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PENAL INSTITUTIONS Use of Inmates for Private Gain: Authorize Use of Inmates as Voluntary Labor for Privately Owned Profit-Making Employers Producing Goods and Services for Sale to Public and Private Purchasers; Authorize Georgia Correctional Industries Administration to Enter into Service Contracts with Privately Owned Profit-Making Employers Producing Goods and Services for Sale to Public and Private Purchasers; Provide for Determinations by the Georgia Department of Labor as to Whether Inmates Would be Displacing Other Workers and Whether Labor Shortages Exist

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PENAL INSTITUTIONS

Use of Inmates for Private Gain: Authorize Use of Inmates as Voluntary Labor for Privately Owned Profit-Making Employers Producing Goods and Services for Sale to Public and Private Purchasers; Authorize Georgia Correctional Industries Administration to Enter into Service Contracts with Privately Owned Profit-Making Employers Producing Goods and Services for Sale to Public and Private Purchasers; Provide for Determinations by the Georgia Department of Labor as to Whether Inmates Would Be Displacing Other Workers and Whether Labor Shortages Exist

BILL NUMBER:

HB 1173

SUMMARY:

HB 1173 would have amended Chapters 1, 5, and 10 of Title 42 of the Official Code of Georgia Annotated to allow inmates to volunteer for certain jobs in private industries. Additionally, it would have allowed the private sale of inmate-produced goods, directed the Georgia Department of Labor to ensure that inmates did not displace other workers and that officials only use inmate labor in areas where labor shortages existed, and allowed penal authorities to enter into service contracts with privately owned profit-making employers producing goods and services for sale to public and private purchasers.

History

“[T]hey asked for volunteers for the work More than seventy men spoke up[] because it was outside work[,] and May is one damn

fine month for outside work.”¹ When the character Red spoke these words, he was describing the innate joy that people derive from putting in an honest day’s work.² One of the basic tenets of our society is that people should be able to support themselves with the fruits of their labor; yet, current Georgia law denies this basic right to Georgia inmates.³

Georgia law prohibits inmates from working for profit-making businesses.⁴ Additionally, Georgia penal institutions may not, with a few exceptions, hire out inmates to “private persons or corporations.”⁵ Finally, the law prohibits the sale of any “goods, wares, or merchandise which have been manufactured . . . by [] inmates.”⁶

In response to exploding incarceration costs, unacceptable recidivism rates, and the institutionalization of convicts who leave prison without marketable skills, Georgia lawmakers proposed HB 1173.⁷ The sponsors of the legislation believed the bill would make the following contributions: (1) allow the State of Georgia to recoup some of the costs associated with housing inmates; (2) provide inmates with marketable skills which would, in turn, reduce recidivism by ensuring that they have a trade on which they may rely when released from incarceration; (3) provide inmates with some financial backing on which they may rely when released from prison; and (4) provide labor for employers in areas with labor shortages.⁸

1. STEPHEN KING, *Rita Hayworth and Shawshank Redemption*, in *DIFFERENT SEASONS* 15, 40 (Signet Printing, 1983).

2. *See id.*

3. *See* 1985 Ga. Laws 1483, § 1, at 1484 (codified at O.C.G.A. § 42-1-5(b) (Supp. 2004)) (“It shall be unlawful for a custodian . . . [to] allow [an] inmate to be used for any purpose resulting in private gain to any individual.”) (emphasis added).

4. *Id.*

5. 1956 Ga. Laws 161, § 22, at 177 (codified at O.C.G.A. § 42-5-60(a)(1) (Supp. 2004)).

6. 1993 Ga. Laws 629, § 1, at 629 (codified at O.C.G.A. § 42-5-60(b) (Supp. 2004)).

7. *See* Telephone Interview with Rep. Alan Powell, House District No. 23 (Apr. 26, 2004) [hereinafter Powell Interview]; Carlos Campos, *Official: Pay Ga. Inmates to Work: Program Would Permit Jobs in Private Industry*, ATLANTA J. CONST., Dec. 13, 2003, at D1, available at 2003 WL 68977738 (noting that “[t]he Georgia prison system is the nation’s sixth-largest, costing state taxpayers more than \$900 million a year to operate,” and that the average annual cost of incarceration is \$17,500 per year per inmate); *This Just Might Work*, THE AUGUSTA CHRONICLE, Dec. 29, 2003, at A04, available at 2003 WL 71375702; Dave Williams, *Inmate-Work Bill Pushed in Atlanta*, THE AUGUSTA CHRONICLE, Dec. 19, 2003, at B12, available at 2003 WL 71377297 (noting that the money paid to inmates under the legislation “would be used to compensate their victims, reimburse the [S]tate and help support [inmates’] families”).

8. *See* Powell Interview, *supra* note 7; Campos, *supra* note 7; *This Just Might Work*, *supra* note 7; Williams, *supra* note 7.

Bill Tracking of HB 1173

Representatives Alan Powell of the 23rd district and Doug Teper of the 42nd district introduced HB 1173 during the 2004 session.⁹ After the House read HB 1173 for the first time on January 16, 2004, and a second time on January 26, 2004, the Speaker assigned it to the State Institutions and Property Committee, where it died a quiet and uneventful death.¹⁰ The Committee's failure to endorse, or even recommend any changes to, HB 1173 stems primarily from the fact that the ideas behind the proposed legislation are new to most lawmakers.¹¹ Representative Powell expressed confidence that, as lawmakers become more familiar with the underlying issues and see the need for improvement, they will become more amenable to legislation such as HB 1173.¹²

Had HB 1173 become a law, it would have amended portions of four chapters of Title 42 of the Official Code of Georgia Annotated.¹³ Section 1 of the bill would have amended Chapter 1 of Title 42.¹⁴ Specifically, the bill would have amended section 42-1-5(d) of the Code by adding exemptions for certain work programs described in section 3 of the bill.¹⁵ As discussed below, these programs would have included programs offered by for-profit employers.

Section 2 of HB 1173 would have amended Chapter 5 of Title 42.¹⁶ Section 2 would have amended the current law by granting penal authorities, in certain circumstances, the authority to enter into contracts in which for-profit businesses would use inmate labor.¹⁷

9. HB 1173, as introduced, 2004 Ga. Gen. Assem.

10. State of Georgia Final Composite Status Sheet, HB 1173, Jan. 16, 2004 (May 19, 2004); State of Georgia Final Composite Status Sheet, HB 1173, Jan. 26, 2004 (May 19, 2004); see State of Georgia Final Composite Status Sheet, HB 1173, Apr. 7, 2004 (May 19, 2004) (showing that the bill entered committee and did not return to the House for debate).

11. See Powell Interview, *supra* note 7.

12. See *id.*

13. HB 1173, as introduced, 2004 Ga. Gen. Assem.

14. Compare HB 1173, as introduced, 2004 Ga. Gen. Assem., with 1985 Ga. Laws 1483, § 1, at 1484 (codified at O.C.G.A. § 42-1-5(d) (Supp. 2004)).

15. Compare HB 1173, as introduced, 2004 Ga. Gen. Assem., with 1985 Ga. Laws 1483, § 1, at 1484 (codified at O.C.G.A. § 42-1-5(d) (Supp. 2004)). Currently, Code section 42-1-5(b) prohibits the use of inmates in for-profit operations. 1985 Ga. Laws 1483, § 1, at 1484 (codified at O.C.G.A. § 42-1-5(b) (Supp. 2004)).

16. HB 1173, as introduced, 2004 Ga. Gen. Assem.

17. Compare HB 1173, as introduced, 2004 Ga. Gen. Assem., with 1956 Ga. Laws 161, § 22, at 177 (codified at O.C.G.A. § 42-5-60(a)(1) (Supp. 2004)).

Additionally, section 2 would have changed the law to allow private parties to purchase goods made by inmates.¹⁸

Section 3 of HB 1173 would have added a new article—Article 6—to Chapter 5 of Title 42 of the Official Code of Georgia Annotated.¹⁹ The proposed addition noted the beneficial results of allowing inmates to work for profit-making companies.²⁰ Section 3 then instructed authorities to take steps to ensure “[a]ppropriate conditions and limitations for voluntary labor.”²¹ These limitations included steps to limit inmate labor to fields in which there was a dearth of labor (thus preventing labor displacement of the public), to ensure that inmates earned “the local prevailing wage,” and to secure “provision of benefits to [working] inmates comparable to benefits provided for noninmate workers.”²²

Further, section 3 directed that penal authorities obtain certification for any labor programs under the federal Prison Industry Enhancement Certification Program (“PIE”).²³ This would have ensured “appropriate conditions and limitations in many areas of concern for programs of voluntary labor by inmates for privately owned profit-making employers producing goods and services for sale to public and private purchasers.”²⁴

Finally, section 4 of HB 1173 would have amended Chapter 10 of Title 42.²⁵ Current Georgia law prohibits administrators from compensating inmates for any labor or services they perform.²⁶ HB

18. Compare HB 1173, as introduced, 2004 Ga. Gen. Assem., with 1993 Ga. Laws 629, § 1, at 629 (codified at O.C.G.A. § 42-5-60(b) (Supp. 2004)). Currently, Code section 42-5-60 prevents authorities from contracting out inmate labor to for-profit businesses. 1956 Ga. Laws 161, § 22, at 177 (codified at O.C.G.A. § 42-5-60(a)(1) (Supp. 2004)). It also prohibits the sale of inmate-produced goods to private entities with the exception of (1) private schools, (2) sales in which the buyer would use the goods on a “publicly funded project,” and (3) sales of goods to correctional facilities housing “inmates from the State of Georgia.” 1993 Ga. Laws 629, § 1, at 629 (codified at O.C.G.A. § 42-5-60(b) (Supp. 2004)).

19. HB 1173, as introduced, 2004 Ga. Gen. Assem.

20. *Id.* The intended benefits were as follows: “[G]enerating taxes from inmate income; lowering the cost of incarceration . . . ; providing participating inmates income to pay fines, restitution, and family support; providing job experience and skills . . . ; allowing participating inmates to accumulate savings available for their use when released from the correctional institution; and lowering recidivism rates.” *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. HB 1173, as introduced, 2004 Ga. Gen. Assem.

25. *Id.*

26. See 1985 Ga. Laws 283, § 1, at 307 (codified at O.C.G.A. § 42-10-4(5) (2003)).

1173 would have changed this to allow compensation for inmate performance in approved programs.²⁷

Analysis

There has not been a great deal of litigation regarding inmate labor.²⁸ Indeed, the idea of allowing inmates to work in any capacity is one that lawmakers have only recently suggested.²⁹ In spite of this, the idea of using inmate labor has already drawn criticism.³⁰ Opponents to the legislation have voiced fears that “the program proposed [by HB 1173] endangers both incarcerated and non-incarcerated workers in Georgia, undermines workers’ rights in general by exploiting a captive workforce, and exposes the [S]tate to increased liability.”³¹

Social Implications

Comparing HB 1173 to the convict-leasing system from the late nineteenth-century, Sara Totonchi of the Southern Center for Human Rights noted that the bill would have driven down wages in spite of the safeguards included in the bill.³² Ms. Totonchi also stated that HB 1173 would have done little to decrease recidivism because “relative[ly] few prisoners will have the mental health, physical health[,] and security level to qualify them for participation in this program[; therefore], relative[ly] few can benefit from the program.”³³

27. Compare HB 1173, as introduced, 2004 Ga. Gen. Assem., with 1985 Ga. Laws 283, § 1, at 307 (codified at O.C.G.A. § 42-10-4 (2003)).

28. In addition to a dearth of litigation, Georgia Attorney General Opinions have addressed the topic only twice. See 1999 Ga. Op. Att’y Gen. 107, available at 1999 WL 599468; 2001 Ga. Op. Att’y Gen. U01-4, available at 2001 WL 1511058.

29. See Powell Interview, *supra* note 7 (noting that this legislation espouses a new idea for Georgia); Electronic Mail Interview with Sara J. Totonchi, Public Policy Director, Southern Center for Human Rights, May 13, 2004 [hereinafter Totonchi Interview] (noting that the General Assembly passed HB 734, allowing inmates to volunteer to work for non-profit organizations, in 2002 and that since then lawmakers have proposed three bills (including HB 1173) dealing with inmate labor).

30. See Campos, *supra* note 7; *This Just Might Work*, *supra* note 7; Williams, *supra* note 7 (discussing opposition viewpoints to HB 1173).

31. See Totonchi Interview, *supra* note 29.

32. *Id.* Ms. Totonchi contends that the safeguards in the bill would not be effective because “the law of supply and demand dictates that the ‘local prevailing wages’ for similar jobs in the community [would] decrease.” *Id.*

33. *Id.*

Opponents also assert that the legislation would not help inmates develop marketable skills but would merely consign them to performing repetitive, low-skill functions, such as sorting products at poultry plants.³⁴ Finally, opponents claim that the bill's intent is not to help inmates as much as it is to benefit the State by providing another source of tax revenue while garnishing a significant portion of inmates' wages to pay for incarceration-related expenses.³⁵

The bill's supporters have several responses to these and other concerns. First, participation in the program would be entirely voluntary, obviating the concern that the State of Georgia would be coercing or exploiting inmates.³⁶ Second, the program would seek to minimize depression of non-inmate workers' wages by limiting participation to those industries which are experiencing a labor shortage.³⁷ Additionally, concerns about inmates being unable to develop marketable skills may be at least partially unfounded.³⁸ Finally, any programs promulgated under the legislation would have to comport with federal PIE standards, which would, ostensibly, ensure appropriate working conditions.³⁹

34. See *id.*; see also Williams, *supra* note 7 (quoting an opponent of the bill as stating that "I don't think working repetitive tasks at a poultry plant is going to give you marketable skills").

35. See Totonchi Interview, *supra* note 29. Specifically, Ms. Totonchi stated:

To say that HB 1173 is good for prisoners is misleading[] because the [S]tate's benefits dwarf the possible benefits to prisoners: a) the [S]tate gets tax revenue from prisoner earnings and an 80% cut from prisoners' paychecks [and] b) [p]risoners get a fraction of their paycheck for work which is likely to be unskilled and of little benefit to re-entry[] on a work site where they have no statutory protection. Is the State's real interest in HB 1173 not the benefit to prisoners[] but rather the development of prisoners as a lucrative source of revenue? We caution the [S]tate of Georgia to be careful that it not rationalize the exploitation of human beings in the name of false benefits to the enslaved.

Id.

36. See Williams, *supra* note 7.

37. *Id.*

38. See *This Just Might Work*, *supra* note 7 (stating that the assertion that inmates will not develop marketable skills in the their assigned jobs "might be true for some [jobs], but not all"); see also Powell Interview, *supra* note 7 (noting that programs promulgated under the legislation would not bear any similarities to the "chain gangs" of years past).

39. See HB 1173, as introduced, 2004 Ga. Gen. Assem. Section 3 of the bill would have added Code sections 42-5-120 to -123. These sections would, *inter alia*, require all inmate labor programs to obtain certification under the PIE standards. *Id.* However, one should note that opponents to the bill feel that this is insufficient to ensure prisoner protection. Totonchi Interview, *supra* note 29. Ms. Totonchi states:

Even with the regulations set forth by the Federal PIE program, prisoners are not protected by the Fair Labor Standards Act. The bill creates the potential for dangerous workplace situations without sufficient protection from safety, harassment, and/or health hazards. Incarcerated workers would not be able to participate in collective bargaining or other strategies for ensuring worker protections.

Id.

Legal Implications

Although it is unclear whether a court would have found HB 1173 unconstitutional, its passage might have resulted in other legal consequences for the State of Georgia.⁴⁰ Because the State would remove inmates from their cells and place them in the workplace, similar legislation, if passed in the future, may give rise to some liability issues.⁴¹ Lawmakers have failed to address issues such as who would be the party or entity responsible for the safety of inmate laborers.⁴² Sponsors of any similar future legislation should address such issues to prevent a potential flood of litigation involving injuries to inmates or others arising out of inmates' presence in the workplace.

Conclusion

"I cannot draw a cart, nor eat dried oats; if it be a man's work, I'll do it."⁴³ When he penned these lines, Shakespeare was stressing the importance of allowing people to work. He recognized how crucial it is for people to be able to support themselves. Assuming that lawmakers can craft legislation that will ensure equitable treatment of inmate laborers, the General Assembly should pass legislation such as HB 1173 so that inmates can begin shouldering some of the burden of their upkeep, learning marketable skills, and building savings upon which they may rely when released.

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40. See Totonchi Interview, *supra* note 29 (noting potential grounds for lawsuits stemming from workplace safety issues).

41. See *id.* (stating that the bill exposes the State to potential liability arising out of harm to inmates or others). In fact, "[HB 1173] does not specify who is responsible for ensuring that the health and safety of incarcerated workers are protected on the job." *Id.*

42. *Id.*

43. WILLIAM SHAKESPEARE, KING LEAR act 5, sc. 3.