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Prisoner Work Programs

Contents

Introduction

Many correctional facilities have work programs or assignments of one sort or another for prisoners. This article briefly examines a few of the legal issues that arise as a result of such programs or assignments.

The questions briefly examined are: What is the legal basis for requiring prisoners to work? Isn't this unconstitutional "involuntary servitude?" It there a right to work while incarcerated? What about prisoners who have been convicted, but who have appeals currently pending of their criminal convictions? Can they be compelled to work during that time period, which often stretches out to a good number of years? When prisoners are required to work, must they be paid minimum wages under the Fair Labor Standards Act? The question of the possible impact of state laws on such wages is also briefly addressed. For a general discussion of the issue of inmate funds, some of which may have, as their source, prison work assignments, see an earlier article in this journal, Legal Issues Pertaining to Inmate Funds, 2008 (4) AELE Mo. L.J. 301 (April 2008).

This short article does not attempt to be comprehensive, and excludes discussion of many questions of interest, including issues concerning the appropriateness of a prisoner's work assignment, injuries to prisoners during work assignments, use of prisoners for work assignments for private employers, work release programs, and claims of discrimination in work assignments on the basis

of race, gender, sexual orientation, national origin, disability, or religion. At the conclusion of the article, a few useful resources are listed.

Involuntary Servitude?

The Thirteenth Amendment to the Constitution of the United States, adopted in 1865 following the bloody Civil War, and followed shortly by the Fourteenth and Fifteenth Amendments (adopted in 1868 and 1870 respectively, and guaranteeing equal protection and due process of law, and barring racial discrimination in voting rights), abolished the barbaric institution of slavery and also broadly prohibited the practice of 'involuntary servitude," forcing someone to work against their consent or will—with one important exception.

The full text of the Thirteenth Amendment reads:

> **Section 1**. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> **Section 2.** Congress shall have power to enforce this article by appropriate legislation.

The text of the Amendment, and the exception contained in Section 1, is fairly clear, and its meaning would appear to be obvious, yet there have been, over the years, a number of lawsuits in which convicted prisoners have attempted to object to being compelled to work while incarcerated, citing the Thirteenth Amendment, and arguing that it somehow constitutes prohibited "involuntary servitude." Some prisoners, using hyperbole, have even attempt to claim that it constitutes "slavery."

Courts have uniformly rejected these claims and pointed to the language of the Amendment as authorizing the imposition of "involuntary servitude" as a "punishment for crime whereof the party shall have been duly convicted." See Wendt v. Lynaugh, No. 87-2122, 841 F.2d 619 (5th Cir. 1988).

In Draper v. Rhay, #18242, 315 F.2d 193 (9th Cir.), cert. denied, 375 U.S. 915 (1963), the court stated: "When a person is duly tried, convicted and sentenced in accordance with law, no issue of peonage or involuntary servitude arises." Other cases ruling the same way include: United States v. Drefke, #82-1706, 707 F.2d 978 (8th Cir.), cert. denied sub nom., Jameson v. United States, 464 U.S. 942 (1983), in which the Court said: "The Thirteenth Amendment ... is inapplicable where involuntary servitude is imposed as punishment for crime." Also see Piatt v.

MacDougall, #82-5328, 773 F.2d 1032 (9th Cir.1985); Ray v. Mabry, 76-2123, 556 F.2d 881 (8th Cir.1977); and Jobson v. Henne, #29780, 355 F.2d 129 (2d Cir.1966).

Pre-trial detainees, of course, have been convicted of nothing, and cannot be subjected to “punishment” of any sort. That does not mean, of course, that detention facilities and correctional institutions cannot afford detainees with opportunities to work, it merely means that they cannot be compelled to do so, and that the constitutional prohibition on “involuntary servitude” fully applies to them.

On the other hand, there is “work,” and then there may, in some instances, be “chores” in the view of some courts, more minimal tasks such as cleaning up one’s cell that pretrial detainees may be required to do without running afoul of the constitutional prohibition on involuntary servitude, under the reasoning that such tasks may be necessary to the running of the facility and not be intended as punishment.

In Ford v. Nassau Co. Executive, 97-CV-2399, 41 F.Supp.2d 392 (E.D.N.Y. 1999), for instance, the court found that a pre-trial detainee's rights were not violated by requiring him to work distributing food, allegedly without pay, or else face segregation in "lock-in"; compulsion to do “chores” in correctional facility did not amount to involuntary servitude or slavery in violation of Thirteenth Amendment.

The court reasoned that there was no evidence of intent to punish the detainee, or that the tasks assigned were the result of any conduct or misconduct on his part. The task being performed, helping to feed other prisoners, served a legitimate institutional interest or need, and the type of “chore” that this represented, including handing out food, mopping, and sweeping, the court reasoned, more closely resembled those that have traditionally been held to be allowable reasonable “housekeeping” duties than the type of duties imposed as “forced labor.”

Another case presenting similar reasoning include Bijeol v. Nelson, 77-2195, 579 F.2d 423 (7th Cir. 1978) (per curiam), in which the court held that where pretrial detainees were required to participate in "general housekeeping duties," including rotated cleaning assignments of common areas, there was no constitutional violation despite the fact that the detainees were segregated if they did not participate. In that case, inmates received no compensation at all, and the court noted that even more arduous tasks would not affect the court's decision. Also, in Hause v. Vaught, 92-6328, 993 F.2d 1079 (4th Cir. 1993), the court ruled requiring pretrial detainees to help clean their "module" or, in the alternative, be subjected to 48-hours "lock-down" was not inherently punitive.

A Right to Work?

A related question occasionally raised is whether those in custody, whether convicted prisoners or pre-trial detainees, have some kind of "right" to work. Courts have generally rejected this kind of claim.

In Carter v. Tucker, No. 03-5021, 69 Fed. Appx. 678 (6th Cir. 2003), the court ruled that a prisoner in Tennessee had no constitutional right to a particular job assignment or to prison employment in general, and therefore could not pursue claim for violation of due process based on prison's failure to restore him to his former job after his disciplinary conviction was reversed. Similarly, in Vignolo v. Miller, 95-17196, 120 F.3d 1075 (9th Cir. 1997), the court stated that there is no constitutional right to prison employment.

In Collins v. Palczewski, 92-768, 841 F.Supp. 333 (D. Nev. 1993), a federal court also found that a Nevada state prisoner did not have a constitutionally protected right to continued prison employment or any similar right under state statutes or administrative regulations. Also see Moore v. Grammer, 87-1088, 442 N.W.2d 861 (Neb. 1989), stating that a Nebraska inmate had no due process right to prison employment or a particular wage rate, and Douglas v. DeBrun, 96-656, 936 F.Supp. 572 (S.D. Ind. 1996), rejecting a prisoner's claim that his constitutional rights were violated because he had no access, while incarcerated in a prison's "Idle Unit," to jobs (or to vocational, rehabilitation, or educational programs), on the basis that there is no constitutional right to such programs.

In Bulger v. U.S. Bureau of Prisons, 94-41226, 65 F.3d 48 (5th Cir. 1995), the court held that Federal Prison Industries regulations did not create a property right to a job, including a rejection of a supposed right to a particular job.

Work While Appeals Are Pending

While convicted prisoners may be compelled to do more than just "chores," and may be compelled to "work," convicted prisoners may have their convictions overturned on appeal. What about the issue of compelling a convicted prisoner to work during the time period when they are engaged in challenging the validity of their conviction on direct appeal?

The text of the Thirteenth Amendment, after all, does say that the punishment of involuntary servitude may only be imposed for crimes of which a person "shall have been duly convicted." Does the fact that a prisoner has an argument that there is a defect of some sort in the process through which they were convicted excuse them from having to comply with an ordered prison work assignment?

In O'Connell v. Johnson, No. 07-2001, 2007 U.S. App. Lexis 19664 (3rd Cir.). a Pennsylvania prisoner's sentence was vacated in a state court, and he continued to serve his sentence pending further proceedings, which subsequently led to the vacating of his sentence when his conviction was overturned on appeal. Under these circumstances, the court ruled, requiring him to work during the time that his sentence was vacated did not violate his constitutional rights, nor did the deduction, during that time, of money from his prison account to pay previously-ordered restitution. Under prior federal precedent, the plaintiff remained a convicted person while any post-trial proceedings were ongoing in the state courts. Forcing him to work during that time therefore did not violate his 13th Amendment rights.

Similarly, in Tourscher v. Horn, #97-3671, 184 F.3d 236 (3rd Cir. 1999), the court ruled that a prisoner was properly required to work in prison cafeteria despite the overturning of his conviction on appeal, when the state was pursuing further appeals and the overturning of conviction was not final. The court also ruled that neither convicted prisoners nor pretrial detainees were "employees" for purposes of Fair Labor Standards Act minimum wage provisions. See also Plaisance v. Phelps, 87-3655, 845 F.2d 107 (5th Cir. 1988), stating that requiring convicted inmates to perform assigned work while their appeal is pending does not violate thirteenth amendment.

See also Stiltner v. Rhay, 108397, 322 F.2d 314 (9th Cir. 1963), stating that there "is no federally protected right of a state prisoner not to work while imprisoned after conviction, even though that conviction is being appealed," and Omasta v. Wainwright, 81-5798, 696 F.2d 1304 (11th Cir. 1983), which ruled that holding that where a prisoner is incarcerated "pursuant to a presumptively valid judgment . . . the thirteenth amendment's prohibition against involuntary servitude is not implicated. . . . even though the conviction may be subsequently reversed."

The Wages of Work

The Biblical statement about the "wages of sin" is well known. For incarcerated prisoners, the question arises as to what are the wages of work?

For some, there may not be any wages at all. There are court decisions stating outright that, if a prisoner may be forced to work as punishment following a conviction, it does not violate their constitutional rights to not pay them anything at all. In Sigler v. Lowrie, 19212, 404 F.2d 659 (8th Cir.1969), the court stated that any compensation for the work of prisoners "is by grace of the state, and ruled that it did not violate the equal protection rights of a prisoner that some states, such as Texas at the time, forced prisoners to work without pay while prisoners were paid

for work in other states, and also in Texas some prisoners were paid for work depending on their status and kind of work.

The court reasoned that the pay was discretionary and that the state had the right to make reasonable rules as to whether or not it will pay prisoners and under what circumstances they will be paid, absent some specific kind of outlawed discrimination.

Also see. Rochon v. Louisiana State Penitentiary Inmate Account, #88-3625, 880 F.2d 845 (5th Cir. 1989), holding that prisoners have no constitutional right to be paid for prison work, and Wendt v. Lynaugh, #87-2122, 841 F.2d 619 (5th Cir. 1988), a case mentioned earlier, stating that the requirement that prisoners work without pay was not "involuntary servitude."

What about the impact of federal minimum wage law, the Fair Labor Standards Act?

In Banks v. Roberts, No. 1:06-CV-01232, 2007 U.S. Dist. Lexis 57697 (M.D. Pa.), the court held that a federal prisoner performing the duties of his prison job was not a federal "employee" and it did not violate his rights to fail to pay him the federal minimum wage for that work. See also Nicastro v. Clinton, 94-0590, 882 F.Supp. 1128 (D.D.C. 1995), ruling that federal prisoners assigned to perform work for the Federal Prison Industries were not "employees" entitled to minimum wages under the Fair Labor Standards Act, and Henthorn v. Department of Navy, #92-5382, 29 F.3d 682 (D.C. Cir. 1994), finding that a federal prisoner required to do work on grounds of a naval air station was not an employee under the terms of the Fair Labor Standards Act, and therefore was not entitled to federal minimum wage for the work done.

See also Morgan v. MacDonald, #92-16643, 41 F.3d 1291 (9th Cir. 1994), stating that a Nevada prisoner who was required to work or take vocational training for 40 hours per week was not an "employee" entitled to federal minimum wages for his work, and McMaster v. State of Minn., #93-2502, 30 F.3d 976 (8th Cir. 1994), holding that inmates in state-run prison industries were not entitled to federal minimum wages.

In Lentz v. Anderson, 888 F.Supp. #3:93CV7274, 847 (N.D. Ohio 1995), the court ruled that an Ohio inmate was not an "employee" under the federal Fair Labor Standards Act while working as part of prison industry program, and was not entitled to federal minimum wages.

Similarly, in Danneskjold v. Hausrath, #95-2062, 82 F.3d 37 (2nd Cir. 1996), a federal appeals court ruled that prison labor that produces goods or services to meet a prison's own institutional needs is not covered by the Fair Labor Standards

Act (FLSA) and its minimum wage requirements, and in Burleson v. State of Cal., #95-16188, 83 F.3d 311 (9th Cir. 1996), the court held that current and former inmates in the California state prison system working for the state Prison Industry Authority were not "employees" entitled to minimum wages under the Fair Labor Standards Act (FLSA).

In Kavazanjian v. Naples, No. 06-CV-3390, 2006 U.S. Dist. Lexis 69080 (E.D.N.Y.), a federal court found that New York prisoners' work for the state Department of Motor Vehicles was not, in economic reality, an employer-employee relationship entitling them to pursue their claims for federal minimum wages or overtime compensation. The job assignments served correctional purposes by giving the prisoners opportunities for job training and skill development.

What about prisoners working at a facility operated by a private corrections company? The court in Bennett v. Frank, No. 04-1959, 2005 U.S. App. Lexis 960 (7th Cir.), answered that question by finding that prisoners at a privately operated prison are not entitled to minimum wages for their prison work assignments.

In Young v. Cutter Biological, #86-1318, 694 F.Supp. 651 (D. Ariz. 1988), the court found that inmates were not entitled to minimum wages for work they did in a state prison, despite the fact that they were working for a private employer. And the location where the work is done also may not alter the result. See Murray v. Mississippi Dept. of Corrections, #89-1167, 911 F.2d 1167 (5th Cir. 1990), deciding that compelling an inmate to work without pay on private property did not violate his constitutional rights.

There may be some circumstances, however, in which inmates assigned to work may be entitled to wages, including minimum wages. See Watson v. Graves, #89-3899, 909 F.2d 1549 (5th Cir. 1990), asserting that inmates who were not sentenced to hard labor, who worked for $20 a day in a work release program, were not subjected to involuntary servitude, but they were "employees" of the private employers who utilized them, and entitled to protections of the Fair Labor Standards Act.

In some instances, under either federal or state law, prisoners performing a particular kind of work, particularly in manufacturing goods, may have to be paid a “prevailing wage,” with the purpose being to make sure that goods made by convict labor do not unfairly undercut the prices of goods produced by private industry. Under a federal statute, 18 U.S.C. Secs. 1761-62, for instance, some prisoners are paid a "prevailing wage" when employed manufacturing goods for sale in interstate commerce.

Similarly, in Vasquez v. State of California, #D038889, 129 Cal. Rptr. 2d 701 (Cal. App. 4th Dist. 2003), the court found that a union officer had standing, under California state law, to sue the state as a taxpayer to make it ensure that a joint venture company employing prisoners paid them "prevailing wages" when they were employed under a statute, Ann. Cal. Penal. Code Sec. 2717.1 et seq., requiring them to work to reimburse the state for the cost of their confinement.

In McMaster v. State of Minn. #4-92-1058, 819 F.Supp. 1429 (D. Minn. 1993), however, the court ruled that prison inmates were not entitled to minimum wages or "prevailing wages"; since the Fair Labor Standards Act did not cover inmates and a federal law requiring that prevailing wages be paid to prisoners producing goods being transported in interstate commerce was not passed for inmates' benefit, but to prevent unfair competition with private industry

In Adkins v. S.C. Depart. of Corrections, #25860, 602 S.E.2d 51 (S.C. 2004), the court found that a South Carolina statute allegedly requiring state Department of Corrections to pay prevailing wages to inmates employed by prison industry did not provide a private right of action in the courts to inmates to pursue claims for alleged violations. Prisoners could, however, seek a remedy for violations by pursuing an inmate grievance. In Wicker v. S.C. Dept. of Corrections, No. 25859, 602 S.E.2d 56 (S.C. 2004), the same court found that a South Carolina inmate was entitled to payment of "prevailing wage" for his work in prison industry under state statute, pursuant to a decision by an administrative law judge in the inmate's grievance requiring correctional officials to pay such wages to the prisoner.

Resources

- Website of UNICOR, the Federal Prison Industries, Inc. (FPI).
- Federal Bureau of Prisons Program statements concerning prison industries and vocational training. (Click on the 8000 series for on-line access to these).
- Reentry and Prison Work Programs by Shawn Bushway, Urban Institute (2003). A report, which examines issues surrounding work programs in prison for recidivism, including jobs in the prison setting, short term vocational training in prison, and short term assistance in the job search process upon release.
- Report: Congressional Research Service: Federal Prison Industries (updated 2007).
- "Prison Industry Enhancement Certification Program" (NCJ 203483), Bureau of Justice Assistance, March 2004. PDF or HTML Describes a program that exempts certified state and local departments of corrections from normal restrictions on the sale of inmate-made goods in interstate

commerce. A total of 50 jurisdictions may be certified under this program by demonstrating to BJA that they meet statutory and guideline requirements.

- Saylor, W. G. and Gaes, G. G. (2006). Commentary About the Scientific Merit of the Post Release Employment Project (PREP). Federal Bureau of Prisons, Washington, DC. (15 pgs., pdf format).
- "Factories with Fences: A History of the Federal Prison Industries," Federal Bureau of Prisons, 49 pgs. [PDF]

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