Georgia Work$: How Does An Unlawful Program Become a National Model?

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What is Georgia Work$?

- Created in 2003 but picks up steam with Recession
- Unemployed workers registered with Georgia DOL receive on-the-job training with participating employers
- Continue to collect weekly UI benefits while on assignments
- Additional subsidy of up to $600
- Training lasts 6 weeks
- 24 hours per week
- Workers Compensation funded by State
- Over 11,000 participants through 2010
- GDOL reports 38% placed with GW$ employer; over 60% employed within 90 days after quarter of participation
GW$: How It Was Sold

- Job-specific training; best learning is on-the-job
- Reduces UI duration
- Hiring at the discretion of employer but in a tough labor market, GW$ is like an extended private interview
- Employers want hiring decision to carry minimal risk. GW$ provides opportunity to assess whether employee is “right fit”, has good work ethic
Training or Employment?

- Early promotional materials: Program “designed for workers to showcase their skills… and perhaps pick up new skills in the workplace”

- Reports that many GW$ participants are working in entry level jobs that do not involve formalized program of education or training
Legal Challenge

NELP letter to Secretary Solis (December 2009) argues that GW$ violates both federal wage and UI law because:

1. **Under FLSA, worker must receive minimum wage ($7.25/hour) for employment**
   - Exception for individual in “training” but GW$ activities do not meet FLSA definition of training

2. **Under FUTA withdrawal standard, workers must be unemployed to receive UI benefits.**
   - There is an exception for UI claimants in “approved training” but GW$ activities do not meet definition of approved training
DOL Responds

- USDOL issues guidance to states that responds to questions in NELP’s letter (TEGL 12-09, issued 1/29/10)
- Provided to help states understanding applicability of various federal laws as they relate to workplace-based training initiatives targeting UI claimants
- Relevant federal laws include SSA, FUTA, FLSA and WIA
DOL Response (TEGL 12-09)

- **UI Withdrawal Standard**
  - Trust fund dollars can only be used to pay UI benefits.
  - UI can only be paid to an individual who is unemployed (“with respect to unemployment”).
  - UI cannot be paid as a subsidy for employment or as a stipend since withdrawal would be related to incentivizing employment and not “with respect to unemployment”.

- UI claimants must be able and available for work but that requirement may be waived if in “approved training” as defined by state.
Employers who participate in subsidized work-based training programs implemented by states for unemployed workers may be subject to FLSA requirements for workers placed in program.

FLSA applies to “employees” defined broadly but may not include persons who, without any express or implied compensation agreement work for their own advantage on premises of another.

- Workers who receive work-based training may fall into this category as “trainee”
- However, fact-specific analysis of worker’s activities necessary to determine if worker is covered “employee” or exempt “trainee”
Wage & Hour Division’s 6-Part Test

To be a “trainee” under the FLSA, the following factors must apply:

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.
The Test Applied: The Trainee Exemption is Extremely Narrow

- “If workers engage in the primary operations of the employer or perform productive work (for example, filing, performing other clerical work, 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.

- Labeling work training is not enough. “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.”
Georgia Work$ Attracts Attention

- Despite the strong guidance, USDOL takes no action regarding Georgia program
- Popularity of GW$ approach grows, praised by former President Clinton
- Cantor tells White House program is a model
- Non-statutory versions launched in New Hampshire and Missouri
- Legislation passed in NJ (using TEGL language and 6-part test) but vetoed by Governor
- Legislation proposed in other states; USDOL identifies conformity problem with PA bill
“Bridge to Work” Introduced

- In September, President introduces American Jobs Act that includes proposed reauthorization of EUC and federal funding of Extended benefits for one year.
- Proposal includes a $4 billion Reemployment Now Fund that states can use for a variety of approved program activities designed to help long-term unemployed secure jobs.
- One approved program is “Bridge to Work” which builds on the GW$ model but incorporates a variety of features designed to overcome FLSA problems.
Bridge to Work: Primary Features

- **EUC.** Program is limited to long-term unemployed, typically EUC claimants.
- **Employee.** Unlike GW$, Bridge does not engage in fiction that worker is a “trainee”. Participant is treated as an employee.
- **More Hours.** Assignments are short-term jobs, lasting up to eight weeks and ranging from a minimum of 25 hours to 38 hours per week.
- **Wage law.** Applicable federal and state minimum wage laws apply.
- **Exempt from UI weekly eligibility requirements.** Workers are exempted from having to be able, available and seeking work in order to qualify for EUC benefit.
- **Workers’ compensation** coverage must be provided by employer.
- **No displacement.** Participating workers may not displace current employees or those who are on layoff status, nor undermine the promotional opportunities of the existing workforce.
Reaction and Future Prospects

- Strong negative reaction from worker advocates.
- Concerns that even though program is limited to EUC claimants, labeling BTW as UI “reform” encourages erosion of UI insurance principles and injects “work first” principles from welfare reform into UI system.
- There are more effective options to create subsidized jobs for unemployed workers other than providing free labor for employers and that require a greater level of employer commitment and investment in the worker.
- Bridge to Work is still very much in the mix of options as Congress considers reauthorization of EUC and EB beyond December 31, 2011.
GW$ Postscript

- CEPR report reviewed GW$ data from 11/09 to 9/10 and found 70% of participants who found jobs after program were in low-wage jobs (general clerical, child-care, retail, restaurant, maintenance) and the higher-paying jobs were in fields already requiring higher education/credentials that could not have been acquired in 6 or 8 week program (law, social work, Auto repair).

- New labor commissioner expresses concerns about the program’s costs and effectiveness.

- New data released by the state calls into question prior estimates of job placement/retention.

- By time BTW introduced, GW$ has 19 active participants.