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**ADVISORY: TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 12-09**

**TO:** GOVERNORS  
STATE WORKFORCE AGENCIES  
STATE WORKFORCE ADMINISTRATORS  
STATE LABOR COMMISSIONERS  
STATE WORKFORCE LIAISONS  
STATE WORKFORCE BOARD CHAIRS  
STATE WORKFORCE BOARD DIRECTORS  
LOCAL WORKFORCE BOARD CHAIRS  
LOCAL WORKFORCE BOARD DIRECTORS  
STATE UNEMPLOYMENT INSURANCE DIRECTORS

**FROM:** JANE OATES /s/  
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Employment and Training Administration

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**SUBJECT:** Joint Guidance for States Seeking to Implement Subsidized Work-Based Training Programs for Unemployed Workers

**1. Purpose.** The purpose of this joint issuance from the Assistant Secretary of the Employment and Training Administration and the Deputy Administrator of the Wage and Hour Division is to provide guidance to states that may be considering implementation of subsidized work-based training initiatives for unemployed workers, which could include claimants who are receiving unemployment compensation (UC), exhaustees of UC, and/or other unemployed workers who may not be eligible for UC. This advisory is intended to help states understand applicable Federal laws, regulations, and policies related to the Social Security Act and the Federal Unemployment Tax Act (which govern the Unemployment Compensation program), the Fair Labor Standards Act, and the Workforce Investment Act of 1998, as amended, as they develop and implement these types of initiatives.

<b>REVISIONS:</b> None	<b>EXPIRATION DATE:</b> Continuing
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**2. References.** The Workforce Investment Act of 1998 (WIA); Section 303(a)(5) of the Social Security Act (SSA) and Sections 3304(a)(4) and 3306(h) of the Federal Unemployment Tax Act (FUTA); Unemployment Insurance Program Letter (UIPL) No. 8-98; UIPL No. 45-89; Training and Employment Guidance Letter (TEGL) No. 2-07; TEGL No. 14-08; TEGL No. 21-08; TEGL No. 21-08, Change 1; TEGL No. 2-09; 20 CFR 604; 20 CFR 663; Section 203(e) of the Fair Labor Standards Act (FLSA); Section 10b11 of the Wage & Hour Division Field Operations Handbook.

**3. Background.** In the context of the current recession, states and their local service delivery partners have worked to develop innovative strategies to help Americans get back to work as quickly as possible in good jobs with career opportunities. As states have considered new initiatives, they have looked to a variety of models that have been demonstrated in the past or previously implemented as Federal programs. Among the models being examined are those that connect a worker with an employer and provide work-based training for the unemployed worker while the worker continues to receive unemployment benefits. These models provide: new skills for the worker, exposure to new occupations and careers, and work experience that can be highlighted on a resume; and may help move the unemployed worker into permanent employment with the employer providing the training.

There is a wide variety of work-based training models, using different training alternatives, funding streams, and methods of financially supporting unemployed workers while they are in training, including work-based training models that are defined in statute, such as WIA on-the-job training (OJT). This guidance does not address every possible model. Rather, it is intended to provide some basic parameters related to three key program areas that states should consider. Of particular importance under the Fair Labor Standards Act (FLSA) is determining whether participants in work-based training programs are “employees” (in which case they may be covered by the FLSA’s minimum wage and overtime provisions) or “trainees” (in which case the FLSA’s provisions do not apply). The guidance also provides program parameters for use of WIA funds and UC implications of targeting UC claimants specifically. It also is intended to promote consultation and collaboration across programs and agencies, including Department of Labor, Wage and Hour Division, as part of the development process prior to implementation in cases that are not clearly within a specific established program or model, like WIA OJT for example.

#### **4. Programmatic and Legal Considerations.**

States need to be aware of three areas of law and program policy when developing and implementing work-based training programs. They are:

##### **Workforce Investment Act of 1998**

Work-based training models that connect unemployed workers with employers can be funded with several types of WIA funds. Statewide workforce investment activities funds provide the most flexibility. WIA Adult and Dislocated Worker local area formula

funds also can be used, but they come with additional restrictions. WIA Youth local area formula funds can be used to serve unemployed workers who also qualify as eligible youth.

Some work-based training programs may allow participants to continue collecting UC while receiving training. The specific parameters that regulate participants' ability to continue to collect UC while participating in training are detailed in the UC sections of this TEGL.

States can administer work-based training programs in several ways, subject to the program's design and the eligibility criteria mandated by the funding stream. More specifically, programs may be implemented as one of the following:

- A state research and/or demonstration project;
- A "work experience;"
- A training activity;
- On-the-job training; or
- A "work experience" or training activity coupled with supportive services.

WIA funding can also be used to support registered apprenticeship programs, another method of connecting unemployed workers with employers. The eligibility criteria for each funding stream are discussed in more detail below.

### **Additional information by funding stream**

#### WIA 15% Statewide Workforce Investment Activities Funds

Projects supported with funds reserved by the Governor for statewide workforce investment activities may offer work-based training opportunities. WIA provides states with authority to use statewide activities funds to conduct "research and demonstrations." [20 CFR 665.210(c).]

#### WIA Adult and Dislocated Worker Local Area Formula Funds

WIA Adult and Dislocated Worker local area formula funds can be used to support work-based training programs in several ways. The eligibility requirements and allowable activities for each delivery mechanism are discussed below.

*Intensive Service:* WIA Adult and Dislocated Worker programs may offer work-based training to eligible participants as an intensive service when the program meets the criteria of a "work experience."

As defined in WIA regulations, a "work experience is a planned, structured learning experience that takes place in a workplace for a limited period of time. Work experience may be paid or unpaid, as appropriate. A work experience workplace may be in the private for-profit sector, the non-profit sector, or the public sector. [20 CFR 663.200(b).] Labor standards, such as minimum wage and overtime provisions, may apply to any

person participating in any work experience where an employee/employer relationship exists, as defined by the Fair Labor Standards Act [Id.]. See the FLSA discussion below for more information.

*Training Service:* Work-based training may be provided under the authority of several types of training services authorized in WIA, such as “programs that combine workplace training with related instruction” or “training programs operated by the private sector.” [WIA Sec. 134(d)(4)(D)(iii),(iv).] If the provider of the training is on the Eligible Training Provider List (ETPL), work-based training can be funded with local WIA Adult and Dislocated Worker allocations.

*On-the-Job Training (OJT):* WIA Adult and Dislocated Worker local area formula funds may also be used to fund OJT. Unlike other types of work-based training, all OJT participants are hired by the employer conducting the training. As employees, OJT participants may be ineligible to continue collecting UC.

Through an OJT contract, occupational training is provided to participants in exchange for the reimbursement of up to 50 percent of the participants’ wage rate to compensate for the employer’s extraordinary costs [20 CFR 663.700]. Additionally, with an approved waiver, local areas can provide additional compensation for smaller employers. OJT contracts also have additional eligibility criteria, such as length restrictions and wage requirements. [20 CFR 663.700 – 663.730.]

*Registered Apprenticeship:* Though not a WIA program, apprenticeship or pre-apprenticeship programs can be supported with WIA Adult and Dislocated Worker local area formula funds in several ways.

Most significantly, individual training accounts (ITAs) can provide financial support for the related instruction portion of apprenticeships, as well as access to pre-apprenticeship training. Customized training and OJT can also integrate with apprenticeship programs, as discussed in TEGL No. 2-07, “Leveraging Registered Apprenticeship as a Workforce Development Strategy for the Workforce Investment System.”

Funds provided by the American Recovery and Reinvestment Act and the 2010 WIA appropriations provide additional flexibility. Both sources allow Local Workforce Investment Boards to contract directly with institutions of higher education under certain conditions, even if they are not on the ETPL. With this flexibility, local areas can use WIA Adult and Dislocated Worker local area formula funds to provide financial support for the related instruction portion of apprenticeships or pre-apprenticeship training at additional training providers. This flexibility is not limited to apprenticeship, and is discussed in more detail in TEGL No. 14-08; it is mentioned because of its potential use in an apprenticeship-based work-based training model.

*Supportive Services:* Supportive services such as transportation, child care, dependent care, and housing may be provided when necessary to enable an individual to participate in WIA activities including core, intensive, or training services. [20 CFR 663.800.] To

obtain supportive services, the participant must be unable to obtain supportive services through other programs providing such services and meet all other locally-established criteria. [20 CFR 663.805.] When work-based training is delivered as an intensive or training service, participants may be eligible to receive supportive services.

### WIA Youth Local Area Formula Funds

WIA Youth local area formula funds may be used to support paid or unpaid work experiences, but only for youth who meet the program eligibility requirements. [20 CFR 664.200 – 664.250.] “Paid and unpaid work experiences” are one of the ten program elements required of all WIA Youth programs [20 CFR 664.410(a)(4)], and must meet several criteria. [20 CFR 664.460] Additionally, work-based training programs designed for eligible youth may “pay wages and related benefits for work experiences.” [20 CFR 664.470.]

### Rapid Response Funds

Work-based training is not a required rapid response activity [20 CFR 665.310], nor does it clearly meet the criteria for additional allowable activities [20 CFR 665.320]. However, in developing reemployment strategies for dislocated workers, in the course of a rapid response intervention, work-based training strategies may be entertained using other state or local funding sources.

### **Unemployment Compensation (UC)**

When a work-based training model targets UC claimants specifically and/or there is consideration of using unemployment funds generally in the context of the overall model, it is important to understand both Federal and state UC laws that may apply.

*Overview of Basic UC principles.* Since the inception of the Federal-State UC program, Federal law has permitted participating states to make payment of UC only with respect to an individual's unemployment. Put another way, Federal law prohibits the payment of UC to an individual who is not unemployed for some portion of the week in which UC is claimed, unless specifically authorized by Federal law. As a result, states' attempts to develop innovative models to assist UC recipients' return to work must adhere to this requirement. Following is a discussion of this requirement, its implications, and some options available to states.

*Unemployment fund dollars may only be used to pay UC.* Section 3304(a)(4), FUTA, requires, as a condition for employers in a state to receive credit against the Federal tax, that state law provide that:

. . .all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund. . . .

Section 303(a)(5), SSA, contains the same requirement as a condition for states receiving administrative grants. Section 3306(h), FUTA, defines compensation as "cash benefits payable to individuals with respect to their unemployment." Taken together, these provisions are referred to as "the withdrawal standard." Under the withdrawal standard, money may only, with statutorily-authorized exceptions, be withdrawn from a state's unemployment fund for the payment of UC to an individual "with respect to [an individual's] unemployment."

*UC may only be paid to an individual.* As explained in UIPL No. 45-89, amounts may be withdrawn from a state's unemployment fund only to pay UC directly to individuals. Amounts may not be withdrawn to pay an employer as a subsidy for wages or as an incentive to provide employment. (Statutorily-authorized exceptions are also discussed in UIPL No. 45-89.)

*UC may only be paid if the individual is unemployed.* As noted above, amounts may be withdrawn from the unemployment fund for payment to individuals with respect to an individual's "unemployment." The 1935 Senate Report on the original Social Security Act creating the program also emphasized that UC may be paid only with respect to an individual's unemployment:

Unemployment compensation differs from relief in that payments are made as a matter of right not on a needs basis, but only while the worker is involuntarily unemployed. . . . Payment of compensation is conditioned upon continued involuntary unemployment. [S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935).]

During the debate on the passage of the Social Security Act, the original sponsor, Senator Wagner, stated that, "the only important requirement [of the Social Security Act's unemployment compensations provisions] is that the State law shall be genuinely protective, and that its revenues shall be devoted exclusively to the payment of insurance benefits", 79 CONG. REC. 9284 (June 14, 1934).

*Implications.* Because UC may only be paid to individuals with respect to their unemployment, it may not be paid to individuals who have not experienced unemployment during the week claimed. Similarly, UC may not be paid as a subsidy for employment (e.g. to make up the difference in hourly wages between the individual's former job and the individual's new, lower paying job ) or as a stipend since it is not a payment "with respect to unemployment," but is instead a payment with respect to being employed. In addition, money may not be withdrawn from the unemployment fund to make incentive payments to employers to hire UC claimants. Doing so would create two problems. First, the amount would not be paid to the individual whose unemployment is being compensated. Second, the withdrawal would be made with respect to a program for incentivizing the hiring of workers by employers rather than "with respect to [the individual's] unemployment."

*UC may be paid to individuals in training notwithstanding the requirement that they be able and available for work.* Federal UC law has always been interpreted as requiring states, as a condition of participation in the Federal-State UC program, to limit the payment of UC to individuals who are able and available (A&A) for work. (For additional information, see 20 CFR 604.5.) However, a state may consider an individual available for work “for all or a portion of the week claimed, provided that any limitation placed by the individual on his or her availability does not constitute a withdrawal from the labor market.” Thus it would be possible for a state to consider individuals in work-based training (for example, 20 hours a week) A&A as long as they were available for work during some portion of the week.

*UC may be paid to individuals in training approved by the state UC agency.* Federal law prohibits denial of UC to individuals participating in training with the approval of the state agency based on state law provisions relating to availability for work, active search for work, or refusal of work. However, individuals who are participating in employer sponsored “on-the-job training” are not “unemployed” and thus may not be paid UC unless they are not working full time during the week the on-the-job training takes place. In TEGLs Nos. 21-08 and 21-08, Change 1, the Department encouraged states to broaden their definition of approved training and to implement procedures that would facilitate individuals’ participation in training. In TEGL No. 2-09, the Department provided information about recommended policies for approved training.

*Individuals working part-time may be eligible for UC.* Each state’s UC law includes provisions for UC payments to individuals who are partially unemployed. Depending on state law requirements concerning monetary and non-monetary eligibility, individuals who are earning part-time wages may be eligible for UC as long as they are unemployed for some part of the week being claimed.

### **Fair Labor Standards Act**

Employers who participate in subsidized work-based training programs implemented by states for unemployed workers may be subject to the requirements of the Fair Labor Standards Act (FLSA) with respect to the workers who are placed with them. If an employment relationship exists between the participating employer and the worker, and the worker is engaged in work subject to the FLSA and does not satisfy one of the FLSA’s exemptions, the employer must pay the worker at least the federal minimum wage for all hours worked and overtime pay at one and one-half times the worker’s regular rate for all hours worked over 40 in a workweek. State and local minimum wage and overtime laws may apply as well. If the worker is a trainee as opposed to an employee under the FLSA, then he or she is not covered by the FLSA’s minimum wage and overtime provisions.

The definition of “employee” is very broad under the FLSA, but persons who, without any express or implied compensation agreement, work for their own advantage on the premises of another may not be employees. Workers who receive work-based training may fall into this category and may not be employees for purposes of the FLSA. The

specific facts and circumstances of the worker's activities must be analyzed to determine if the worker is a bona fide "trainee" who is not subject to the FLSA or an "employee" who may be subject to the FLSA. The employer is responsible for complying with the FLSA and participation in a subsidized work-based training initiative for unemployed workers as described in this guidance does not relieve the employer of this responsibility.

The U.S. Department of Labor's Wage and Hour Division (WHD) has developed the six factors below to evaluate whether a worker is a trainee or an employee for purposes of the FLSA:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to what would be given in a vocational school or academic educational instruction;
2. The training is for the benefit of the trainees;
3. The trainees do not displace regular employees, but work under their close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion the employer's operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the conclusion of the training period; and
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

If all of the factors listed above are met, then the worker is a "trainee", an employment relationship does not exist under the FLSA, and the FLSA's minimum wage and overtime provisions do not apply to the worker. Because the FLSA's definition of "employee" is broad, the excluded category of "trainee" is necessarily quite narrow. Moreover, the fact that an employer labels a worker as a trainee and the worker's activities as training and/or a state unemployment compensation program develops what it calls a training program and describes the unemployed workers who participate as trainees does not make the worker a trainee for purposes of the FLSA unless the six factors are met. Some of the six factors are discussed in more detail below.

#### Training Similar to Vocational School/The Primary Beneficiary of the Activity

In general, the more a training program is centered around a classroom or academy as opposed to the employer's actual operations, the more likely the activity is training. Also, the more the training is providing the workers with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the worker is a trainee. On the other hand, if the workers are

engaged in the primary operations of the employer and are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits is unlikely to make them trainees given the benefits received by the employer.

### Displacement and Supervision Issues

Employers with bona fide training programs typically do not utilize trainees as a substitute for regular workers. If the employer uses the workers as substitutes for regular workers, it is more likely that the workers are employees as opposed to trainees. As well, if the employer would have needed to hire additional employees or require overtime had the workers not performed the work, then the workers are likely employees. Conversely, if the employer is providing job shadowing opportunities where the worker learns certain functions under the close and constant supervision of regular employees, but performs no or minimal work, this type of activity is more likely to be a bona fide training program; however, if the worker receives the same level of supervision as employees, this would suggest an employment, rather than a training, relationship.

### No Job Entitlement/No Entitlement to Wages

Typically, before the work-based training begins, both the employer and the worker agree that the worker is not entitled to a job at the conclusion of the training period or wages for the time spent in training. The parties' expectations regarding the compensation and job opportunities are relevant but not determinative. Even when such an agreement exists, hiring workers who finish the training program is considered in determining whether an employment relationship exists, and frequently hiring such workers suggests that the workers are not trainees. Finally, if the worker is placed with the employer for a trial period with the hope that the worker will then be hired on a permanent basis (even if the worker is not automatically entitled to a job at the end of the period), then the worker is not likely to be a trainee during the trial period.

Examples:

1. The worker is placed in a classroom setting maintained by an employer to learn to be an electronic technician with no guarantee of future employment with the employer. After the training period, the employer hires the worker (even though the worker was not entitled to a job and most training participants do not receive offers of employment). Because the employer did not benefit from the worker's activities during the training period and the training is very similar to the training that is provided in a vocational school, the training program is likely bona fide, and the worker is not an employee under the FLSA.
2. A worker who participates in a program at a retail store or restaurant and who assists customers or operates a cash register with little supervision may be an employee because the employer derives tangible benefit (*i.e.*, productive work) from the worker's activities. Also, a worker who performs such work may result

in the employer's not hiring an employee whom it would otherwise hire, or result in a regular employee working fewer hours than he or she would otherwise work – both of which suggest an employment relationship.

**5. Action Requested.** Provide this directive to appropriate elected officials, government leaders, staff, and workforce partners who are developing and implementing work-based training models designed to serve unemployed workers. Those developing these models are strongly encouraged to consult and engage the Department of Labor's Wage and Hour Division on issues associated with differentiating a work-based training program from employment.

**6. Inquiries.** Inquiries should be directed to the appropriate Department of Labor Regional Office for the Employment and Training Administration and/or the Wage and Hour Division, depending on the nature of the inquiry.

The WHD's website at <http://www.dol.gov/whd> provides relevant information regarding the application of the FLSA to training programs. The WHD's District Offices located nationwide are available to answer questions regarding specific training programs. For further assistance, please call WHD's toll-free helpline at 1 (866) 4US-WAGE, (1-866-487-9243).