or for a prison itself are not entitled to minimum wage under

FLSA because they are not in an employer-employee relationship with the prison.⁴

SUBSTANTIAL DIFFERENCES EXISTED
BETWEEN PAY AND MINIMUM WAGE

For the most part, inmates in the five prison systems we visited either were not paid or were paid at rates that were substantially less than the federal minimum wage of \$4.25 an hour. (See Appendix). For example, BOP generally pays its maintenance inmates 12 to 40 cents per hour and its industry inmates 23 cents to \$1.15 per hour. Of these five systems only some Arizona and Nevada inmates had the opportunity to earn the minimum wage or more. For example, about 60 of the approximately 650 Arizona inmates working in prison industries were involved with private sector operations and could earn minimum wage.

Many inmates at the five systems were paid at the lower rates of the established pay scales. For example, BOP policy for nonindustry inmates provides that about 55 percent of the inmates are to be paid an hourly rate for maintenance work at pay grade 4 (12 cents), 25 percent at grade 3 (17 cents), 15 percent at grade 2 (29 cents), and 5 percent at grade 1 (40 cents). Our review of prisoner payroll records at the four federal prisons we visited indicated that the inmates were generally being paid at the lower pay grades.

Our analysis of data from the Justice Department and others indicated that the nation's other prison systems had similar pay rates for their inmate workers. For example, a nationwide survey done by the Justice Department indicated that prison industry inmates were generally paid a regular rate of less than \$1 an hour during 1991.

⁴See Hale v. Arizona, 993 F.2d 1387, 1393-95 (9th Cir. 1993) (inmates working in prison programs structured under Arizona law requiring prisoners to work at hard labor were not "employees" of the prison under FLSA); Harker v. State Use Indus. Envelope Shop Inmates, 990 F.2d 131, 135-36 (4th Cir. 1993) (FLSA does not apply to prison inmates performing work at prison workshop within the penal facility as part of rehabilitative program); Vanskike v. Peters, 974 F.2d 806, 807-9 (2d Cir. 1992) (inmate who worked in Illinois prisons as a maintenance worker and knit shop line worker was not entitled to minimum wage under FLSA). It should be noted that some courts have found inmates to be entitled to minimum wage under FLSA when the inmates are performing work for private, outside employers. See, e.g. Carter v. Duchess Community College, 735 F.2d 8 (2d Cir. 1984) (holding that FLSA might apply to an inmate working as a community college tutor for classes taught inside a prison).

Cost of Paying for Existing Work
Levels at Minimum Wage

All five prison systems would face a substantial increase in costs in the hundreds of millions if existing inmate work levels had to be compensated at the minimum wage. If required to pay the minimum wage, officials at these systems noted that they would likely impose substantial user fees and reduce their inmate labor levels.

BOP officials told us that their industries paid 15,300 prisoners average rates of 87 cents an hour for 27.2 million regular hours worked and \$1.75 an hour for 1.8 million overtime hours worked during fiscal year 1992. This amounted to about \$26.9 million for inmate compensation--\$100 million less than what paying the minimum wage would have cost for the same number of hours. Although overall data were not available, our review of payrolls at the four federal prisons we visited indicated that the difference in pay for maintenance work would have been substantially greater than the difference for industrial work had the inmates been paid minimum wage. This is because wages for maintenance work were substantially less than the wages for industrial work and because most inmates work in maintenance jobs.

At the state level, for example, Arizona officials noted that their industries paid about \$614,000 in inmate wages for the year ending June 30, 1992, as compared with about \$3.7 million they would have paid for the same number of hours at minimum wage. Arizona officials did not have statewide information on how much inmate maintenance would have cost at minimum wage. However, at the Arizona prison we visited officials estimated that for the year ending June 30, 1993, they will pay inmate wages of about \$458,000 (average of 26 cents an hour) for maintenance work compared with about \$7.5 million if the estimated number of hours were paid at minimum wage.

These hypothetical differences between existing and minimum wage payrolls do not include the cost of employer-paid benefits that inmates may be entitled to if they were considered to be employees. For example, under certain circumstances prison systems and the inmates both could be subject to paying social security taxes amounting to 7.65 percent of the inmates' earnings.

On the other hand, the differences between existing and minimum wages do not include potential charges such as user fees and taxes which could result in some of the additional wage costs being returned to the federal and state governments. For example, officials at the prison systems we visited generally believed that if inmates were to receive the minimum wage, the prison systems would be forced to assess substantial user fees.

Of the five prison systems we visited, only Nevada imposes a room and board charge on its maintenance and industry inmate workers who earn less than minimum wage--24.5 percent of their weekly wages in excess of \$18. Nevada also charges nonindigent inmates \$4 each time they report on sick call.

Victim restitution and child support payments are examples of other possible deductions from inmates' pay. Unlike room and board charges, however, these deductions represent funds that would be paid to members of the general public and not recovered by federal and state treasuries. However, some payments may result in reduced government expenditures. For example, if the inmates paid child support and their children are supported by government aid programs, the net effect may be to reduce the amount paid by federal and state governments.

CONTACTED PRISON SYSTEMS' VIEWS ON PAYING MINIMUM WAGES

Because there is little available research or studies on the potential impact of prisoners being covered under FLSA's minimum wage provisions, some ramifications are unknown. Nevertheless, the 20 prison systems we contacted generally believed that paying minimum wage would adversely affect prison work, job training programs, and prison security. They also noted other potential issues associated with treating inmates as employees and identified few benefits of paying inmates minimum wages.

Officials did not believe that they would be able to continue to employ the same number of inmates if they had to pay the minimum wage. For example, Arizona officials said it was unlikely that they would be given the additional funds to pay minimum wages, even if the increased pay amount was substantially reduced by imposing user fees. Therefore, Arizona officials maintained that they would be forced to substantially reduce the inmate workforce.

The four other prison systems we visited told us that they would also have to substantially reduce the number of inmates who work if minimum wages had to be paid. Officials from the 15 prison systems we surveyed by telephone also said that fewer inmates would be permitted to work. Further, 13 of the 20 prison systems contacted believed that the inmates who remained employed would work fewer hours, while 3 thought they would work more, and 3 thought they would work the same number of hours. One system did not know how the number of hours inmates worked would be affected.

Other Potential Impacts of
Paying Minimum Wage

The prison systems provided similar responses to questions about potential impact on (1) inmate idle time, (2) prison security, (3) efforts to teach good work habits and job skills, (4) industries' earnings, (5) routine institution maintenance, and (6) public works.

All 20 prison systems told us there would be increased inmate idle time and more inmate rule infractions or security problems if minimum wages had to be paid. Officials at both the prison system headquarters offices and at the specific prisons we visited consistently noted that reduced inmate work would mean more inmate idle time, contribute to more inmate disorder and violence and make their prisons more dangerous. For example, according to BOP, the reduced employment "would seriously jeopardize the security of federal penal and correctional facilities, as idleness and boredom multiplied among an inmate population serving significantly longer sentences, with virtually no prospects for early release."

All 20 prison systems thought that efforts to teach good work habits and/or job skills would also be reduced. BOP's prison industry officials said that the reduced employment would deprive thousands of inmates of the opportunity to learn the basic work skills that are essential to success in the outside world.

Nineteen of the 20 prison systems we contacted had prison industries. Of the 19, 17 responded that having to pay minimum wage would eliminate or substantially reduce earnings from those industries. For example, BOP said that paying minimum wage would result in a substantial increase in product cost, to the point that their products would not be competitive. Consequently, BOP told us that it would have to automate much of its industrial production and reduce inmate employment drastically in order to control labor costs, continue to offer products to federal agencies at current market prices, and remain self-sufficient.

Regarding the impact on institution maintenance, 19 prison systems thought minimum wage would lead to less frequent routine maintenance. The other thought that maintenance efforts would be enhanced because only the most motivated and able inmates would be filling the fewer jobs available.

In response to our final survey question, 17 prison systems told us they had inmates who performed public service projects. Of the 17, 12 thought that minimum wage would result in such projects being abolished and 5 said that fewer projects would be done. For example, a Nevada official told us that they would have to stop much, if not all, of the roadwork and other public service now done by approximately 1,500 work camp inmates.

OTHERS' PERSPECTIVES ON PAYING
MINIMUM WAGE FOR PRISONER WORK

Some organizations and studies had a different perspective on inmate pay than the prison officials we contacted. Some generally favor improving inmate work programs and inmate pay through greater use of prison industry programs. These programs could be operated by, or operate like, private sector businesses, the "factories with fences" approach. Some also support paying inmates the prevailing wage so that prison industries do not have an unfair competitive advantage over businesses that do not have access to prison labor.⁵

The "factories with fences" approach had its roots in Justice Department efforts in the mid-1970s to assist states in coping with the problems of inmate idle time and inefficient work programs. The Justice Department provided funds and other support to implement a prison industry model in participating states. The model was based on private sector concepts such as productivity-based wages. In 1979, Congress authorized seven PIE projects that allowed the seven participating correctional agencies to sell the products of private sector-operated prison industries across state lines, provided, among other things, that inmates be paid the higher of the prevailing wage in the free market or the minimum wage and be assessed charges such as room and board. (The Justice Department was given responsibility for certifying that a project or correctional agency met the PIE criteria.) Through subsequent amendments, Congress raised the number of authorized PIE projects to 50.

In the 1980s, then-Chief Justice Warren Burger, working with representatives from the corrections, business, labor, legal, and academic communities, further promoted the idea of greater private sector involvement in prison industries. It included having those industries pay prevailing wages, sell products to the public, and generally operate like free-world industries. Under the program, deductions were to be taken from the inmates' pay for such items as room and board, taxes, and victim restitution.

Our review showed that the "factories with fences" concept was expected to apply to industries work. Also, according to representatives from The Brookings Institution and the now-defunct National Center for Innovation in Corrections involved in developing the concept, it was anticipated that because of budgetary and other problems, many prison systems would not

⁵In our discussions of this matter with BOP officials, they pointed out that federal prison industries are a mandatory source of procurement for other federal agencies.

extensively pursue the concept. A 1989 Justice Department survey found that only about 5,000 inmates had worked in PIE and non-PIE private sector-operated industries.

Concerning the issue of unfair competition, prison industries, like BOP's, have long faced criticism from labor groups and businesses about the low wages paid to inmate workers. The American Federation of Labor and Congress of Industrial Organizations' (AFL-CIO) position is that prison labor programs should pay wages that are not less than the prevailing wage for similar work in the private sector to avoid unfair competition and displacing workers who are not imprisoned. The AFL-CIO also says that inmates should pay room and board, taxes, victim restitution, and where necessary, dependent support. However, the AFL-CIO opposes the sale of prison-made goods and services to the public.

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This concludes my prepared statement. I would be pleased to answer any questions the Committee may have.

Basic Inmate Pay Policy At Visited Prison Systems

Prison system	Maintenance pay rates	Industries pay rates
BOP	Generally 12 to 40 cents an hour; outstanding work could result in a bonus of up to one-half an inmate's monthly pay. Some inmates are paid only \$5.25 a month because of, for example, budget problems.	23 cents to \$1.15 an hour with up to 40 additional cents an hour on the basis of work considered outstanding and length of time employed.
Arizona	10 to 50 cents an hour.	40 to 80 cents an hour, but inmates involved with private sector industries earn minimum wage (\$4.25).
Florida	Only pays a few inmates (e.g., inmates working in canteen operations receive \$50 to \$75 monthly).	15 to 45 cents an hour with increases, based on length of time employed, of up to 15 cents an hour.
Nevada	Prison officials decide who is to be paid and how much; pay is generally less than \$1 an hour.	Minimum wage (\$4.25) for private sector-operated industries. For prison managed industries, pay is based on piece rates that could exceed minimum wage.
Virginia	20 to 45 cents an hour.	55 to 80 cents an hour. ^a

^aThese rates were being implemented at the time of our visit.

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