



WORK EXPERIENCE AND TRANSITIONAL JOBS

PURPOSE

This policy provides guidance on work experience and transitional jobs. This policy is intended to help service providers understand applicable Federal laws, regulations, and policies related to the Fair Labor Standards Act and the Workforce Innovation and Opportunity Act (WIOA), as they develop and implement these types of initiatives.

SCOPE

The Workforce Development Board of Ventura County (WDBVC) and its contractors and subrecipients.

REFERENCES

- Workforce Innovation and Opportunity Act, Public Law 113-128
- Training and Employment Guidance Letter (TEGL) No. 12-09, Joint Guidance for States Seeking to Implement Subsidized Work-Based Training Programs for Unemployed Workers (January 29, 2010)
- TEGL No. 23-14 WIOA Youth Program Transition (March 26, 2015)
- TEGL No. 19-16 Guidance on Services provided through the Adult and Dislocated Worker Programs under the Workforce Innovation and Opportunity Act (WIOA) and the Wagner-Peyser Act Employment Service (ES), as amended by title III of WIOA, and for Implementation of the WIOA Final Rules (March 1, 2017)

POLICY AND PROCEDURES

Paid and Unpaid Work Experience

20 CFR § 681.600 defines work experience as “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 may take place in the private for-profit sector, the non-profit sector, or the public sector. Labor standards apply in any work experience where an employee/employer relationship, as defined by the Fair Labor Standards Act or applicable State law, exists. Consistent with § 680.840 . . . , funds provided for work experiences may not be used to directly or indirectly aid in the filling of a job opening that is vacant because the former occupant is on strike, or is being locked out in the course of a labor dispute, or the filling of which is otherwise an issue in a labor dispute involving a work stoppage. Work experiences provide the participant with opportunities for career exploration and skill development.” Additional information on the employer/employee relationship may be found on DOL’s Wage and Hour Division website.

The Workforce Development Board of Ventura County is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities.

Work experience may be provided, where determined as appropriate through the Individual Employment Plan development process, for eligible program participants for whom one or more of the following conditions exist:

- the individual has no previous work history,
- the individual has had no work history within the past five years, and/or
- the individual is otherwise eligible for WIOA individualized career and is in need of this service to assist them in preparing for participation in another appropriate training service or activity or to successfully obtain and retain unsubsidized employment.

This type of work experience activity is intended to provide training and skill development in the skills necessary to successfully obtain and retain employment, including punctuality, attendance, communication, team work, dependability, and task completion, and is not required to provide training in technical or job specific skills. There is no requirement that the individual will be retained by the worksite following the successful completion of this type work experience activity.

Transitional Jobs

Transitional jobs are a type of work-experience under WIOA and are considered an individualized career service. Transitional jobs are time-limited and wage-paid work experiences that are subsidized up to 100 percent.

These jobs are in the public, private, or nonprofit sectors and are only available for individuals with barriers to employment who are chronically unemployed or have an inconsistent work history. This service must be combined with career and supportive services. Transitional job placements should contribute to the occupational development and upward mobility of the participant.

Transitional jobs provide an individual with work experience that takes place within the context of an employee-employer relationship, in which the program provider generally acts as the employer, and with an opportunity to develop important workplace skills. The WIOA Final Rule governs the requirements for transitional jobs at 20 CFR 680.190 and .195.

These jobs must be designed to establish a work history for the individual, demonstrate success in the workplace, and develop the skills that lead to entry into and retention in unsubsidized employment. Unlike on-the-job training (OJT), there is no requirement that the employer retains the individual upon completion of the transitional job; however, retention, where appropriate, is preferred for the benefit of the worker and employer. Local WDBs may use up to 10 percent of their combined total of adult and dislocated worker funds to provide transitional jobs.

Federally Defined Barriers to Employment

- a) Displaced homemakers;
- b) Low-income individuals;

- c) American Indians, Alaska natives, and Native Hawaiians;
- d) Individuals with disabilities, including youth with disabilities;
- e) Older individuals (age 55 or older);
- f) Justice-involved individuals;
- g) Homeless individuals;
- h) Youth who are in or have aged out of the foster care system;
- i) Individuals who are English Language Learners, individuals who have low levels of literacy, and individuals with substantial cultural barriers;
- j) Eligible migrant and seasonal farmworkers;
- k) Single partners (including single pregnant women);
- l) Long-term unemployed individuals (unemployed 27 or more weeks);
- m) Recipients of public assistance.

Chronic Employment or Inconsistent Work History

- a) Have been unemployed for 13 weeks or longer; or
- b) Were unemployed at 27 of the past 52 weeks; or
- c) Have held three or more jobs in the past 52 weeks and are currently unemployed or underemployed.

Individuals who are underemployed may include:

- Individuals employed less than full-time who are seeking full-time employment
- Individuals who are employed in a position that is inadequate with respect to their skills and training
- Individuals who are employed who meet the definition of a low-income individual in WIOA Section 3 (36)
- Individuals who are employed, but whose current job earnings are not sufficient compared to their previous job earnings from their previous employment per state and local policy

Fair Labor Standards Act

Employers who participate in subsidized work-based training programs 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.

Service providers shall review the Fair Labor Standards Act (FLSA) to determine whether participants 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).

Child Labor Laws

Almost all minors under the age of 18 are subject to California's child labor protections. Under the California Labor Code, "minor" is defined as any person under the age of 18 years required to attend school under the provisions of the Education Code, and any person under age six. "Dropouts" are subject to California's compulsory education laws, and thus are subject to all state child labor law requirements. Emancipated minors, while subject to all California's child labor laws, may apply for a work permit without their parents' permission.

The [Department of Industrial Relations website](#) contains information regarding:

- Child Labor Laws
- Work Permits
- Entertainment Work Permits

General Requirements

Length of Time

Work experience and transitional jobs must not exceed 480 hours or 9 months per participant.

Funding Levels and Reimbursement

All placements must pay at least that state or local minimum wage, whichever is higher. Overtime, sick time, vacation, or holiday is not part of work experience and transitional jobs reimbursement under any circumstances.

Worksites

- a) Worksites may be a private-for-profit business, private non-profit organization, or public-sector employer.
- b) Worksites must provide a quality work experience for participants to gain valuable skills.
- c) Worksites must provide a safe environment for participants to gain skills.

- d) Worksites are not eligible if they have other individuals on layoff from the same or substantially equivalent position of the placement activity.
- e) The placement activity cannot infringe upon the promotion or displacement of any currently employed worker or a reduction in their hours.
- f) The worksite cannot use the placement activity for a same or a substantially equivalent position that is open due to a hiring freeze.
- g) Worksites cannot have recently relocated, resulting in the loss of employment of any employee of such business at the original location in the U.S. Placement activities may not be granted to the worksite until after 120 days have passed since the relocation.
- h) Worksite selection shall be based on Ventura County's in-demand industry sectors.
- i) Each worksite shall not have more than five (5) participants, concurrently, without prior approval from Workforce Development Board of Ventura County (WDBVC).
- j) A pool of worksites shall be developed and maintained to provide a wide range of training opportunities to the participants and enhance their skills development.
- k) A list of worksites, with the following information, shall be maintained:
 - i. Name and address of employer/worksite
 - ii. Name, position title, email address and phone number of supervisor
 - iii. Status: Active, In Progress, or Inactive
 - iv. For active worksites:
 - Name of participants placed
 - Cumulative number of actual hours completed
 - Actual Start Date and Anticipated/Actual End date
- l) Pre-Evaluation of Worksites
Service providers shall develop a pre-evaluation tool to determine the appropriateness of utilizing the employer for work experiences. The evaluation components should include provisions of the worksite agreement such as safety, labor law requirements, status of layoffs, etc. In addition, it should evaluate age appropriateness and level of exposure to work readiness and job skills, type of supervision available, as well as review the previous work experience placements at the same location.

Potential worksite employers should also demonstrate a commitment to helping participants receive the experience and training needed to meet their goals. As part of participation, these employers should be willing to work closely with Provider staff, especially since participants have barriers to employment. Proper worksite supervision should be one of the factors that are reviewed prior to placement of the participant in the activity.

- f) The service provider shall provide an orientation to the worksite supervisor(s). The orientation should cover topics such as purpose of the program, contact information, worksite agreement, equal employment, child labor laws (if applicable), payroll, record keeping, safety, discipline, prohibited items, termination policies, grievance, monitoring incident reporting, and more.
- g) The service provider shall create a Work Experience Employer Handbook. The Handbook shall be provided to the employer.
- h) No individual may be placed in an employment activity if a member of that person's immediate family is directly supervised by or directly supervises that individual (20 CFR 683.200(g)).

Worksite Agreement

- a) A worksite agreement shall be fully executed before a participant can start.
- b) A worksite agreement template provided by the WDBVC shall be used (Attachment I)
- c) At minimum, the work site agreement shall provide the following:
 - i. Names and contact information of all parties
 - ii. Names and titles of all employer staff authorized to sign the participant's timesheet
 - iii. Responsibilities and expectations of the participant, the Worksite/Employer and Provider staff
 - iv. The job title, wage, detailed list of specific skills to be learned, timeline and benchmarks to be achieved, weekly schedule, and number of hours to be completed by the participant
 - v. Identification of the legal requirements that must be met, including worksite safety requirements
 - vi. Statement informing the worksite that they may be subject to worksite monitoring by both the local and State representatives, as well as regular visitations by Provider staff
 - vii. Provision of termination of the agreement/contract for non-performance or failure to meet the requirements of the agreement/contract
 - viii. Non-discrimination and equal opportunity clauses
 - ix. Statement that the activity will not displace employees
 - x. Statement that participants must not be engaged in sectarian activities
 - xi. Other information, relative to the specific activities
 - xii. Signatures and dates from the worksite, participant and Provider staff
- d) Where a waiver of any WDBVC policy provisions is needed, WDBVC approval of a formal waiver request from the Provider must be secured before any Worksite Agreement is executed.

- e) A copy of the signed worksite agreement must be kept in the participant's file.

Worksite Monitoring

- a) Active worksites shall be monitored by the service provider at least two times each program year to ensure compliance with the Worksite Agreement.
- b) Results of the monitoring review shall be documented, filed and made available to the WDBVC upon request.
- c) Any worksite that demonstrates a pattern of non-compliance shall not continue as a worksite.

Timesheets

- a) Payroll must be handled by the service providers or a subcontractor.
- b) Payroll must be strictly based on timesheets completed by the participants, reviewed and signed by the Supervisor and duly approved by designated service provider staff for payment. (See Attachment II – Model Timesheet).
- c) All timesheets must be kept in the participant's file.
- d) Availability of additional funding may also be cause for changes or exemptions to this policy. This determination is made by the WDBVC.

CalJOBS

- a) Activities must be coded in CalJOBS using the most appropriate activity codes and indicating corresponding start and end dates.
- b) Applicable Measurable Skills Gains must be recorded in CalJOBS upon successful completion of activities.

ACTION

Bring this policy to the attention of all affected staff.

INQUIRIES

Inquiries regarding this policy can be addressed to the WDBVC at 805-477-5306.

/S/ Rebecca Evans, Executive Director
Workforce Development Board of Ventura County

ATTACHMENTS:

- Attachment I - Worksite Agreement
- Attachment II - Model Timesheet