

of the 10,000 acres of mature seed producing pine orchards are treated with 1,500 to 7,500 lb ai. Use on young seed orchards is more important (20 to 50 percent of the acres), although usage is still estimated to be less than 100 lb ai. Aggregate annual economic impacts would be no higher than \$11,000, which represents a 2 to 3 percent increase in production costs.

Because of the minor benefits associated with carbofuran's use on this site, the Agency proposes cancellation.

10. *Sunflowers*. Many types of birds, including waterfowl, game birds, songbirds, and other species are expected to be present when carbofuran is applied to this site. These birds are expected to frequent sunflower fields and border areas for feeding, nesting, cover, brood-rearing, and bedding. Neither field studies nor bird kill incidents were available.

The LD<sub>50</sub>/sq ft analysis indicated a minimum of 6 and a maximum of 1368 for the three representative bird groups.

All of these are high enough to suggest potential risk to each bird group. Because of the similarity of this site to the other sites, such as corn, the risk is expected to be similar.

Sunflowers account for less than 1 percent of both granular and total carbofuran usage. From 1 to 5 percent or 18,400 to 105,900 U.S. acres are treated with 18,400 to 121,100 lb ai annually. Over the last few years, more cost-effective rescue treatments are replacing the use of at-planting insecticides such as granular carbofuran. No adverse impacts are expected for either sunflower producers or consumers.

Because of the minor benefits, the Agency concluded that high risks, especially as compared to the alternatives, outweigh the benefits of use and proposes cancellation.

11. *Other sites*. Carbofuran is also registered for use on sites that were not examined with the same degree of intensity. The risk from use on these sites is anticipated to be similar to the risks from use on corn.

Regarding benefits, a review of the potential alternatives for these sites indicated that registered alternatives are not available for the following:

| Site                     | Pest                         |
|--------------------------|------------------------------|
| Section 3 registrations: |                              |
| Banana.....              | Weevils.                     |
| Sugarcane stubble.....   | Wireworms (FL only).         |
| 24(c) registrations:     |                              |
| Sugarcane.....           | Sugarcane beetle.            |
| Sugarcane stubble.....   | White grubs (TX).            |
|                          | Sugarcane beetle (MS).       |
| Sweet corn.....          | Corn stalk weevil (FL).      |
| Alfalfa.....             | Pillbug (IL).                |
| White pine.....          | White pine cone beetle (OH). |

The Agency did not receive comments during the PD 1 comment period regarding the benefits of use on these sites. Thus, the Agency assumes the benefits are negligible, although no alternatives are registered, and proposes cancellation.

A review of the potential alternatives of the other crops indicated that alternatives that may be used either at-planting or as foliar treatments are available. Thus, the Agency has determined that the hazard outweighs the minor benefits and proposes cancellation of these remaining minor uses of carbofuran.

#### F. Conclusions

The Agency proposes to cancel the registrations of all granular products containing the active ingredient carbofuran. The Agency has evaluated several risk reduction measures and has concluded that the avian hazard of granular carbofuran outweighs the benefits of continued use. The Agency recognizes that while the substantial risks outweigh the substantial benefits associated with the use of carbofuran on rice, additional information pertaining to carbofuran's risks and benefits and on this site would be desirable. Additionally, the Agency requests the submission of any efficacy data on carbofuran and its alternatives.

#### G. Proposed Regulatory Actions

The Agency proposes to cancel all granular products containing carbofuran that are registered for all crops.

#### IV. Procedural Matters

As required by FIFRA sections 6(b) and 25(d), and 40 CFR 154.31(b), EPA has transmitted copies of a draft Notice

of Intent to Cancel based on this Notice, together with the support documents, to the Secretary of Agriculture and the Scientific Advisory Panel for comment. EPA will publish any comments received from the Secretary or the Panel, and EPA's responses, in the Notice of Final Determination.

#### V. Public Comment Opportunity

The Agency is providing a 60-day period for the public to comment on this Notice and on the Carbofuran Special Review Document. Comments must be submitted by March 27, 1989. All comments and information should be submitted in triplicate to the address given in this Notice under **ADDRESS**. The comments and information should bear the identifying notation OPP-30000/48A. All comments, information, and analyses which come to the attention of EPA may serve as a basis for final determination of regulatory action during the Special Review.

#### VI. Public Docket

The Agency has established a public docket (OPP-30000/48A) for the Carbofuran Special Review. This public docket will include (1) this Notice; (2) any other notices pertinent to the Carbofuran Special Review; (3) non-CBI documents and copies of written comments or other materials submitted to the Agency in response to this Notice, and any other documents regarding carbofuran submitted at any time during the Special Review process by any person outside the government; (4) a transcript of all public meetings held by the Agency for the purpose of gathering information on carbofuran; (5) memoranda describing each meeting held during the Special Review process between Agency personnel and any person outside government; and (6) a current index of materials in the public docket.

Dated: January 5, 1989.

John A. Moore,

Acting Deputy Administrator.

[FR Doc. 89-1584 Filed 1-24-89; 8:45 am]

Billing Code 6560-50-M

# Fast Facts

Wednesday  
January 25, 1989

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## Part V

## Department of Labor

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### Employment and Training Administration

**Apprenticeship 2000, Focus Paper on  
Support Activities and Linkages; Notice  
and Request for Comments**

**DEPARTMENT OF LABOR****Employment and Training  
Administration****Apprenticeship 2000, Focus Paper on  
Support Activities and Linkages****AGENCY:** Employment and Training  
Administration, Labor.**ACTION:** Notice; request for comments.

**SUMMARY:** The Department of Labor's Employment and Training Administration has completed the first stage of its review of apprenticeship. This included a public discussion of five broad issues surrounding expansion of the apprenticeship concept of training. This is the second focus paper, designed to examine specific issues and options in more detail. The first focus paper, published in the *Federal Register* of October 14, 1988, announced a series of three focus papers. This paper combines the second and third papers. It examines ways to overcome barriers to expansion of apprenticeship through appropriate support activities and better program linkages. The term "expansion" means expansion of the apprenticeship concept of training. It encompasses expansion outside the current occupational boundaries, as well as improvement to, and potential expansion of, the traditional apprenticeship program.

**DATE:** Public comment is sought on the effectiveness of the methods suggested for overcoming barriers to expansion, including the feasibility and appropriateness of the support activities and linkage options described in this focus paper. Public comment is also welcome on alternative methods for overcoming barriers to expansion. Comments must be received by February 24, 1989.

**ADDRESS:** Comments shall be mailed to James D. Van Erden, Director, Bureau of Apprenticeship and Training, Room N-4649, 200 Constitution Avenue NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** James D. Van Erden, Director, Bureau of Apprenticeship and Training, Office of Job Training Programs, Employment and Training Administration, Telephone (202) 535-0540 (this is not a toll-free number).

Signed at Washington, DC, this 19th day of January, 1989.

Roberts T. Jones,

Assistant Secretary of Labor for Employment and Training.

**Apprenticeship 2000—Focus Paper on  
Support Activities and Linkages***Background*

Publication of an issue paper exploring expansion of the apprenticeship concept (52 FR 45904, December 2, 1987) launched the Apprenticeship 2000 review. The purpose of the review is to determine the role of the apprenticeship system in meeting America's future needs for a skilled work force. A short-term research effort to support the review was announced in the *Federal Register* on June 3, 1988 (53 FR 20386).

The public response to the issue paper has been analyzed, and the results were published in the *Federal Register* on September 2, 1988 (53 FR 34250). The analysis of the public response found overwhelming support for the apprenticeship concept as a method of training skilled workers. There was also significant consensus that apprenticeship should be expanded, but within certain limits and without sacrificing quality. The first focus paper presented alternative models for apprenticeship and examined measures for defining quality in apprenticeship programs (53 FR 40326, October 14, 1988).

For discussion, this second focus paper assumes that some significant level of expansion of the apprenticeship model will occur, and asks how to accomplish such expansion. The details of the program structure needed to support expansion will be developed following analysis of public comments and research results. However, such further efforts will conform to several basic principles. These include: equal access for employers and equal opportunity for all workers; employer-based training; portability of worker credentials; formal recognition of identifiable skill competencies; and maximum flexibility, within a structured base, to adapt training to work place needs.

Expansion includes two parts: Strengthening the traditional apprenticeship program, without changing its basic character; and establishing a separate program, based on the most effective and successful characteristics of apprenticeship, but modified to fit the changing economic environment. Public comment is sought on the appropriate support and linkage activities necessary for an effective expansion of apprenticeship to occur. Comment is also sought on how these activities should be organized and carried out.

*Framework for Expansion***1. Current Apprenticeship Programs**

There is strong support for the current apprenticeship programs which produce well-rounded, multi-skilled journey workers primarily in the construction and manufacturing industries. The private sector financing structure and the delivery system for these traditional programs have worked well over the years, with government and education providing appropriate support activities. These programs should be preserved, but strengthened, where needed, to keep pace with technological changes and to be responsive to workers' needs for upgrade training and retraining. They should also expand because of the continuing need for skilled, versatile workers in traditional apprenticeable occupations.

The first focus paper presented alternatives for improving and expanding traditional apprenticeship programs. The alternatives included: A career ladder approach to journey level completion, worker certification, periodic assessments, and institution of a formal appeals process. This focus paper does not reach conclusions on these issues. It does, however, assume that the traditional apprenticeship program will be expanded within some limits. It also assumes that some changes to existing regulations will be made to improve the current system. Such changes will be consistent with the basic principles for expansion, and will assure a minimum standard of quality in training.

**2. Structured Work-Place Training**

The first focus paper presented the concept of a separate program based on the successful characteristics of the traditional apprenticeship program. No single proposal for such a program is proposed here. Therefore, this paper does not address details of any potential separate training program. However, a separate training program, based on the elements and concepts of apprenticeship, is being explored. To advance the discussion, commentators should assume that a separate program will be developed, in line with the basic principles mentioned above.

A structured work-place training program, based on the successful elements of apprenticeship, is one possible option for programs which might better suit employers' needs for specialized skills outside of the construction industry, or for skills that can be mastered in periods different

from traditional programs. A work-place training program could also be responsive to workers' needs for flexibility and portability in training and retraining, and could encourage career ladder alternatives. It might also include some of the features of traditional apprenticeship programs, such as structured on-the-job training with related instruction; and industry-based, voluntary approach to training; registration of programs; and recognition of results. Some of the features might be different from the current apprenticeship system. These differences might include a separate program structure and separate terminology, career ladder or modular approaches to training (for example, recognized results less than journey level, or building skill competencies over time), and certification of skill competencies.

#### *Need for Apprenticeship Models*

Employers of all types and sizes will need employees with stronger basic skills as well as better skills required by new technologies. Yet private sector investment in training has been insufficient. The most common form of employee training is informal. Much less frequent is a more structured method of training. Only about 10 percent of employees receive any formal training from their employers.<sup>1</sup> In addition, small employers, who will need to train employees most, are the least able to make such a training investment.

Recent research at the University of Pittsburgh on how learning skills are acquired found that programs that are successful in teaching thinking and learning skills share many of the elements of apprenticeship. Like apprenticeship, the programs which were studied "encourage student observation and commentary \* \* \* allow skill to build up bit by bit, yet permit participation even for the relatively unskilled, often as a result of the social sharing of tasks (and) are organized around particular bodies of knowledge and interpretation \* \* \* rather than general abilities."<sup>2</sup>

Apprenticeship has added benefits. For the employer, apprentices are productive wage-earners while they are learning. In addition, the classroom instructor, the on-the-job mentor, and the employer all can review and contribute to an apprentice's progress in training. For the employee, apprenticeship offers the opportunity to

earn wages while learning a skill.

A strength of apprenticeship in this country has always been that it is a voluntary program developed, supported, and carried out by industry, with minimal government regulation. Apprenticeship works because, in the industries in which it operates, employers, unions and employees are convinced that apprenticeship is in their self-interest.

#### *Barriers*

Despite employers' needs for skilled workers and the advantages of structured training, the number of employers who register apprenticeship programs has been relatively small. Therefore, there are assumed to be barriers to employers' use of apprenticeship to meet their needs. Some of these barriers are not specific to apprenticeship, but apply to overall employer investment in training. Among the barriers to investment in training, and in apprenticeship, are:

- **Cost—Training can be expensive.** This is particularly true for small employers training relatively few employees. Apprenticeship programs can involve start-up costs, time spent instructing by on-the-job trainers, deferred productivity, and costs related to classroom instruction.

- **Perception of union control—The perception in the general employer community is that apprenticeship is a training program for the construction and manufacturing industries, used only for the organized trades. In fact, apprenticeship can be used for many occupations in a wide range of industries. The majority of approved programs are now in the non-union sector.**

- **Fear of "pirating"—Many say that the cost of apprenticeship might not be considered prohibitive if there were some assurance that apprentices—in the later stages of their training, when they are more productive—and completers were not hired by firms that do not invest in training.**

- **Lack of support structure—Many current apprenticeship program sponsors are individual employers not covered by collective bargaining agreements. Many sponsors of traditional programs, however, are covered by such agreements. The latter have a structure to support the development and implementation of apprenticeship programs designed to meet established standards. These Joint Apprenticeship and Training Committees (JATCs) operate apprenticeship trust funds, which share the costs of administration of**

apprenticeship programs by all participating employers. The absence of a support structure may inhibit significant expansion among new employers or employers not subject to a collective bargaining agreement. This may be particularly true for small employers who will experience most of the job growth and will do most of the training.

- **Government involvement—Many employers, even entire industries, will not participate in a program that has any degree of government involvement. Apprenticeship is a cooperative national training system in which business, labor, education, and federal and state governments all have a role to play. The aversion to government programs may be at work with some employers, even though apprenticeship is a program in which the role of government is relatively non-intrusive.**

#### *Overcoming Barriers*

There are many options for overcoming possible barriers and increasing an employer's motivation to sponsor an apprenticeship program. Some of these activities are ongoing in the apprenticeship system, and might be adapted to any expansion of apprenticeship. Others represent activities that would be new to the apprenticeship system. The categories presented below are: (1) Support activities, (2) linkages, and (3) appropriate roles for the federal and state governments.

##### **1. Support Activities**

Apprenticeship support activities, performed by the Bureau of Apprenticeship and Training (BAT) and the State Apprenticeship Councils (SACs), include: Promotion, technical assistance, registration and certification, and various oversight activities. This paper seeks comments on which of these activities would be critical to improvement and/or expansion of apprenticeship, what the objectives of the activities should be, and how they should be accomplished. Commentators may also wish to include suggestions for additional activities.

- **Promotion.** The promotion of apprenticeship programs has traditionally been a function of the BAT. Promotion is also a function of the state apprenticeship agencies, recognized by the Secretary of Labor for federal purposes. Promotion encourages enlisting new program sponsors and greater participation by existing sponsors. Promotional efforts at the national, state and local levels have

<sup>1</sup> American Society for Training & Development, *The Learning Enterprise*, Draft, September 1988.

<sup>2</sup> Resnick, Lauren B., *Educational Researcher*, December 1987.

included direct personal contacts, written materials, and to a lesser extent, radio and television public service announcements.

Except for the military and certain public sector jobs, success in marketing apprenticeship outside the traditional building and manufacturing trades has been limited. In recent years, federal promotional efforts have also been limited. How important will promotion be in efforts to broaden apprenticeship effectively in both the traditional areas and in new occupations and industries?

- *Technical assistance.* BAT and state staff provide technical assistance to potential and existing program sponsors. Staff assist sponsors in developing the structured on-the-job training component, securing appropriate related theoretical instruction, developing affirmative action plans, and in various aspects of ongoing programs. The availability and expertise of staff, especially outside the traditional skilled trade areas, however, varies from one location to another.

The availability and quality of technical assistance may be a significant support function needed for expansion. What should be the objectives of technical assistance in an expansion effort, and whose responsibility is it? Should efforts be directed to specific sponsors, or should there be a more systematic national effort to develop and make accessible curricula for a wide range of occupations? Are there other agencies or organizations which might also provide technical assistance?

- *Registration/Certification/Accreditation.* In support of apprenticeship programs, the BAT and the SACs register both new programs and new apprentices. Program sponsors in BAT states, and in some SAC states, receive a registration certificate which certifies that the program meets standards for registration. The apprentice, upon completion, receives a certificate of completion from the BAT, or the SAC or, in some states, both. Thus, in effect, there is no single, complete, national registration/certification system for apprenticeship programs.

This system of registration and certification does not ensure portability of skill recognition because a worker's certificate from one state may not be accepted in another state. Furthermore, the certificate only attests to completion and does not serve to inform employers of the specific competencies achieved. To promote the principle of portability, should current procedures be changed to provide universal recognition for program sponsors and for individual

training results? If so, how should this be accomplished? Commentators should also consider whether a national system of registration/certification is needed. If the answer is yes, should portions of the process be delegated? If so, which entities should be involved, and, under what circumstances?

- *Special recognition.* Now the major—some say only—benefits for an employer of registering an apprenticeship program are the lowered wage rates permitted under Davis-Bacon, and the ability to require related training "off the clock," without compensation. Are there ways of increasing the recognition value of both registration approval and certification of completion that would provide enough additional incentive for employers to develop and register apprenticeship programs? For example, national awards for excellence in apprenticeship could focus attention on its contributions to national productivity and generate industry pride in training accomplishments. Or, are there means of helping industries to use their apprenticeship programs as a "selling" technique, such as auto dealers displaying their mechanics' training certificates in service departments?

- *Delivery system.* Apprenticeship is an industry-based training program. Private employers, either on their own initiative or through a collective bargaining agreement, sponsor apprenticeship programs. (Local, state and federal governments, including the military, also operate registered apprenticeship programs.) As mentioned above, the lack of a support structure or delivery system may be a barrier to expansion of apprenticeship. Under the JATC model, employers who lack the resources to train on their own can jointly sponsor an apprenticeship program. Furthermore, employee interests are represented in decision-making about the operation of the apprenticeship program. Is providing assistance in forming delivery systems crucial to expansion of apprenticeship and broader work-place training programs? Should efforts be made to duplicate the JATC model? If so, who should provide this assistance: government, education, associations, others? Finally, if such help is provided, should it be focused on emerging occupations and industries, on small employers, or on all potential programs, including those in the traditional apprenticeship trades?

- *Provide loans to apprenticeship or work-place training sponsors.* Employers or associations could receive loans to pay for the initial costs of developing and implementing

apprenticeship programs. The amount of such loans could be based on some combination of number of apprentices, skill level of the occupation, and length of training.

- *Subsidize the costs of related instruction.* Providing classroom training related to the skills being learned on the job is essential to the success of apprenticeship and is a requirement for registration. Related instruction is sometimes paid for solely by the state, or in conjunction with federal vocational education funds. However, who provides related instruction and who pays for it varies from state to state. Some states have their own methods of providing funds for related instruction. California, for example, through the "Montoya Law," provides monies to apprenticeship program sponsors through the education system, for related and supplemental instruction.

- *Help lower the costs of doing business.* Among the possibilities for using apprenticeship to lower business costs is in the area of lower insurance rates. Apprenticeship includes safety training and strict rules of supervision while learning. It is logical to believe, and there is some evidence to suggest, that apprentices and journey workers trained through apprenticeship have a lower accident rate on the job. If this is shown to be true in specific industries, then the insurance industry might lower specific rates (e.g., workers' compensation) based on apprenticeship safety training.

- *Contract preference.* At times, in specific circumstances, preference in the award of federal or state contracts has been given to firms that exhibit certain characteristics or undertake certain activities. Preference on certain contracts could be reserved for firms that hire apprentices or structured work-place trainees in certain occupations.

## 2. Linkages

Apprenticeship programs over the years have developed linkages with other programs, particularly with the education system, and also with parts of the employment and training system. Although there are many creative apprenticeship linkages with a variety of organizations, these linkages have not been universally adopted.

Employers receive no direct federal funds for sponsorship of apprenticeship programs. However, many federal, state, and local funds are spent on education, employment and training, and related programs. These resources can be used to lower the costs of training for apprenticeship program sponsors. Operating in this way, linkages can be

significant incentives for program sponsors.

Apprenticeship linkages are conceivable with a great number and variety of organizations at state and local levels. The kinds of linkages that can develop and flourish will depend on the purpose, perspective and leadership of existing organizations. Barriers to successful coordination can be formidable, but the potential benefits may make the effort required to establish linkages extremely worthwhile. Linkage activities should increase the ability of apprenticeship programs both to produce skilled workers and to serve populations that are different from the current apprenticeship populations.

The specific objectives of apprenticeship linkage activities include the following:

- To provide for coordinated employment and training and education programs that produce the maximum value for the dollars invested;
- To increase the likelihood that women, minorities, immigrants and youth will be able to enter and succeed in apprenticeship;
- To raise the visibility and awareness of apprenticeship; and
- To improve the quality of apprenticeship through such methods as:
  - Better related instruction; and
  - Valid competency tests.

Commentators are asked to consider what kinds of linkages with the following organizations or programs will help meet these objectives.

Commentators are specifically asked to suggest additional organizations which might be the focus of linkage efforts for a specific purpose, and how such linkages might best be established.

• *Education.* Linkages with education are among the most frequent kind of links for apprenticeship programs because of the requirement for related instruction. However, the details of how a related instruction program is developed and conducted vary considerably from state to state and among apprenticeship sponsors. Among the other links that could strengthen the apprenticeship program and which are operated, to varying degrees, are: School to apprenticeship programs; development of curricula and instructional materials; instructor training; associate degree programs, which combine apprenticeship training and college study; membership in sponsoring organizations to represent workers, if no union active in apprenticeship; and linkages with assessment and evaluation services.

• *Job Training Partnership Act (JTPA).* The prevalence of higher-paying

skilled occupations in the apprenticeship system makes it an attractive link for programs like JTPA which are evaluated, in part, by participants' outcomes after completion. Pre-apprenticeship programs operated by JTPA sponsors are a fairly common method of providing the economically disadvantaged the necessary support and background to gain access to apprenticeship. Other kinds of links with JTPA could include using the Private Industry Councils to increase the visibility of apprenticeship in the employer community, and conducting upgrade training or retraining.

• *Job Corps.* Many Job Corps Centers already have strong linkages to apprenticeship through their pre-apprenticeship programs, largely in the building trades. Can these successful models be duplicated for other occupations?

• *Federal-State Employment Service system (ES).* The State Employment Service is used most frequently today by apprenticeship sponsors for testing and selection. In the past, ES has operated apprenticeship information centers, and some states have recently reinstituted this activity. The first focus paper presented for comment the idea that occupational performance tests could be used before completion of apprenticeship. At the national level, the United States Employment Service's (USES's) expertise in testing could make it a valuable partner for apprenticeship. Under federal BAT guidance, and with industry direction and involvement, USES might develop or adapt such performance tests or design others to assess and document the performance of apprentices. Another option might be to use USES to develop methods of assessing applicants' experience so they can begin their apprenticeship above the entry level.

• *Economic development organizations.* In recent years there has been a growing awareness among public and private economic development practitioners of the importance of the human capital factor in private investment decisions. Most states now include, at least in a general way, employment and training in their economic development plans for strengthening the business climate and creating jobs for their residents. However, most state coordination strategies in this area are still evolving. Because registered apprenticeship programs are evidence of a commitment to developing and maintaining a skilled work force, they can be a particularly attractive development tool. Links with economic development organizations, such as chambers of commerce, and

state and local government economic development agencies, might include: Aggressive marketing of apprenticeship as evidence of a skilled work force in the state; and promoting apprenticeship in the small business community, while helping to tailor programs to their needs.

### 3. Federal/State Roles

Administration of the national apprenticeship system is a mix of solely federal, joint federal-state, and mostly state administration. In 23 states, the BAT directly administers apprenticeship. In the 27 states where direct administration of apprenticeship is delegated to a state agency, the role of the BAT varies widely, from only minimal involvement in some state activities to a substantial role in others.

While this diversity provides options and flexibility to the states, it also results in differences and inconsistencies in program registration and certification procedures among states. Thus, the current administrative structure needs review to examine options needed to support an expanded and improved national apprenticeship system. Some of the issues raised are long-standing. Recommendations for resolution of these issues could appropriately be made regardless of any expansion efforts. Following are some areas where change to the current federal/state relationship and roles might be considered.

• *Minimum state level.* Current federal regulations do not prescribe any minimum level of state activity required for recognition. In at least several states, the SAC serves essentially as a registration agency, with BAT staff performing all the administrative functions. Some maintain that this adds a cumbersome layer of bureaucracy with no real benefit to the program sponsors or the apprentices. Accordingly, should there be minimum requirements for the level of effort as a condition for recognition? If so, what criteria should be used in establishing the minimum state level of effort?

• *Participation by all states.* Several respondents to the broad issue on government role suggested establishing a federal-state apprenticeship system modeled after the federal-state unemployment insurance (UI) system. In the UI system, state agencies receive federal administrative grants and employers receive tax credits against their federal unemployment tax if the state enacts an unemployment insurance law that conforms with federal requirements. For employers to receive tax credits, the state law must meet requirements of the Federal

Unemployment Tax Act. Receipt of administrative grants is conditioned on requirements in Title III of the Social Security Act. Although state participation in the UI system is theoretically voluntary, the financial inducements are such that all states participate in the system.

A similar arrangement or variations of such an arrangement are conceivable for the apprenticeship system. Of course, any alternative could change the present federal-state structure by adding more or less federal oversight. On the other hand, it would promote establishment of a national federal-state apprenticeship system unlike the hybrid structure that now exists. Is a federal-state apprenticeship system modeled after the UI system, or some other model, a desirable goal? If so, what should be the minimum federal requirements for state participation?

- *Consistency among states.* The focus papers have examined issues about quality, accreditation and portability of apprenticeship. Does there need to be more uniformity among the states in apprenticeship program operations? Or, does the unique economic environment of each state argue for diversity? If uniformity is important, is it more important in some areas than others: for example, in apprenticeable occupations, program standards, program registration and approval procedures, curriculum, or some other area?

- *Procedural safeguards.* Current federal regulations do not provide for potential program sponsors to be advised of the reasons for denial of program registration. There are no appeal rights for potential program sponsors in BAT states and in many SAC states. The right to appeal an adverse finding is basic to most government programs. Should it be included in apprenticeship programs? If so, what are the appropriate levels for appeal?

- *Oversight.* The BAT conducts annual compliance reviews of SAC operations for consistency with federal regulations. The Secretary of Labor may derecognize a SAC which fails to comply with federal regulations, after opportunity for corrective action. In fact, no SAC has ever been involuntarily derecognized. In large part, this is because this sanction is viewed as too extreme, considering the voluntary nature of state participation. Is derecognition too strong a tool for

fostering compliance? If faced with this action, would a SAC choose to go out of business for "federal purposes" rather than comply with federal regulations? How might this impact the national apprenticeship system?

While derecognition would always be an option available to the Secretary, there may be interim actions to ensure SACs comply with federal rules. One suggested alternative is a periodic recertification of SACs. Another is to establish procedures for routine review and approval of state law and regulatory changes related to the delegation of federal functions. Are these viable options and/or are there others?

- *Other.* Suggestions have been made that additional efforts are needed to clarify respective responsibilities in states where apprenticeship is jointly administered by the BAT and the SAC. However, in 25 of the 27 SAC states, responsibilities are established in written agreements. However, many of these may be little more than a paper exercise. What more should be done to clarify the federal/state roles? Are there additional steps that might provide more structure to existing processes?

#### *Summary of Public Comments Requested*

ETA is presenting for comment many specific questions and issues related to various ways of overcoming any barriers to expansion of the apprenticeship concept of training. The general categories include: I. Support Activities, II. Linkages, and III. Federal/State Roles. Many commentators will not want to address all the issues and questions presented, and ETA welcomes responses to selected questions. For ease in responding, a summary of the questions is provided below. Commentators are requested to follow the order presented and key their responses to the numbers listed below.

#### *Issue I—Support Activities*

A. Public comment is sought on the mix of activities listed below that will best support expansion of apprenticeship. Should the mix be different for expansion of the traditional program than for expansion under a structured work-place training program?

- Promotion
- Technical assistance
- Registration/certification/accreditation
- Special recognition

- Delivery system
- Loans
- Help subsidize related instruction
- Lower costs of doing business
- Contract preference

B. Are there other support activities that would be effective in overcoming barriers to expansion?

C. Who should undertake the various activities necessary for expansion? BAT? States? Education? Business? How should these activities be implemented?

#### *Issue II—Linkages*

A. Public comment is sought on the degree to which strengthened or additional linkages are needed to improve or expand apprenticeship programs and on how such linkages should be undertaken.

B. What other organizations will be most important to improvement and expansion of apprenticeship? What should be the nature of the apprenticeship system's relationship with them?

#### *System III—Federal/State Roles*

A. *Minimum state level.* Should there be minimum requirements for the level of state effort as a condition of recognition by the Secretary?

B. *Participation by all states.* Is a federal/state apprenticeship system in which all states participate a desirable goal? If so, how can this goal be accomplished and what should be the minimum requirements for state participation?

C. *Consistency among states.* Is uniformity among states important? If so, in what areas is uniformity most important—apprenticeable occupations, program standards, program registration and approval procedures, curriculum, other?

D. *Procedural Safeguards.* Should there be minimum requirements for notification and rights to appeal adverse decisions on program registration?

E. *Oversight.* How can BAT best foster compliance of the SACs with federal regulations? What other options to derecognition are viable for compliance purposes, i.e., periodic recertification, regular review of law and regulatory changes?

F. *Other.* What more should be done to clarify the federal-state roles?

[FR Doc. 89-1622 Filed 1-24-89; 8:45 am]

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# Federal Register

Wednesday  
January 25, 1989

## Part VI

## Office of Personnel Management

5 CFR Part 300

Employment (General); Government Use  
of Private Sector Temporaries; Final Rule

**OFFICE OF PERSONNEL  
MANAGEMENT****5 CFR Part 300****Employment (General);****Government Use of Private Sector  
Temporaries****AGENCY:** Office of Personnel  
Management.**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing a final rule establishing criteria and conditions under which agencies may consider using temporary help service firms for meeting short term temporary work needs. We are issuing the rule to respond to agencies' requests for flexibility to provide public services and to maintain productivity. The effect of this rule will be to give agencies an optional, additional tool for meeting short term needs which has long been available to other public and private organizations.

**EFFECTIVE DATE:** February 24, 1989.**FOR FURTHER INFORMATION CONTACT:**  
Thomas O'Connor, (202) 653-9407.

**SUPPLEMENTARY INFORMATION:** On October 17, 1988, OPM published (at 53 FR 40546) proposed regulations which would permit agencies to use temporary help services in certain situations. The policy is intended to benefit the public, agencies, and employees: services to the public will be maintained, managers can keep up timely operations, and employees may more readily get time off for dependent care, family emergencies, extended recovery, or other important personal situations. In preparing the final regulations, we considered carefully the more than 50 responses received during the comment period. While we have maintained the basic approach of the proposal, we have made many changes in response to the concerns of agencies, Federal employee organizations, temporary help firms, and other organizations and individuals.

We appreciate the concerns raised by Federal employee unions and by some other commenters regarding such matters as the employer-employee relationship, supervision, costs, and OMB Circular A-76 requirements. We want to address those matters in detail first and will cover other comments in the section analysis. Some responses asked about operational and advisory matters which would not be included in a rule. In accordance with regular OPM practice, we will address those matters

through the Federal Personnel Manual System.

**I. Introduction**

What these regulations would permit is simply this—the occasional use of a private sector temporary for a few days or weeks when an employee needs to be absent or an agency is faced with an immediate, critical need which cannot be met readily through temporary appointment procedures. A temporary help service firm specializes in having personnel on tap to step into a job quickly.

The use of outside help is a long-standing practice in every other type of organization in the United States: private companies; city, county, and State governments; and even Federal agencies which are independent of the general personnel system, such as the Federal Reserve System and the Tennessee Valley Authority. The Government of Canada has administratively authorized use since 1980.

In all of those organizations, the situation is the same. The outside temporaries are legally the employees of a temporary help firm, which exercises overall control of their activities from hiring through termination. The client contracts with the firm for services, gives the temporaries assigned a brief orientation and work tasks, and reviews the work product. There is no employer-employee relationship created with the client.

These regulations simply transfer this idea to the Federal sector. They will make outside temporaries available to Federal agencies, at their option, but in a more restricted and controlled way than other organizations use them.

In our capacity as the Federal agency authorized by statute to administer, execute, and enforce the laws governing the civil service under 5 U.S.C. 1103(a)(5), we believe such use is proper. There is no statutory prohibition. The guidance and opinions of the past (best known as the Pellerzi-Mondello opinions after the two General Counsels of the former Civil Service Commission who prepared them), which placed the use of temporary help services under the general ban against contracting for personal services, must give way to a new interpretation based on court decisions, the statutory definition of a Federal supervisor, evolving experience, and the now-established role which temporary help services perform. This rule reflects that new interpretation and it amends the Pellerzi-Mondello opinions with respect to the use of temporary help service firms.

Clearly, the policy is not meant to solve permanent recruitment needs, pay problems, or other unrelated matters, as some commenters believed. We believe the policy should be viewed in terms of the immediate, short-term needs it seeks to address, and, where the policy is used, we believe it will provide an opportunity for agencies and employees to judge how the use of these services function in practice.

We will keep the policy under review and are prepared to make changes where need is indicated. We plan to make a full review of the policy in 2 to 3 years, and will evaluate it for further continuation.

**II. Origins**

For a number of years, we have received many individual suggestions from Federal agencies and from private firms that the Government should be able to use the same services that are available to private sector organizations.

In 1986, the President issued Executive Order 12552, which requires agencies to improve the quality, timeliness, and efficiency of public services. We established the Personnel Directors Productivity Task Force at that time to identify impediments to modern personnel management in Federal agencies. For a wide variety of reasons, including major changes in the national work force, employers are facing increasingly difficult staffing challenges. These are described in the recently completed "Civil Service 2000" study, which provides a projection of future labor market conditions and agency needs through the end of this century. While some items in the report require further discussion, it is clear we must begin to address those challenges now.

The specific impetus for developing the new temporary help policy came from the Task Force's recommendations. We believe we have taken a reasonable and prudent approach to the recommendations, an approach which seeks to recognize the needs of agencies and employees. It should be noted that use of temporary help services is entirely optional with each agency, is a supplement to an agency's own personnel and resources, and is permitted only in narrowly defined circumstances. Because the policy is optional and because use is restricted to situations which are difficult to forecast—for example, individual employee needs for dependent care, family emergencies, or extended recovery—we have not projected any numerical estimates of the extent to

which agencies may elect to use these services.

The thrust of the proposal is to clarify previous legal or policy concerns so that Federal agencies may use, in a proper manner, services long available to other employers. The Federal Government will be the last significant employer to begin using those services.

### III. The Employer-Employee Relationship

A permanent civil service is a vital component of all modern governments. The Federal civil service performs a wide variety of essential activities for our Nation. In the Federal Government, a comprehensive system of legal obligations, rights, restraints, and benefits encompasses and uniquely characterizes Federal employees. This system is necessary to assure the direct control of the basic machinery of the Government and to protect the integrity of the civil service.

When the work of an agency is performed by a contractor rather than by Federal employees, the general guidance is that the agency must avoid creating an employer-employee relationship with the contractor's employees because those employees were not hired under the system of civil service laws. This means an agency may not recruit, test, select, reward, reassign, grant leave to, discipline, or separate, a temporary help service contractor's employees. The contractor must perform these actions because the contractor is the employer. (This does not preclude a temporary help service employee from applying for and being hired by a Federal agency for civil service employment.)

We have reviewed the legal and policy restraints, resulting from the civil service employment laws, on the ability of agencies to contract for temporary help services. Under OPM's previous guidance, such contracts have not been allowed because they were understood to create an employer-employee relationship without observing the legal requirements for civil service employment.

While the definition of what constitutes civil service employment is in statute (5 U.S.C. 2105), the former Civil Service Commission interpreted that definition in 1967 and 1968 in its Federal Personnel Manual Letters 300-8 and 300-12 (the Pellerzi-Mondello opinions) to agencies. That guidance has been applied in Comptroller General rulings, in court decisions, and in the Federal Acquisition Regulation.

The statutory tests in 5 U.S.C. 2105 for identifying a Federal employee are whether the individual worker is

performing an authorized Federal function, is supervised by a Federal official or employee, and is appointed formally to the civil service by an authorized Federal official or employee.

While outside temporaries would be doing Federal work, they would neither be supervised (they would receive technical instructions) nor appointed by Federal officials or employees, within the meaning of section 2105:

#### 1. Absence of Supervision

##### A. Universal Practice

For all other employers, public and private, use of outside temporaries does not present a question that the temporaries might be the employees of the client. The role of the temporary help service firm is well established and clear cut, and the temporaries are legally its employees.

Typically, for example, a client will give rough drafts to, and review the typed products of, a typist from a temporary help firm. Yet this type of relationship has never been judged sufficient evidence of supervision to make the client the employer of the temporary. Supervision is a broad activity consisting of many significant authorities and responsibilities toward employees, including performance appraisal and accountability—it is far more than one individual's assigning work to another.

##### B. Statutory Definition

While 5 U.S.C. 2105 does not define supervision, in 1978 the Civil Service Reform Act added a definition of a Federal supervisor at 5 U.S.C. 7103(a)(10). It reads, in pertinent part,

(10) supervisor means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment \* \* \*

The statute clearly states the broad scope and full range of activities which typifies a supervisor's relations with, and control over, employees. A Federal agency would not perform these supervisory activities with respect to outside temporaries; the temporary help firm would.

#### 2. Absence of Appointment

Recent case law interpreting 5 U.S.C. 2105 makes clear that Federal employment cannot exist in the absence of a formal appointment. An appointment is a conscious, deliberate

act by an agency to initiate an employer-employee relationship. Further, a contract issued by a contracting or procurement authority is not an appointment made by an official with authority to appoint as the law requires.

Section 2105 expressly goes beyond the common law employer-employee relationship and requires more than just the supervisory relationship. All three criteria of that law must be satisfied in order for an individual to be a Federal employee within the meaning of the statute. See *Costner v. United States*, 665 F. 2d 1016, 1021 (Ct. Cl. 1981); also, *United States v. Testan*, 424 U.S. 392 (1976); *Lodge 1858, American Federation of Government Employees v. Administrator, National Aeronautics and Space Administration*, 580 F. 2d 496 (DC Cir. 1978), cert. denied, 439 U.S. 927 (1978); *Baker v. United States*, 614 F. 2d 263 (Ct. Cl. 1980); *National Treasury Employees Union v. Reagan*, 663 F. 2d 239 (DC Cir. 1981); *Horne v. Acosta*, 803 F. 2d 687 (U.S.C.A. Fed. Cir. 1986); and *Watts v. OPM*, 814 F. 2d 1576 (U.S.C.A. Fed. Cir. 1987).

To quote just two of those cases, the court in *Costner* significantly noted, an abundance of Federal function and supervision will not make up for lack of an appointment.

In *Horne*, the court fully examined the appointment question and said,

It is well established that an appointment is necessary for a person to hold a Government position and be entitled to its benefits.

### IV. Responses to Other Frequent Comments

#### A. Oversight

Agency expenditures will be subject to the full range of internal controls and oversight, inspector general reviews, and audits which apply to every service contract. An agency contracting officer is responsible for seeing to the proper performance of the contract. Each agency is responsible for using these services to advance the work of the agency and for weighing program needs against costs. Agency adherence to our regulations is subject to review under our regular compliance and evaluation activities.

#### B. The Federal Procurement System

Several comments suggested adding security, suitability, liability, and other requirements which already are provided for in the comprehensive Federal procurement system. Agency use of these services will be a procurement rather than a personnel

management matter and as such is subject to all of the contracting laws, the Federal Acquisition Regulation, and the policies of the Office of Federal Procurement Policy and the General Services Administration which apply to every other purchase of goods or services from the private sector.

Under those legal and policy requirements, the Federal procurement system provides for fair and open competition among interested firms and for selecting the firm whose services will provide the greatest value to the Government at the lowest total cost. The procurement system also requires special consideration for small or disadvantaged businesses, for women-owned businesses, for handicapped activities, and for affirmative action by Federal contractors to employ disabled and Vietnam era veterans.

#### C. Costs

Concern was expressed over costs, especially the salaries which firms would pay to the outside temporaries. We have explored the cost of using these services and there are many factors to consider:

—The fees an agency will pay are determined by the contracting process which favors the lowest bidder who can do the job best.

—Under Federal procurement regulations, an agency contracting officer must certify that the price is fair and reasonable.

—The large number of firms makes for a very competitive situation for the buyer.

—Fees vary by company, locality, and occupation.

—Temporary help firms bill clients only for services actually used. Clients do not pay for holidays, vacations, sick leave, or other absences of the firm's employees. From those fees, the firm pays: The salaries and benefits of its employees; the costs of recruiting, testing, hiring, and training as well as maintaining a ready referral pool for instant placement; overhead; and profit.

—The salaries temporary help firms pay are summarized by locality and occupation in a Department of Labor news report dated May 24, 1988, and a more comprehensive industry wage survey, Bulletin No. 2313, dated September 1988. Interested parties may wish to consult those publications.

Like any other private activity, temporary help firms have the right to set the pay of their employees. Agencies will need to be sensitive to Federal employee concerns in a situation where the total compensation a firm would pay to its employees would exceed that of

Federal employees for comparable work under similar conditions.

#### D. Cost Effectiveness

It should be noted that, in every instance, each agency will be responsible for deciding whether temporary help services are worth the cost. Our policy simply will make using such services a possibility for agencies to consider—a use which is limited to certain defined situations and to very short periods spelled out in regulations.

In high-cost localities, agencies may well conclude that temporary help fees are not affordable in all but the most crucial situations. The need to meet a statutory deadline, to respond to a court order, to provide timely services to veterans, to dispense benefits to the elderly, and to assist farmers and small businesses, are representative of the daily tasks agencies must be prepared to perform through their resources. Before using outside temporaries, each agency must weigh each individual situation and consider the relative costs of alternatives, the importance of the work to be done, the need to maintain basic Government operations, the rights of the public, and the personal needs of its employees.

#### E. OMB Circular A-76 and Contracting Requirements

Since OMB is responsible for Circular A-76, we obtained its advice to respond to the following comments:

1. *Comment:* The authority delegated by this regulation must still comply with the requirements of OMB Circular A-76. Before contracting out for temporary employees, agencies must conduct the cost analyses required for an A-76 study. Decisions to fill position vacancies through a temporary help firm cannot be made on an ad hoc basis, especially where the potential exists for the agency to incur increased costs.

*Response:* Circular A-76 cost analysis requirements do not apply to the use of temporary employees under the conditions set by this regulation. A-76 requires cost comparisons of Government operated commercial activities with 10 or more full-time equivalent employees. Because this regulation only allows the use of outside temporaries when an agency cannot locate Federal employees in a timely manner to do the work, there is no competition between agencies and private firms for the work and no basis to make a cost comparison.

2. *Comment:* The proposal is contrary to the concept of career appointments which is inherent in the Federal system.

*Response:* To preserve the career appointment process, § 300.503(c) has

been amended to specifically prohibit use of temporaries where career appointment should be made.

3. *Comment:* Federal personnel principles in essence permit agencies to contract out specific types of work when certain criteria are met, such as those contained in Circular A-76. OPM's regulation is in conflict with these principles in that it allows agencies to contract out positions, as distinguished from specific types of work.

*Response:* Circular A-76 sets the basic policy for executive agencies to determine whether commercial activities should be performed by Federal employees or by private contractors. There is no conflict between Circular A-76 and Federal personnel policies and, in these circumstances, there is no special bar to contracting out the work an individual performs as distinct from contracting out an entire function. The contracting procedure agencies would follow does not turn work or positions over to a contractor. Instead, a contractor is obligated to provide brief fill in or back up services, only at such times as an agency may request. In each instance, an agency must first determine that no employees or qualified candidates are immediately available. Agencies should use Federal employees to the maximum extent possible. The contracting procedure referred to is found in Subpart 16.5 of the Federal Acquisition Regulation and is used regularly by agencies to address possible future needs for goods and services which cannot be predicted.

4. *Comment:* The advisability of using contract temporaries is questionable, since pay disparities between workers doing the same work, side-by-side, will increase the already serious morale problems of the current Federal work force.

*Response:* The outside temporaries will accomplish work that cannot be accomplished by the existing Federal staff; therefore, their use should not harm morale. Without them, the work would not be done in a timely manner and would remain for Federal workers to do at some future time. Also, outside temporaries do not have the benefits that come with full-time Federal employment. For further information on this point, please refer to the earlier discussion in the supplementary information on costs and cost effectiveness.

5. *Comment:* OPM should limit the use of outside temporaries to certain situations and duties, i.e., typing and filing. Such workers should be prohibited from dealing with the public

and working in areas where security clearances are necessary, and the firms should be limited to payments that do not exceed step 5 of the grade of the worker whose duties are being performed by the outside temporary.

*Response:* It is not necessary to restrict outside temporaries to particular positions. Federal managers may use outside temporaries for a variety of tasks only when work cannot be accomplished with Federal employees. To be sure, there are many Federal work assignments which could not be filled by outside temporaries. It would be unreasonable to expect outside temporaries to step into most middle and upper level jobs and have them hit the ground running. There is no need, however, to ban unlikely use and, at the same time, second-guess agencies on individual situations where outside temporaries would be feasible.

An agency must specify in the contract the capabilities and, if any, the security clearance requirements of the workers the firm is required to provide. If an individual does not meet the performance requirements the agency has specified, the firm will assign a qualified replacement.

Concerning the suggested limit on pay levels, please see the earlier discussion of costs and cost effectiveness.

#### V. Section Analysis

Here is a summary of the key changes we have made in the final regulation. Since the changes are based on the comments, we generally will not describe each individual comment.

##### A. Regulatory Agenda and Regulatory Flexibility Act

We did not list development of the regulation in the last agenda because at the time of our agenda submission, we had not decided on a regulatory approach. We have substantially expanded our statement in the regulation concerning the application of the Regulatory Flexibility Act.

##### B. Authority Citation

We added 5 U.S.C. 1103(a)(5) to indicate that we are acting in our capacity as the agency responsible for the administration, execution, and enforcement of the civil service laws.

##### C. Section 300.501

We clarified the definitions of temporary help service firms and private sector temporaries and added definitions for parental and family responsibilities (in place of maternity leave), Federal supervisor, critical need, and local commuting area. We did not add individual consultant-type services

to the temporary help service firm definition because, among other reasons, those services may be acquired under the procurement laws or under 5 U.S.C. 3109.

##### D. Section 300.502

The reference to the Senior Executive Service (SES) in our proposed regulations was meant simply to identify those agencies within the scope of our regulations and not to suggest it would be appropriate to use temporary help services to perform SES work. Therefore, for clarity, we have excluded SES positions from coverage. We also have added an exclusion against using outside temporaries for managerial and supervisory work in the competitive service, since, like the SES, such work would entail control over Federal employees and programs. Lastly, the proposal included agencies with excepted Schedule A, B, and C positions. We are eliminating Schedule C because it would not be appropriate to use outside temporaries because of the confidential relationship required for those positions.

##### E. Section 300.503

We have dropped the concept of specific permitted use situations in the proposal for agency relocations, phase downs, and shortage category recruitment needs. Those situations implied, rather than required, some sort of special need and raised unrelated issues. Rather than listing the situations where use is permitted, we have taken instead a generic approach. We have added a more focused agency critical needs situation which parallels the employee needs situation. Thus, we have neither endorsed nor excluded particular situations, but have defined the kind of situation in which use may be appropriate. Both situations, taken together, will present occasions for temporary help usage as an alternative to short term temporary appointment and provide a rational place for those services within the overall Federal resources management picture.

We have dropped the open-ended special circumstances category from the employee needs situation, added a restriction on use when civil service recruitment for permanent employment should be conducted, and, at the recommendation of a veterans' organization, added references to veterans' preference, disabled veterans, and FPM chapter 316 temporary appointment requirements.

The proposal received overwhelming support from Federal agencies, although they favored expanded usage such as lengthening the 45 workday limit and

using outside temporaries for vacations. Since this is a new situation for most agencies, we have decided not to expand the usage and to proceed with a limited approach until more experience has been gained.

##### F. Section 300.504

We have made the following changes: (1) Stressed that outside temporaries shall not be considered or treated as Federal employees and shall not be regarded as performing a personal service; (2) changed the area for applying the 45 workday limit on an outside temporary from nationwide to the local commuting area; (3) added authority for an agency to grant a one-time, 20 workday extension to let the same outside temporary continue, in maternity situations only; (4) added an overall 120 day cap on any one situation and provided authority for OPM to permit appropriate extensions; (5) and, added instructions that Federal agencies, just like every other organization using temporary help services, are expected to give orientation, assign tasks, and review work products.

##### G. Section 300.505

Reminds agencies that a variety of other means may be available for meeting short-term needs.

##### H. Section 300.506

Reminds agencies of procurement requirements. There is no requirement for imposing civil service qualification standards (such as those in Civil Service Handbook X-118) for Federal employment, on private sector employees. We have noted that agencies must specify the obligations a contractor is required to meet including the types and levels of skills to be provided.

##### I. Section 300.507

Alerts agencies that basic records will need to be kept.

Each agency will be responsible for deciding whether to use temporary help firms and for using them as they would any other management alternative to advance the work of the agency. As in other management actions, an agency should weigh program needs against relative costs. Each agency will be responsible for observing the conditions and criteria of these regulations.

#### E.O. 12291, Federal Regulation

After a careful review of the proposed rulemaking, including the analysis set forth below for purposes of the Regulatory Flexibility Act, OPM has determined that this is not a major rule

for the purposes of section 1(b) of E.O. 12991, Federal Regulation.

#### Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities for the following reasons:

1. OPM is not regulating, establishing criteria for participation of, or imposing requirements including record keeping or reporting on, small or other entities. OPM is regulating the conduct of Federal agencies to avoid the development of an employer-employee relationship should they elect to use outside temporary help.

2. The requirements an entity will have to observe will come about through an agency-initiated contracting process under the already-established, statutory Federal procurement system which applies to all contractors providing goods and services to the Government. The only entities affected would be those who seek and win a contract. Those entities may be viewed as receiving a beneficial economic impact, but we have no way of forecasting how many firms will compete or which ones will win contracts.

3. Our regulations do not require agencies to use private temporary help firms. Use is entirely optional with each agency.

4. Our regulations will provide an additional tool for agencies to consider using in very limited circumstances—emergency and critical needs situations, which by their nature are unpredictable. OPM has no basis for predicting when an agency will elect to use this alternative in light of the many other variables and alternatives which may or may not be present in any particular situation.

#### List of Subjects in 5 CFR Part 300

Administrative practice and procedure, Government employees.

U.S. Office of Personnel Management.

Constance Horner,

Director.

Accordingly, OPM is issuing final rules to amend 5 CFR Part 300 as follows:

#### PART 300—EMPLOYMENT (GENERAL)

1. The authority citation for Part 300 is revised to read as follows:

Authority: 5 U.S.C. secs. 552, 3301, 3302; E.O. 10577, 3 CFR, 1954-1958 Comp., page 218, unless otherwise noted.

Secs. 300.101 through 300.104 also issued under 5 U.S.C. secs. 7201, 7204, 7701; E.O. 11478, 3 CFR, 1966-1970 Comp., page 803.

Sec. 300.301 also issued under 5 U.S.C. 3324.

Secs. 300.401 through 300.408 also issued under 5 U.S.C. secs. 1302(c), 2301, and 2302.

Secs. 300.501 through 300.507 also issued under 5 U.S.C. 1103(a)(5).

Sec. 300.603 also issued under 5 U.S.C. 1104.

2. Subpart E is added to read as follows:

#### Subpart E—Use of Private Sector Temporaries

|         |                                                  |
|---------|--------------------------------------------------|
| Sec.    | Definitions.                                     |
| 300.501 | Coverage.                                        |
| 300.502 | Conditions for using private sector temporaries. |
| 300.503 | Prohibition on employer-employee relationship.   |
| 300.504 | Relationship to civil service procedures.        |
| 300.505 | Requirements for procurement.                    |
| 300.506 | Documentation.                                   |

#### Subpart E—Use of Private Sector Temporaries

##### § 300.501 Definitions.

For purposes of this subpart:

(a) A "temporary help service firm" is a private sector entity which quickly provides other organizations with specific services performed by its pool and employees, possessing the appropriate work skills, for brief or intermittent periods. The firm is the legally responsible employer and maintains that relationship during the time its employees are assigned to a client. The firm, not the client organization, recruits, tests, hires, trains, assigns, pays, provides benefits and leave to, and as necessary, addresses performance problems, disciplines, and terminates its employees. Among other employer obligations, the firm is responsible for payroll deductions and payment of income taxes, social security (FICA), unemployment insurance, and workers' compensation, and shall provide required liability insurance and bonding.

(b) "Private sector temporaries" or "outside temporaries" are those employees of a temporary help service firm who are supervised and paid by that firm and whom that firm assigns to various client organizations who have contracted for the temporary use of their skills when required.

(c) "Parental and family responsibilities" are defined in chapter 630 of the Federal Personnel Manual and include situations such as absence for pregnancy, childbirth, child care, and care for elderly or infirm parents or other dependents.

(d) A "Federal supervisor" of Federal

employees is defined in 5 U.S.C. 7103(a)(10) as

an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment \* \* \*

(e) A "critical need" is a sudden or unexpected occurrence; an emergency; a pressing necessity; or an exigency. Such occasions are characterized by additional work or deadlines required by statute, Executive order, court order, regulation, or formal directive from the head of an agency or subordinate official authorized to take final action on behalf of the agency head. A recurring, cyclical peak workload, by itself, is not a critical need.

(f) A "local commuting area" is defined in Part 351 of this chapter.

##### § 300.502 Coverage.

These regulations apply to the competitive service and to Schedules A and B in the excepted service. These regulations shall not be used:

(a) For the Senior Executive Service, or

(b) For the work of managerial or supervisory positions.

##### § 300.503 Conditions for using private sector temporaries.

An agency may enter into a contract or other procurement arrangement with a temporary help service firm for the brief or intermittent use of the skills of private sector temporaries, when required, and may call for those services, subject to these conditions:

(a) One of the following short-term situations exists—

(1) An employee is absent for a temporary period because of a personal need including emergency, accident, illness, parental or family responsibilities, or mandatory jury service, but not including vacations or other circumstances which are not shown to be compelling in the judgment of the agency, or

(2) An agency must carry out work for a temporary period which cannot be delayed in the judgment of the agency because of a critical need.

(b) The need cannot be met with current employees or through the direct appointment of temporary employees within the time available by the date, and for the duration of time, help is needed. At minimum, this should include

an agency determination that there are no qualified candidates on the applicant supply file and on the reemployment priority list (both of which must provide preference for veterans), and no qualified disabled veterans with a compensable service-connected disability of 30 percent or more under 5 U.S.C. 3112, who are immediately available for temporary appointment of the duration required, and that employees cannot be reassigned or detailed without causing undue delay in their regular work. In instances where a need is foreseeable, as when approval of employee absence is requested well in advance, an agency may have sufficient time to follow the temporary appointment recruiting requirements, including veterans' preference in chapter 316 of the Federal Personnel Manual to determine whether qualified candidates are available by the date needed and for the length of service required.

(c) These services shall not be used:

(1) In lieu of the regular recruitment and hiring procedures under the civil service laws for permanent appointment in the competitive civil service, or

(2) To displace a Federal employee.

**§ 300.504 Prohibition on employer-employee relationship**

No employer-employee relationship is created by an agency's use of private sector temporaries under these regulations. Services furnished by temporary help firms shall be performed by their employees who shall not be considered or treated as Federal employees for any purpose, shall not be regarded as performing a personal service, and shall not be eligible for civil service employee benefits, including retirement. Further, to avoid creating any appearance of such a relationship, agencies shall observe the following requirements:

(a) No one employee of a temporary help firm may work at an agency within its local commuting area for more than 45 work-days in a 6-month period. For departments, the 45 day limit applies to the bureau, service, or other major organizational element at the headquarters level of the department. Provided a situation in § 300.503(a) of this subpart continues to exist, an agency may secure a different individual from the firm or, provided it can show that termination would cause significant delay, an agency may request OPM to authorize the extension of the same individual for a specified period. An agency may authorize the extension of the same individual for one period not exceeding 20 workdays when needed for maternity absence.

(b) An agency's use of private sector temporaries shall not exceed an overall duration of 120 calendar days in any one individual situation under § 300.503(a) of this subpart. OPM may extend that time limit, for a period not to exceed 120 calendar days, in the interest of good administration in circumstances it determines to be appropriate.

(c) Individual employees of a temporary help firm providing temporary service to a Federal agency may be eligible for competitive civil service employment only if appropriate civil service hiring procedures are applied to them.

(d) Agencies shall train their employees in appropriate procedures for interaction with private sector temporaries to assure that the supervisory responsibilities identified in paragraph (a) of § 300.501 of this subpart are carried out by the temporary help service firm. At the same time, agencies must give technical, task-related instructions to private sector temporaries including orientation, assignment of tasks, and review of work products, in order that the temporaries

may properly perform their services under the contract.

**§ 300.505 Relationship of civil service procedures.**

Agencies continue to have full authority to decide to meet their temporary needs by a number of means including appointing individuals as civil service employees, details, redistribution of work, overtime, in-house pools, and the on-call authority.

**§ 300.506 Requirements of procurement.**

(a) Agencies must follow the Federal procurement laws and the Federal Acquisition Regulation, as applicable, in procuring services from the private sector.

(b) Agencies should make full use of the provisions of the Federal procurement system to make clear that the firm is the legally responsible employer and to specify the obligations the firm will have to meet to provide effective performance including such matters as the types and levels of skills to be provided, deadlines for providing service, liability insurance, and, when necessary, security requirements. The Federal procurement system also requires contractors to comply with affirmative action requirements to employ and advance in employment qualified disabled and Vietnam era veterans as provided in 41 CFR Part 60-250, and with public policy programs including equal employment opportunity, handicapped employment, and small businesses.

**§ 300.507 Documentation.**

Agencies are required to maintain basic records to establish that use of temporary help services is consistent with these regulations. Specific instructions will be provided through the Federal Personnel Manual System.

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