



NELP Work-Sharing Model Legislation

November, 2013

Attached is NELP model legislative language for state work-sharing legislation. This language meets the federal requirements set out in the Layoff Prevention Act of 2012 and discussed in the NELP/CLASP Paper *"Seizing the Moment: A Guide to Adopting Work-sharing Legislation after the Layoff Prevention Act of 2012"* (also attached).

The NELP model language largely tracks the federal language issued by USDOL in Unemployment Insurance (UI) Program Letter 22-12, Change 1 (USDOL draft language and commentary attached), but also includes certain optional provisions that appear in other state work-sharing laws that have proven to help state programs run more efficiently and protect worker interests as well. (These optional provisions are also federally approved.) Among these provisions (and states with similar provisions) are:

- Section B (2) - requirement that where workers are represented by union, plan should be signed by collective bargaining representative (Texas and most work-sharing states)
- Section B (8) – requirement that work-sharing employer be current in all UI reporting and taxes (KS, CT and other states)
- Section B (9) – certification that work-sharing employer will not hire new employees in, or transfer employees to, affected unit while work-sharing plan is in effect (MI)
- Section B (10) – certification that work-sharing employer will not lay off covered workers while plan is in effect (MI)
- Section H (5) – wages earned by an employer other than the work-sharing employer are disregarded in the calculation of weekly work-sharing benefit entitlement (CT)
- Section K – severability clause that provides that if USDOL finds that any specific provision would prevent USDOL approval under federal law, that provision shall not apply. (MI)

The rationale and arguments in support of all these provisions are discussed in the *"Seizing the Moment"* paper. State workforce agencies and legislative staff involved in drafting work-sharing bills will be most interested in the UI Program Letter draft language and commentary which spells out the required provisions and some pre-approved optional provisions.

In addition to these provisions, Section I deals with charging of work-sharing benefits. Generally, work-sharing benefits should be charged in the same manner as regular state UI benefits as set forth in section I (1). However, because the federal law provides federal reimbursement of all state work-sharing benefits paid through August 22, 2015, section I (2) provides language by which a state can elect to non-charge participating employers for so long as the federal reimbursement is in effect. This is optional; a state could elect to charge these benefits (as it will have to after August 2015 anyway) and just let the reimbursements help improve the solvency of the state's UI trust fund. The optional non-charging language (which has been adopted by Michigan, Ohio and a number of other states) is provided in the event that state drafters conclude that its value in spurring business interest outweighs any trust fund benefits.

Note that in the NELP model language, sections requiring reference to specific provisions in a state's law are noted in *italics*. I am available to discuss the draft legislation and any questions state advocates may have at your convenience. Please contact me if you want to schedule a discussion. Thanks.

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NELP Model Legislative Language for State Implementation of a Work-Sharing Program

A. Definitions

- (1) “Affected unit” means a specified plant, department, shift, or other definable unit which includes two or more workers to which an approved work-sharing plan applies.
- (2) “Director” means the official of the state agency designated to perform primary oversight of the unemployment insurance program, or any subordinate delegated responsibility for approving applications for participation in a work-sharing plan.
- (3) “Health and retirement benefits” means employer-provided health benefits, and retirement benefits under a defined benefit pension plan (as defined in section 414(j) of the Internal Revenue Code or contributions under a defined contribution plan (defined in section 414(i) of such Code), which are incidents of employment in addition to the cash remuneration earned.
- (4) “Participating employee” means an employee who works a reduced number of hours under an approved work-sharing plan.
- (5) “Participating employer” means an employer who has an approved work-sharing plan in effect.
- (6) “Work-sharing benefits” means unemployment benefits payable to employees in an affected unit under an approved work-sharing plan, as distinguished from the unemployment benefits otherwise payable under the unemployment insurance provisions of state law.
- (7) “Work-sharing plan” means a plan submitted by an employer, for approval by the director, under which the employer requests the payment of work-sharing benefits to workers in an affected unit of the employer to avert layoffs.
- (8) “Usual weekly hours of work” means the usual hours of work for full-time or part-time employees in the affected unit when that unit is operating on its regular basis, not to exceed forty hours and not including hours of overtime work.
- (9) “Unemployment insurance” means the unemployment benefits payable under the state unemployment insurance law other than work-sharing and includes any amounts payable pursuant to an agreement under any federal law providing for compensation, assistance, or allowances with respect to unemployment.

B. Application to Participate in the Short-Time Compensation Program.

An employer wishing to participate in the work-sharing program shall submit a signed written work-sharing plan to the director for approval. The Director shall develop an application form to request approval of a short-time compensation plan and an approval process. The application shall include:

- (1) The affected unit (or units) covered by the plan, including the number of full-time or part-time workers in such unit, the percentage of workers in the affected unit covered by the plan, identification of each individual employee in the affected unit by name, social security number, and the employer's unemployment tax account number and any other information required by the director to identify plan participants.
- (2) Certification by the employer that it has obtained the written approval of any applicable collective bargaining representative and has notified all affected employees who are not in a collective bargaining unit of the proposed work-sharing plan.
- (3) A description of how workers in the affected unit will be notified of the employer's participation in the work-sharing plan if such application is approved, including how the employer will notify those workers in a collective bargaining unit as well as any workers in the affected unit who are not in a collective bargaining unit. If the employer will not provide advance notice to workers in the affected unit, the employer shall explain in a statement in the application why it is not feasible to provide such notice.
- (4) A requirement that the employer identify the usual weekly hours of work for employees in the affected unit and the specific percentage by which their hours will be reduced during all weeks covered by the plan. An application shall specify the percentage of reduction for which a work-sharing application may be approved which shall be not less than 10 percent and not more than 60 percent. If the plan includes any week for which the employer regularly provides no work (due to a holiday or other plant closing), then such week shall be identified in the application.
- (5) Certification by the employer that, if the employer provides health benefits and retirement benefits under defined benefit pension plans (as defined in section 414(j) of the Internal Revenue Code) or contributions under a defined contribution plan (defined in section 414(i) of such Code) to any employee whose usual weekly hours of work are reduced under the program, such benefits will continue to be provided to employees participating in the work-sharing program under the same terms and conditions as though the usual weekly hours of work of such employee had not been reduced or to the same extent as other employees not participating in the work-sharing program.

For defined benefit retirement plans, the hours that are reduced under the work-sharing plan shall be credited for purposes of participation, vesting, and accrual of benefits as though the usual weekly hours of work had not been reduced. The dollar amount of employer contributions to a defined contribution plan that are based on a percentage of compensation may be less due to the reduction in the employee's compensation. Notwithstanding the above, an application may contain the required certification when a reduction in health and retirement benefits scheduled to occur during the duration of the plan will be applicable equally to employees who are not participating in the short-time compensation program and to those employees who are participating.

- (6) Certification by the employer that the aggregate reduction in work hours is in lieu of layoffs (temporary or permanent layoffs, or both) of regularly employed employees in the affected unit. The application shall include an estimate of the number of workers who would have been laid off in the absence of the short-time compensation plan.
- (7) Agreement by the employer to: (a) furnish reports to the director relating to the proper conduct of the plan; (b) allow the director or his authorized representatives access to all records necessary to approve or disapprove the plan application, and after approval of a plan, to monitor and evaluate the plan; and (c) follow any other directives the director deems necessary for the agency to implement the plan and which are consistent with the requirements for plan applications.
- (8) Certification by the employer that it has filed all quarterly reports and other reports required under the *state unemployment insurance law* and has paid all quarterly contributions, reimbursements in lieu of contributions, interest and penalties due through the date of the employer's application.
- (9) Certification by the employer that it will not hire new employees in, or transfer employees to, the affected unit during the effective period of the work-sharing plan.
- (10) Certification by the employer that it will not lay off participating employees during the effective period of the work-sharing plan, or reduce participating employees' hours of work by more than the reduction percentage during the effective period of the work-sharing plan, except in cases of holidays, designated vacation periods, equipment maintenance, or similar circumstances.
- (11) Certification by the employer that participation in the work-sharing plan and its implementation is consistent with the employer's obligations under applicable federal and state laws.
- (12) The effective date and duration of the plan that shall expire not later than the end of the twelfth full calendar month after the effective date.
- (13) Any other provision added to the application by the director that the United States Secretary of Labor determines to be appropriate for purposes of administering the work-sharing program.

C. Approval and Disapproval of a Work-Sharing Plan

The Director shall approve or disapprove a work-sharing plan in writing within thirty days of its receipt and promptly communicate the decision to the employer. A decision disapproving the plan shall clearly identify the reasons for the disapproval. The disapproval shall be final, but the employer shall be allowed to submit another short-time compensation plan for approval not earlier than fifteen days from the date of the disapproval.

D. Effective Date and Duration of the Work-Sharing Plan

A work-sharing plan shall be effective on the date that is mutually agreed upon by the employer and the director, which shall be specified in the notice of approval to the employer. The plan shall expire on the date specified in the notice of approval, which shall be either the date at the end of the 12th full calendar month after its effective date or an earlier date mutually agreed upon by the employer and the director. However, if a work-sharing plan is revoked by the director under paragraph E of this Act, the plan shall terminate on the date specified in the director's written order of revocation. An employer may terminate a short-time compensation plan at any time upon written notice to the Director. Upon receipt of such notice from the employer, the director shall promptly notify each member of the affected unit of the termination date. An employer may

submit a new application to participate in another work-sharing plan at any time after the expiration or termination date.

E. Revocation of Approval

The director may revoke approval of a work-sharing plan for good cause at any time, including upon the request of any of the affected unit's employees. The revocation order shall be in writing and shall specify the reasons for the revocation and the date the revocation is effective.

The director may periodically review the operation of each employer's work-sharing plan to assure that no good cause exists for revocation of the approval of the plan. Good cause shall include, but not be limited to, failure to comply with the assurances given in the plan, unreasonable revision of productivity standards for the affected unit, conduct or occurrences tending to defeat the intent and effective operation of the plan, and violation of any criteria on which approval of the plan was based.

F. Modification of an Approved Work-Sharing Plan.

An employer may request a modification of an approved plan by filing a written request to the director. The request shall identify the specific provisions proposed to be modified and provide an explanation of why the proposed modification is appropriate for the short-time compensation plan. The Director shall approve or disapprove the proposed modification in writing within ten working days of receipt and promptly communicate the decision to the employer. The director, in his or her discretion, may approve a request for modification of the plan based on conditions that have changed since the plan was approved provided that the modification is consistent with and supports the purposes for which the plan was initially approved. A modification does not extend the expiration date of the original plan, and the director must promptly notify the employer whether the plan modification has been approved and, if approved, the effective date of the modification. An employer is not required to request approval of a plan modification from the director if the change is not substantial, but the employer must report every change to the plan to the director promptly and in writing. The director may terminate an employer's plan if the employer fails to meet this reporting requirement. If the director determines that the reported change is substantial, the director shall require the employer to request a modification to the plan.

G. Eligibility for Work-Sharing Benefits

An individual is eligible to receive work-sharing benefits with respect to any week only if the individual is monetarily eligible for unemployment insurance, not otherwise disqualified for unemployment insurance, and:

- (1) during the week, the individual is employed as a member of an affected unit under an approved work-sharing plan, which was approved prior to that week, and the plan is in effect with respect to the week for which work-sharing benefits are claimed;
- (2) notwithstanding any other provisions of this Act relating to availability for work and actively seeking work, the individual is available for the individual's usual hours of work with the work-sharing employer, which may include, for purposes of this section, participating in training to enhance job skills that is approved by the director such as employer-sponsored training or training funded under the Workforce Investment Act of 1998; and

(3) notwithstanding any other provision of law, an individual covered by an approved work-sharing plan is deemed unemployed in any week during the duration of such plan if the individual's remuneration as an employee in an affected unit is reduced based a reduction of the individual's usual weekly hours of work under an approved work-sharing plan.

H. Benefits

- (1) An individual's work-sharing benefit amount shall be the product of the regular weekly unemployment insurance amount for a week of total unemployment multiplied by the percentage of reduction in the individual's usual weekly hours of work.
- (2) An individual may be eligible for work-sharing benefits or unemployment insurance, as appropriate, except that no individual shall be eligible for combined benefits in any benefit year in an amount more than the maximum entitlement established for regular unemployment insurance, nor shall an individual be paid work-sharing benefits for more than 52 weeks under an approved work-sharing plan.
- (3) The work-sharing benefits paid to an individual shall be deducted from the maximum entitlement amount of regular unemployment insurance established for that individual's benefit year.
- (4) Provisions applicable to unemployment insurance claimants shall apply to work-sharing claimants to the extent that they are not inconsistent with the work-sharing provisions of state law. An individual who files an initial claim for work-sharing benefits shall receive a monetary determination.
- (5) An individual who is eligible for work-sharing benefits shall not be subject to the provision of state unemployment insurance law relating to partial unemployment benefits. Wages earned from an employer other than the work-sharing employer during the week of work-sharing eligibility shall be disregarded in the calculation of the individual's weekly work-sharing benefit.
- (6) An individual who is not provided any work during a week by the work-sharing employer, or any other employer, and who is otherwise eligible for unemployment insurance shall be eligible for the amount of regular unemployment insurance to which he would otherwise be eligible.
- (7) An individual who is not provided any work by the work-sharing employer during a week, but who works for another employer and is otherwise eligible may be paid unemployment insurance for that week subject to the disqualifying income provisions of the provision of state unemployment insurance law relating to partial unemployment benefits.

I. Charging Work-Sharing Benefits

- (1) Except as provided in subsection (2) of this section, work-sharing benefits shall be charged to an employers' experience rating account in the same manner as unemployment insurance is charged under the charging provision of state unemployment insurance law. Employers liable for payments in lieu of contributions shall have work-sharing benefits attributed to service in their employ in the same manner as unemployment insurance is attributed under the provision of state unemployment insurance law relating to the financing of benefits by employers using the reimbursing method.

- (2) If federal funding is available to the state for the purpose of full reimbursement for the cost of funding work-sharing benefits paid by the unemployment insurance agency pursuant to section 2162 of the Layoff Prevention Act of 2012 and an approved work-sharing plan under this act, those benefits shall not be charged or billed to a participating employer.

J. Extended Benefits

An individual who has received all of the work-sharing benefits or combined unemployment insurance and work-sharing benefits available in a benefit year shall be considered an exhaustee for purposes of extended benefits, as provided under *the provisions of the state unemployment insurance law relating to extended benefits*, and, if otherwise eligible under those provisions, shall be eligible to receive extended benefits.

K. Severability Clause

If any provision of this Act would otherwise cause the United States Department of Labor to withhold the approval required to implement a work-sharing program under section 3304(a)(4)(e) of the Federal Unemployment Tax Act, 26 USC 3304, and section 303(a)(5) of the Social Security Act, 42 USC 503, that provision does not apply.