



Workforce Development System Technical Advisory



November 26, 2004

Workforce Development System Technical Advisory #04-21

- TO:** Chairpersons of Local Workforce Investment Boards
Chief Elected Officials
WIA Grant Recipients
WIA Fiscal Agents
WIA Local Area Contact Persons
- SUBJECT:** WIA Work Experience Programs and Employer Liability for Unemployment Insurance Coverage
- Purpose:** To provide guidance to Local Workforce Investment Areas (LWIAs) regarding the basis for determining liability for Unemployment Insurance (UI) coverage in work experience activities under WIA Title 1-B programs
- Background:** Section 129(C)(2) of the Workforce Investment Act enumerates ten elements that must be provided by all youth program operators. In general, local Workforce Investment Areas contract with specialized youth service providers to assure comprehensive service delivery including individual assessment, developing individual service strategies and implementing the ten required youth program elements.
- Two of the ten required elements that aid in preparing youth for employment are paid/unpaid work experiences and summer employment opportunities. WIA describes work experience programs as planned, structured learning experiences that take place for a limited period of time, whether in the private for-profit sector, the not-for-profit sector or the public sector. These work experience programs are designed to enable youth to gain exposure to the work environment and its requirements by providing them with the opportunity for career exploration, personal growth, and occupational skills development.
- Work experiences may be subsidized or unsubsidized. WIA regulation section 664.470 states that funds may be used to pay the wages and related benefits for work experiences in the public, private, for-profit, or not-for-profit sectors when the individual assessment and service strategy indicate that a work experience is the appropriate model to use in meeting the needs of the eligible youth.
- Questions have been raised concerning the basis by which identity of the employer and the consequent liability for UI coverage in work experience activities is established. State Unemployment Insurance law provides the context for establishing the liable employer for unemployment insurance purposes. Section 511.1 of the UI law defines "employment" to mean any service under any contract of employment for hire, express or implied, written or oral. If a work experience program provides for the performance of services and payment of at least minimum wage, it would meet the definition and be considered covered employment for UI purposes. Although there are exclusions to that definition provided in the law, none of those exclusions pertain to work experience services.
- Case law and guidance from the Unemployment Insurance Division of the New York State Department of Labor note that if a particular work experience program is provided for primarily a classroom setting type of training, with minimal services and with no pay, or minimal payment of a stipend to cover expenses (usually less than minimum wage), it would not be considered a contract of hire, and therefore not covered employment for UI purposes.
- If the work experience program is considered employment, the next question becomes which entity is considered the employer for UI purposes and therefore liable for UI related costs and reporting. In establishing the identity of the liable employer, UI case law provides it is the entity which exercises supervision, direction and control over the work experience services. The source of funding or who actually makes the payment is not determinative. In work experience programs, the worksite employer for whom the services are performed and who has direct supervision over the services would commonly be considered the employer for UI purposes. However, if it can be demonstrated that the entity serving as coordinator of a work experience program (e.g. a youth contractor such as a BOCES or CBO) has the ultimate right of direction and control over the work experience services being provided to that youth, then the youth contractor would be the employer for UI purposes rather than the worksite employer.

Evidence of such 'right of direction and control' would be that the youth contractor entity:

- Determines the eligibility of the participants
- Has the right to hire and terminate the participants, or reassign them
- Assigns the participants to the worksite employer
- Actively participates in designing the work experience, including the job duties to be performed, rate of pay, etc.
- Monitors on a regular basis the performance of those duties and is responsible for resolving any problems between the participant and the worksite employer

Under WIA, the role of providers of youth services is consistent with the activities that determine the 'right of direction and control.' Youth providers are responsible for the individual assessment and the service strategy, for determining that the work experience is appropriate, for aligning the work experience with the academic capacity and occupational plans of the individual youth. The youth service provider monitors the work experience, provides counseling and intervention to assure a positive outcome, and conducts follow up services at the conclusion of the work experience. Anything less relegates the work experience to nothing more than a wage subsidy program for the employer with few tangible benefits to the participant.

Action:

Local Workforce Investment Areas and local youth service providers must be aware of the essential differences among OJT, wage subsidy, and work experiences. When a local area contracts with a youth provider for the provision of a work experience program, there should be a discussion of these differences and a clear delineation of the roles and responsibilities of each party to the contract. Having done that, the parties will better be able to understand how the UI law will apply to the work experience program. These discussions and the items indicated as evidence of direction and control in this advisory should be outlined in a written contract between the parties along with a clear statement that the coordinating entity retains the ultimate right of direction and control over the services, even though the contract may state the worksite employer may supervise the day to day activities. Absent that statement and full implementation of such a strategy, the worksite employer would be the liable employer for UI purposes and would be liable for UI related costs and reporting while the youth participated in the work experience program.

Questions regarding whether services are considered employment and the identity of the employer for UI purposes should be addressed by mail to the New York State Department of Labor, Unemployment Insurance Division, Liability and Determination Section, Harriman Office Building Campus, Albany, NY 12240, or by fax to the UI Liability and Determination Section at (518) 485-6172. Include copies of contracts with any inquiry.

Questions regarding this Technical Advisory may be directed to your State Representative.