U.S. Department
of Transportation
**Federal Highway Administration**

# Memorandum

Subject: INFORMATION: Employee Lease Agreements

Date: July 5, 2000

From: Mr. Dwight A. Horne
Director of Program Administration

Reply to Attn. of: HIPA-30

To: Mr. Curtis D. Reagan
Division Administrator
Austin, Texas

Your March 1, 2000, memorandum requested an interpretation of FHWA's policy regarding the use of leased employees on Federal-aid highway construction contracts. The Texas Department of Transportation (TxDOT) is proposing to modify their specifications to allow prime contractors to apply the cost of leased employees towards the 30% requirement. Based on our review of the statutes, regulations and guidance governing this issue, we have concluded that a prime contractor may count leased employees toward its own organization for the 30 percent minimum work requirement. The proposed modification to TxDOT specification is a satisfactory supplement to Form FHWA-1273.

In the near future, the relevant paragraphs of Form FHWA-1273 will be changed pursuant to the FHWA regulation 23 CFR Sections 633.103-4 to reconcile the form to the present regulatory language to read:

> The term "perform work with his own organization" refers to workers employed or leased by the prime contractor, and equipment owned or rented by the prime contractor, with or without operators. Such term does not include employees or equipment of a subcontractor or lower tier subcontractor, agents of the prime contractor, or any other assignees. The term may include payments for the costs of hiring leased employees from an employee leasing firm meeting all relevant Federal and State regulatory requirements. Leased employees may only be included in this term if the prime contractor meets all of the following conditions:
>
> > (1) the prime contractor maintains control over the supervision of the day-to-day activities of the leased employees;
> > (2) the prime contractor remains responsible for the quality of the work of the leased employees;
> > (3) the prime contractor retains all power to accept or exclude individual

> employees from work on the project; and
> (4) the prime contractor remains ultimately responsible for the payment of predetermined minimum wages, the submission of payrolls, statements of compliance and all other Federal regulatory requirements.

The key issue is supervision and control of any leased personnel. If the leased personnel are treated as employees of the prime contractor, and would be considered as such but for their actual employment by a leasing agency, then for purposes of 23 CFR Section 635.116(a) they should be considered employees of the prime contractor's organization.

Additionally, the use of employee leasing companies by Disadvantaged Business Enterprises (DBE) shall meet independence and control concepts described in the preamble to the February 2, 1999 DBE Final Rule (page 5120) as well as the requirements of 49 CFR Section 26.71 (q) which states the following:

> "The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as the ultimate responsibility for wage and tax obligations related to the employees."

Thank you for the opportunity to address your concerns. Should you have any questions, please contact David Cox at (202)366-1561.