

12-2011

Report Pursuant to LD 1238 'Resolve, Authorizing the Bureau of Unemployment Compensation to Study Establishment of a Voluntary Workplace Training Program'

Maine Department of Labor

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Recommended Citation

Maine Department of Labor and Maine Bureau of Unemployment Compensation, "Report Pursuant to LD 1238 'Resolve, Authorizing the Bureau of Unemployment Compensation to Study Establishment of a Voluntary Workplace Training Program'" (2011). *Unemployment Compensation Documents*. 4.
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**Maine Department of Labor
Bureau of Unemployment Compensation**

**LD 1238 'Resolve, Authorizing the Bureau of Unemployment Compensation
to Study Establishment of a Voluntary Workplace Training Program'**

**Report to the
Joint Standing Committee on
Labor, Commerce, Research and Economic Development**

December 2011

Authorized by the 125th Maine Legislature

Legislative Background for the Study Resolve

LD 1328 was introduced during the first session of the 125th Maine Legislature. It proposed establishing a 'Back to Work' workplace training program. This bill was ultimately amended to a study resolve directing the Bureau of Unemployment Compensation within the Department of Labor to examine existing programs in the states of Georgia, New Hampshire and Utah and report back its findings to the Labor, Commerce, Research and Economic Development Committee for possible legislation in the second session.

Executive Summary

In light of the recent economic downturn, states have looked at developing innovative strategies to help unemployed workers get back to work as quickly as possible in jobs with career opportunities. Models that have generated interest are those that connect a worker with an employer and provide work-based training for the unemployed worker while the individual continues to receive unemployment benefits. These work-based training models are voluntary for both the employer and the unemployment recipient and offer potential benefits for both parties. The worker gains new skills, exposure to new occupations and careers and actual work experience that can be included in a resume. Additionally, the experience may facilitate a potential employment opportunity with the employer providing the training. Although the employer is not required to 'hire' the worker at the end of the training period, the arrangement does give the participating employer an opportunity to observe the worker interacting in the workplace to see if there is a good fit to the organization before possibly extending a job offer.

There are variety of "voluntary workplace training program" models currently in operation using different training alternatives, funding streams and methods of financially supporting unemployed workers while they are in training. Basic to all though is that they are voluntary for both the unemployed worker and the employer. The worker must be unemployed and currently collecting unemployment benefits and the business must provide training for an actual job although there is no requirement that the worker be hired into the job at the end of the training. Additionally, some or all of the compensation paid to the worker is subsidized. To encourage worker participation, unemployment benefit eligibility is not jeopardized by the lack of an offer of permanent employment at the end of the training period. If otherwise eligible, the

individual may return to (or continue, depending on the model) collecting benefits once the training has been completed.

This report is based on four different state models (New Hampshire, Georgia, Utah and Texas) that operate work-based training programs, and on guidance published by the U.S. Department of Labor (USDOL). Each model included in this report incorporates slight variations from one another but all meet the federal requirements outlined in the guidance provided by USDOL. Variations are created by the unique needs or characteristics of each state.

There are three primary models for subsidizing the compensation provided to the worker under a work-based training program:

- The trainee receives unemployment benefits only,
- The trainee receives unemployment benefits plus an 'employment' stipend,
- The trainee is paid by the employer and the employer receives a hiring incentive payment to help cover the costs.

Each model has benefits and issues that must be carefully considered. Most issues can be summarized under (1) compliance with Fair Labor Standards Act laws and (2) funding.

This report does not draw a conclusion as to the appropriate model for the State of Maine. However, it does provide an overview of the programs as they exist in other states, discusses the issues that need to be considered in choosing a model, and identifies questions to help guide the decision-making process.

Introduction

Over the last several years, many states have looked for innovative ways of encouraging job growth and assisting people who are out of work with finding new jobs. One such method is to implement a voluntary workplace training program. Through this program, employers and individuals voluntarily and jointly enter into a training agreement. Under this agreement, the compensation paid to the trainee is subsidized by the government, either as a payment made directly to the individual or as an incentive payment to the employer. In general, such an agreement does not guarantee a job after the training period. The lack of a job offer at the end of the training period does not disqualify an individual from receiving unemployment benefits, as long as they are otherwise eligible.

There are potential benefits for both the employer and the individual. The employer is given a low-cost way of monitoring new potential employees; they can see how a new worker might perform on the job. The individual has the potential for learning a new skill and gaining employment, for which they might not have otherwise been considered.

However, there are a number of administrative and legal issues that must be considered when designing such a program. These include: method and funding of the subsidy; wage and hour laws; and, the cost of administration and the resources required to coordinate and monitor the program.

Unemployment Eligibility Requirements

All unemployment workplace training programs are subject to the applicable State and Federal laws. Of these, the basic framework for receiving unemployment benefits was codified in the Federal Unemployment Tax Act (FUTA). FUTA states that Unemployment Compensation benefits are only payable "...to individuals with respect to their unemployment." This is the basic tenet of the unemployment program, and impacts how Unemployment Trust Fund dollars can be used to support workplace training programs.

Unemployment benefits are payable *to individuals with respect to their unemployment*

The “with respect to their unemployment” portion of the requirement means that in order to receive benefits, an individual must be at least partially without work during a week in which a benefit claim is paid. Therefore, many states set a maximum number of hours each week that a claimant may participate in a **workplace** training program as doing so ensures that this eligibility requirement is met. This differs slightly from the more traditional model training programs, which allow a qualified individual to participate in an educational program full-time and still be eligible for unemployment benefits. These programs are typically accessed through training providers or educational institutions; not by potential employers for whom work could be performed. When taking a class through an educational institution, the individual is not working and is still considered to be unemployed. With workplace training, an individual who participated full-time would be considered to be employed full-time. Therefore, the individual would no longer meet the requirement of involuntary unemployment, and could no longer be eligible for unemployment benefits.

Financial Incentive Models

Normally, employers hire new workers and then begin the training period. When an individual doesn’t work out, for whatever reason, the recruitment and training process must start again. This can become a costly process, with productive time lost to reviewing applications, interviewing and training. A workplace training program can help reduce these expenses by subsidizing the training period. The ‘subsidy’ typically takes one of two forms: the payment of unemployment benefits to the trainee in lieu of wages, or the payment of a hiring incentive to the employer.

Incentives are made either by continuing to pay the trainee their unemployment benefits, or by providing financial incentives to the employer.

Payments to the Trainee

The first type of subsidy is to simply continue to pay the weekly unemployment benefits. Because participants in this program are trainees, and not employees, wages are not required. This is a difficult relationship to define, and will be discussed later in this report. While an individual participates in the training program, they can continue to collect their unemployment benefits, as long as they are otherwise eligible.

Benefit eligibility requirements remain the same *while* the individual is receiving training. They must still be able and available to accept work, they must be looking for work, and they must report any income they earn. The requirement to be able and available for work, and to be at least partially unemployed, as described previously, means that there is a limit to the number of hours in which an individual can be in training with an employer in any given week.

This is the model that is used in New Hampshire's 'Return to Work' program. Participants in this program are limited to 24 hours of training in each week, and can be trained for up to six weeks. Because the weekly maximum number of hours is 24, each individual is still partially unemployed, and therefore eligible for benefits. New Hampshire's program is relatively new having only been implemented in January 2010. Massachusetts is considering a similar program modeled on that of New Hampshire, but has not yet implemented it.

A variation on this type of subsidy is to continue to pay unemployment benefits and supplement this with an additional 'state-funded' stipend. The stipend payment has been included in some states to support the individual in their job training. Unemployment benefits are designed to provide support for basic needs – food and shelter, for instance. The philosophy behind the stipend is that an individual realizes additional costs, such as transportation and child care, when going to work. Unemployment benefits were not intended to support the costs of employment, and the payment of a stipend was designed to provide a "middle ground". The stipend provides additional financial support, but is still less than the individual would typically earn if receiving employer-paid wages.

Funding for this employment stipend **must** be separate from the funding for the unemployment benefits. As stated previously, unemployment benefits must be paid to an individual "with regard to their unemployment." Therefore, unemployment trust funds **cannot** be used for the payment of an employment stipend (by federal law, unemployment trust fund dollars can only be used to fund benefits).

Georgia uses a work-based training model that uses a combination of unemployment benefits and stipend to compensate the worker while in training. The 'Georgia Works' program, one of the longest-running workplace training programs in the country, pays an individual their weekly benefits and an additional \$240 a week for up to eight weeks of training. The model still incorporates a maximum number of hours that can be worked each week; therefore individuals are considered partially unemployed and eligible for unemployment benefits. The Unemployment Trust Fund covers the unemployment benefits paid to the individual. However, the stipend is funded by a Special Administrative Payroll tax paid by Georgia employers.

Payments to the Employer

The second 'subsidy' model diverts significantly from the New Hampshire and Georgia models. This model takes the form of an incentive payment made to the employer rather than paying unemployment benefits to the worker. In this model, the individual is hired temporarily and paid a wage by the employer. This means that the individual is no longer eligible for unemployment while participating in the training. This model is the simplest to administer, as it only requires verification that the individual is still employed and the processing of the incentive payment. There is no need to review unemployment eligibility requirements and to monitor the training for compliance with FLSA, minimum wage and Workers' Compensation laws (described later in this report). The downside is that there is no obvious source of funding for the incentive payment. As with the stipends, unemployment trust funds **cannot** be used to fund incentive payments to the employer.

The employer incentive model is used in Utah and Texas, both of which provide an employer with a \$2,000 incentive payment paid out at various times over a three to four month training period. The models in both states establish a *minimum* number of hours that must be worked each week. This is opposite of the other models, where a maximum number of hours has been set. This is allowable as *no* unemployment benefits are paid out while the individual is temporarily employed. Since no unemployment benefits are paid, the requirements that the individuals be at least partially unemployed and be able and available for work and actively seeking work are eliminated. In addition, the requirement for a minimum number of hours encourages the hiring of full-time employees.

As with the employment stipend paid to the individual, the employer incentive payments cannot be financed by the Unemployment Trust Fund. As stated previously, unemployment funds must be used to pay benefits *to an individual* related to their *unemployment*. Payments must be paid directly to the unemployed person and cannot be paid to another entity on their behalf. In Utah and Texas, funding to finance the incentive payment comes from a combination of American Recovery and Reinvestment Act (ARRA) dollars and other state revenue sources.

In summary, there are a few different ways of providing financial incentives to encourage participation in the program. States have implemented variations of these subsidies based on their need and available funding. Table 1 lists the four sample states, and how they have chosen to subsidize the training.

Table 1. Training Program Subsidy Model by State

State	UC Benefit s	Trainee Stipend	Employe r Incentiv e
New Hampshire	X		
Georgia	✓	✓	

Legal Requirements

There are two legal issues that must be addressed in any training model chosen. These issues relate to the Fair Labor Standards Act and Workers’ Compensation coverage.

Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) created federal law that governs many of today’s employment practices. The primary focus of FLSA is the payment of a minimum wage and overtime, and limits the employment of minors. The minimum wage laws of FLSA affect the voluntary workplace training programs, as they require that for any work performed, a minimum wage must be paid for each hour worked. Exemptions do exist under FLSA, and being a trainee is one such exemption.

In order to be granted the exemption and to be able to pay unemployment benefits in lieu of wages, the relationship between the two parties must be such that the individual meets the federal definition of a trainee. The U.S. Department of Labor has established a six-factor test

to determine whether an individual is considered be in training versus in an employment relationship with the employer.

The 6 factors that must be considered include the following:

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 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.
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

These factors indicate that the training must be equivalent to that which would be offered through an educational institution (Community College, Adult Ed, etc.), but does allow for the fact that the training may occur at the employer's physical location and with the employer's equipment. The employer can provide the training, but cannot benefit from it. In essence, a company could train a participant how to operate a certain piece of machinery, but cannot have the trainee manufacture an item with that machinery that would later be sold or used in the normal course of business. The item would in essence be a "throw-away" – to only be used for the training itself. As another example, an employer whose business primarily focuses on customer service could train and evaluate participants on service etiquette, knowledge of the subject matter, etc., as long as the training did not include service to actual customers. In both instances, the training would help develop a potential employee who could be very productive as soon as they were hired. However, during the training period itself the individual would not contribute to the actual output of the business.

These factors may be difficult for all employers to meet, as many employers do not have a formal training program – they train on-the-job (OJT). OJT is different than the workplace training programs discussed in this report. With OJT, the individual is not a trainee – the individual is actually an employee of the business. In this case, there is no question about the trainee exemption – it does not apply. The individual is paid wages, and all aspects of FLSA and all other state or federal labor laws apply.

In general, to clearly meet the definition of training and pay unemployment benefits in lieu of wages, the delivery of the training must closely resemble that which would be provided in an educational setting. Classroom settings and training labs are clear-cut examples of a training that is exempt from FLSA. Job-shadowing is another form of training that would likely be exempt, as long as any work performed by the trainee is incidental. In each circumstance, the employer cannot benefit from the performance of the individual during the training period.

From a program administration perspective, this element would also necessitate a staffing infrastructure at the state level (usually housed in the State Workforce agency) that would review and monitor any proposed work-based training placements incorporating the payment of unemployment benefits to the trainee to ensure FLSA compliance. Additionally, these staff would take applications from both employers and unemployment benefit recipients who wish to participate in the voluntary workplace program and match the workers with the appropriate business placement as well as monitor the progress and outcomes of these training placements. A State interested in implementing a work-based training program would need to take into consideration whether adequate staffing and funding currently exists in the Workforce Agency to administer the program or whether additional staff and funding is required to carry out these functions.

Workers' Compensation

The second legal issue that would need to be addressed is Workers' Compensation. Even though trainees are not employees of the business, they must still be insured in case of injury. In some of the states with work-based training programs, the Workers' Compensation insurance is provided for by the employer; in others it is provided by the state.

In Utah and Texas, the individuals are hired as employees of the business, and therefore coverage is provided by the employer. In New Hampshire and Georgia, the state provides for the coverage. In Georgia, the coverage is funded out of the same Special Administrative Payroll Tax that supports the stipend payments made by that state. New Hampshire covers the trainees with its own (state government) self-insurance policy, and has to date not incurred any costs since its implementation in 2010. However, New Hampshire's 'no-cost' option is not available in Maine – coverage under the Maine State Government's policy would require an insurance premium to be paid to the State's Risk Management Division. As with the stipend and the incentive payments; the cost of workers compensation insurance cannot be paid for out of the Unemployment Insurance Trust Fund.

Summary & Conclusion

There are a number of factors to consider in designing and implementing a work-based or 'Voluntary Workplace Training' program. The table below (Table 2) summarizes the key factors that were discussed in this report. The factors with the greatest implication for the program and for those who participate in it involve compliance with FLSA laws and the identification of program funding. Workers' Compensation coverage is also an issue, but a subset of the two larger issues. The availability of adequate staff and funding resources to administer the program model chosen must also be assessed.

Table 2. Summary of Benefits and Issues for Possible Subsidy Models

Model	Possible Benefits	Issues
Trainee receives unemployment benefits	<ul style="list-style-type: none"> Funding is available for unemployment benefits 	<ul style="list-style-type: none"> Employment costs may be a barrier for some individuals Funding for Workers' Comp costs is unknown FLSA Trainee Exemption must be proven; failure to comply could result in fines to the employer
Trainee receives unemployment benefits	<ul style="list-style-type: none"> Funding is available for 	<ul style="list-style-type: none"> Funding for stipend

and an employment stipend	unemployment benefits <ul style="list-style-type: none"> • Stipend payment assists individual with Employment costs (transportation, child care, etc.) 	payment unknown <ul style="list-style-type: none"> • Funding for Workers' Comp costs is unknown • FLSA Trainee Exemption must be proven; failure to comply could result in fines to the employer
Employer receives incentive payment	<ul style="list-style-type: none"> • Employment relationship determined – FLSA and WC provided by employer • Savings to Unemployment Trust Fund • Simpler to administer 	<ul style="list-style-type: none"> • Funding for incentive payment is unknown

The intent of the program is to encourage job growth and to offset some of the cost of the hiring and training process currently borne by employers. During the public hearing and ensuing work session discussion for LD 1328, frustration was expressed over the cost of training a new employee to then have the situation not work out for one or both of the parties. Voluntary Workplace Training programs can help alleviate this type of business frustration and cost burden. Additionally, such programs can help unemployed workers more quickly find new employment either through the training placement itself or as a result of having gained new and marketable work skills and experience.

The challenge is to determine which subsidy model best meets the needs of the State and for which there is available fiscal resources to support it. Both models have strengths and challenges. The key benefit in the 'employer incentive payment' model is that the individual has been hired, and has become an employee, even if temporarily. When this occurs, the employer can train the individual in a way that best fits their environment, and can use the output from this individual in the course of their normal operations. The employer can *benefit* from the work that the individual performs. To encourage this job opportunity, states have paid the employer a fixed amount based on the amount of time they employ the individual. To encourage participation on the part of the worker, their unemployment benefits remain available should they not be hired permanently at the end of the training program.

The downside to this model is that funding for the employer incentive payment is not available within current resources. These payments cannot be made from the Unemployment Trust Fund, as they are not payments “to individuals with respect to their unemployment.” The only other funds that the Maine Department of Labor receives for training come under the federal Workforce Investment Act, which provides funds to train Dislocated Workers, Adults and Youth. Federal funding of this program has been cut dramatically in recent years and further cuts have been proposed in Congress. Currently, there are no additional funds available to add a new training program. In Utah and Texas where this model is used, the employer incentive payments have come from ARRA and other state resources.

Other states have avoided this funding problem by choosing to implement the other subsidy model which relies on paying unemployment benefits to the trainee while this individual participates in the voluntary workplace training program. This is an allowable use of Maine’s Unemployment Trust Fund dollars. However in this model, choosing to pay unemployment benefits instead of a wage means that the participation in workplace training must meet the federal definition of a trainee and the greatest indicator of this is that the employer cannot benefit from the performance of the individual. This limits the training to job-shadowing or “throw-away” work, which is used solely for training and not in the normal operations of the business. Failure to meet this requirement could result in a FLSA violation, that carries with it fines and penalties to the employer.

There are also administrative costs associated with processing of applications by both unemployment benefit recipients and employers, coordinating the placement match between the worker and business, reviewing the training plan and monitoring it to ensure that FLSA laws are met, and monitoring the outcomes of these placements. These functions are typically carried out within the State’s Workforce Agency and funded out of the State’s Workforce Investment Act (WIA) funding. The logical placement in Maine would be within the Bureau of Employment Services. However, the work and cost associated with the administration of a new training program cannot be absorbed within existing resources due to current reductions in WIA funding and the ongoing uncertainty about the future availability of these funds.

Additional resources would be required (as was testified to by the department in the previously-held public hearing).

In consideration of these factors, there is no clear recommendation as to the ‘best’ model for a Voluntary Workplace Training Program. How to proceed depends on the desired goal of the proposed program, and the funding available to support it.

In determining the model that would be the best fit for Maine, the Department recommends a discussion on the following questions:

1. **Are employers willing and have the internal capacity to train an individual outside of the normal course of operations?** If the answer is yes, then the FLSA exemption requirements can be met, and a subsidy that pays unemployment benefits to the trainee would work. Benefits can continue to be paid for out of the Unemployment Trust Fund. On the other hand, if the answer is no, then the employer incentive model would be more appropriate, and a funding source would need to be identified.
2. **Who will pay for Workers’ Compensation Insurance?** Under the employer incentive model, this is not an issue – the employer will provide Workers’ Comp coverage. Under the trainee model, other states are split on this issue. Some require the business to provide proof of coverage for trainees; other states provide the coverage themselves. If the State of Maine was to provide coverage, funding to cover the cost of the insurance premiums would need to be identified.
3. **How to fund the administrative resources needed to implement and provide services under a Voluntary Workplace Training program?** The administration of a new training program of this type cannot be absorbed within existing staff resources at the Department of Labor, nor is adequate federal funding available under the Workforce Investment Act to hire the additional staff needed. The federal Unemployment Insurance Administrative grant cannot be used for this purpose. The unemployment payment subsidy model would be the most costly to administer because of the FLSA trainee exemption component requiring review and approval of the proposed training plan. However with either model, there will be some level of technology required,

application processing and match coordination needed between the worker and the business, as well as program outcome reporting. Therefore, administrative funding would need to be identified in order to establish and run this new program.

The Department looks forward to these discussions, and to working with the Committee on proposed legislation.