



Seizing the Moment:

A GUIDE TO ADOPTING STATE WORK SHARING LEGISLATION AFTER THE LAYOFF PREVENTION ACT OF 2012

December 2012 | Neil Ridley and George Wentworth

THE GREAT RECESSION, which triggered massive waves of job losses, sparked renewed interest in measures to avoid or mitigate the effect of layoffs on workers and communities. Many industrial countries created layoff avoidance programs or expanded existing ones.¹ At the same time, there was an upsurge in use of work sharing in the United States, where it is known as short-time compensation (STC), shared work and work share.²

Work sharing is a form of unemployment insurance (UI) that gives employers the option of reducing employees' hours instead of cutting their workforce during a business slowdown. For example, a business may reduce all employees' hours by 20 percent instead of cutting one-fifth of its workforce. Workers can then receive pro-rated unemployment benefits that help compensate for reduced work hours.

In many states, the number of participating employers spiked during the recession and the ratio of weeks of STC benefits paid relative to weeks of regular UI benefits paid was generally higher in most states during the Great Recession than during previous recessions.³ As a result of work sharing, states were able to save about 166,000 jobs in 2009 and nearly 100,000 jobs in 2010.⁴ STC programs also spread more widely across the country. Since 2010, seven states (Colorado, Maine, Michigan, New Hampshire, New Jersey, Oklahoma and Pennsylvania) and the District of Columbia have adopted work sharing, bringing the total number of programs to twenty-five.

Many economists and policy experts have highlighted the value of work sharing in maintaining employment stability during economic downturns. In Germany, short-time work—as work sharing is known there—is credited with preserving jobs and keeping unemployment from rising sharply.⁵ Research shows that established programs in the U.S. also saved jobs, particularly in sectors such as manufacturing in which there was extensive use of work sharing. A recent study suggests that, if STC programs had been

UPCOMING FEDERAL GUIDANCE

The Layoff Prevention Act calls for USDOL to publish model work sharing legislation. State UI administrators, legislators and advocates should make sure to review that guidance when it is published, as well as Unemployment Insurance Program Letters 22-12 and 27-12.

widely available in all states and intensively used during the recent recession, the effect on U.S. employment could have been substantial.⁶

Between 2009 and 2012, Congress considered and ultimately adopted a proposal sponsored by Sen. Jack Reed (and Rep. Rosa DeLauro) to boost use of STC programs. The Middle Class Tax Relief and Job Creation Act—signed by President Obama on February 22, 2012—includes a section known as “the Layoff Prevention Act of 2012” that authorizes temporary subsidies to states providing benefits through STC programs. The legislation also allocates nearly \$100 million in grants to help states launch new programs, improve the operation of existing programs and promote STC more broadly to business and workers. The Layoff Prevention Act (“the Act”) presents opportunities both for states with STC programs and those adopting them to put in place “an effective counter-cyclical tool” for use during economic downturns in the future.⁷

This report, the second in a series prepared by the Center for Law and Social Policy (CLASP) and the National Employment Law Project (NELP), is a guide for state administrators, legislators and advocates seeking to implement work sharing. The next section summarizes the opportunities presented by the Layoff Prevention Act and lays out the timeline for implementation. The middle section explains in detail the new requirements in federal law and the final section highlights a set of additional provisions designed to protect participants in STC programs, set guidelines for employer participation and ensure strong administration.

Implementing the Layoff Prevention Act of 2012

The Layoff Prevention Act—contained in Subtitle D of Title II of the Middle Class Tax Relief and Job Creation Act of 2012 (P.L. 112-96)—offers a historic opportunity for states to adopt and enhance STC programs. The new law establishes a new definition of state STC programs; provides temporary funding to states that operate programs; and institutes a temporary federal program for states without programs in law.⁸ Both states with STC programs in law and those seeking to establish them have more options to implement work sharing as a result of the Act.

States with STC programs in law: Policymakers in states with established programs have until August 22, 2014 to amend their UI laws to conform to the new ten-part definition. They may receive up to three years of federal reimbursement of STC benefit costs and once they have enacted conforming state STC laws, they have until December 31, 2014, to apply for a portion of the \$100 million in grants for program improvement and outreach to employers.

States without STC programs in law: Leaders in states that are expected to adopt STC programs have two options. First, they can establish a new program by amending their state UI law. Once the law is enacted, the state can receive federal reimbursement of STC benefit costs for up to three years and no later than August 22, 2015. They also may apply for a grant to launch the program, educate employers and engage them in work sharing. Second, while state laws are being drafted and adopted, these states can enter into an agreement with the Secretary of Labor to make compensated work sharing immediately available to employers and workers. Under this temporary federal program, states with an approved agreement may receive partial reimbursement of benefit costs paid to workers for no more than two years. The U.S. Department of Labor has released guidelines for states interested in using this option.⁹

“The Layoff Prevention Act..., which is intended to support the development and expansion of state work sharing programs, would likely have a significant positive effect on net job creation.”

KEVIN HASSETT,
American Enterprise
Institute

Testimony before
the Senate Budget
Committee

September 15, 2011

The table below summarizes important deadlines for implementation of the Layoff Prevention Act.

Implementation Dates in the Layoff Prevention Act

STATE ACTIONS	End Dates
Amend existing state laws to conform to new STC definition	By August 22, 2014
Receive federal reimbursements of STC benefit costs paid under state law for up to three years	No later than August 22, 2015
Participate in an optional temporary federal STC program for up to two years	No later than May 24, 2014
Apply for grants to implement STC programs or promote use by employers	By December 31, 2014

Federal Requirements for STC Programs

The Layoff Prevention Act updates federal requirements for STC programs for the first time in twenty years. The new law clarifies that a central element in state programs is the submission and approval of a plan that documents how employee hours will be reduced and how program requirements will be met. If the plan submitted by the employer is approved, employees can file for STC benefits and may receive them provided they are otherwise eligible.

The new federal requirements are contained in subsection (v) of section 3306 of the Federal Unemployment Tax Act (FUTA). If states already have a STC program in law or enact one, they must administer it in accordance with the new definition. This section explains the ten elements of the new definition as listed in the following table.

ELEMENTS OF THE NEW STC DEFINITION

- Employer participation is voluntary.
- Employers reduce employee hours in lieu of layoffs.
- Employees whose hours are reduced by at least 10 percent but not more than 60 percent (as determined by the state) are not disqualified from unemployment compensation.
- Employees receive a prorated share of the unemployment benefits they would have received if totally unemployed.
- Employees meet work availability and work search requirements if they are available for their work week as required.
- Eligible employees may participate in appropriate training approved by the state UI agency.
- If health and retirement benefits are provided, employers must certify that those benefits will not be reduced due to participation in the STC program.
- The employer must submit a written plan to the state UI agency describing how it will implement requirements of the STC program (including a plan to give advance notice, where feasible, to employees whose work week will be reduced), as well as an estimate of the number of layoffs that would have occurred but for the STC program.
- The employer’s plan must be consistent with employer obligations under applicable federal and state laws.
- States can request and the Secretary of Labor can approve such other provisions that are determined to be appropriate for the purposes of STC.

“Like the temporary extension of unemployment insurance benefits, work share has a large bang for the buck, since distressed workers are likely to quickly spend any aid they receive. Work share’s economic effectiveness even exceeds that of straight UI benefits, because it reduces both the financial and psychological cost of layoffs. Work share can particularly help firms that expect reductions to be temporary, by reducing their costs for severance, rehiring and training.”

MARK ZANDI,
Moody’s Analytics

Testimony before
the Senate Budget
Committee

September 15, 2011

1. Employer participation is voluntary.

State law must specify that it is the employer’s choice to reduce hours under a work-sharing program instead of implementing a layoff. In other words, employers cannot be required to use work-sharing as an alternative to layoffs.

2. Employers reduce the number of hours worked by employees in lieu of layoffs.

This provision defines STC as an alternative to layoffs. There are a number of key points to be taken from this requirement:

- (a) An employer who is participating in a work sharing program is reducing the hours of some number of employees *in lieu of* laying off some smaller number of employees. Because the goal of the program is to avert job loss, an employer cannot reduce worker hours under this program unless the alternative would have been layoffs.
- (b) The layoffs being averted may be temporary or permanent. Work sharing programs established prior to the new federal law required that reductions in hours be in lieu of *temporary* layoffs; that is no longer the case. In reality, many employers facing layoff decisions because of declining demand are not able to assess whether a layoff will be temporary or permanent.
- (c) The use of the term “layoffs” infers that an employer applying to participate in a work-sharing program must be trying to avert multiple layoffs—at least 2 employees.

3. Employees whose hours are reduced by at least 10 percent but not more than 60 percent (as determined by the state) are not disqualified from unemployment compensation.

This provision ensures that employees participating in STC are not disqualified from receiving UI benefits on account of their STC participation. It also requires that state law prescribe a minimum and a maximum threshold for a reduction in hours. The minimum reduction must be *at least* 10 percent of normal hours and the maximum reduction must be *at most* 60 percent of normal hours. Most states with existing STC programs have a minimum of 10% or 20% and a maximum of 40% or 50%. A state that elects to adopt a 60% maximum is effectively allowing a participating employer to reduce a full-time worker’s schedule to two days per week.

4. Employees receive a pro rata portion of the unemployment benefits that they would have received if they were unemployed.

Work sharing benefits are a proportion of the UI benefits that the employee would qualify for if he or she was totally unemployed. To qualify for work-sharing benefits, an employee must have enough wages in his or her recent work history to qualify monetarily for regular UI benefits. The actual work sharing benefit correlates with the percentage reduction in the employee’s work hours. Therefore, if an employee’s 40 hours have been reduced by 20% to 32 hours, then the employee is entitled to 20% of his/her UI weekly benefit amount. Therefore, if the employee could qualify for a \$400 weekly benefit amount, then the employee’s work sharing benefit would be \$80 (20% of \$400). This is a unique benefit provided under approved work sharing plans; in almost all circumstances, state UI laws would otherwise deny benefits to claimants who work 4 out of 5 scheduled days. While some state laws might provide a partial

UI benefit when a claimant has a 40% or 60% reduction in hours, the resulting benefit would be much smaller than what would be available under a work sharing program.

5. Employees meet work availability and work search requirements while collecting STC benefits if they are available for their workweek as required.

Generally, unemployed workers who file for UI benefits must be able to work, available for work and actively seeking work; states provide various exceptions to the work search requirement if a UI claimant is on a temporary layoff and is employer-attached. An employee who is receiving work sharing benefits under an approved plan is employer-attached and is in fact providing services to the employer every week. This provision says that work sharing employees satisfy all the able/available/work search requirements as long as they are prepared to report to their work-sharing employer in their normal workweek. Thus, an employee who is experiencing a 40% reduction in hours is expected to be available for work *with the work sharing employer* for the 2 days the employee is not working. At the same time, the employee is not required to look for work with other employers on those days.

6. Eligible employees may participate, as appropriate, in training, (including employer-sponsored training or worker training funded under the Workforce Investment Act (WIA) of 1998) to enhance job skills if such program has been approved by the state UI agency.

This provision ensures that STC participants may participate in training if it is approved by the state workforce agency. Workers who build their skills while they are on a reduced work schedule may perform better in their current job or obtain new or improved skills that may be useful if they take another job. Employers seeking to remain competitive in their industries may also benefit from upgrading the skills of workers who are participating in STC.

Some employers may structure their work sharing plans in a way that the employees' reduced hours might be utilized for retraining. This could be training that the employer sponsors and conducts or it could be training that has been developed and funded under WIA. In the past, very few work sharing plans have included a training program component. Yet, this is an area that has real potential to turn what might otherwise have been simply lost production and wages for one segment of the workforce into an opportunity to upgrade workers' skills and enhance the competitiveness of the business.

The primary concern is that the training must meet the definition of "training" under the Fair Labor Standards Act (FLSA), and it cannot be "employment" which, by law, must be compensated with wages by the employer. The FLSA has a 6-part test for distinguishing between training and employment.¹⁰ The US Department of Labor summarized the FLSA test this way: "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." (Training and Employment Guidance Letter 12-09). Accordingly, employers should be cautious to insure that any training program operated in conjunction with a work sharing program meets the FLSA definition and is not, in effect, a day of work for which the employer

is legally obligated to pay wages. In summary, all training must be included in the STC plan or plan modification, and approved by the state workforce agency in order for an employee to receive work sharing benefits.

7. Employers are required to certify that, if they are providing health and retirement benefits under a defined benefit plan or are making contributions under a defined contribution plan to any employee whose workweek is reduced under a work-sharing program, those benefits will continue to be provided to participating employees under the same terms and conditions as though the workweek of such employees had not been reduced OR to the same extent as other employees not participating in the work-sharing program.

Most existing STC laws already have provisions similar to this. The purpose of this requirement is to ensure that employees participating in a work sharing plan maintain any employer-provided health insurance and retirement coverage at the same level (under the same terms and conditions) as if their hours had not been reduced. In addition, employers must certify that employees participating in an STC plan will be allowed to keep their health benefits and retirement coverage under the same terms and conditions as the employer's non-STC workforce. However, if the employer institutes a change in its health benefits or retirement coverage (e.g. increased worker contributions) that applies to the employees who are not subject to work sharing, the changes must be applied to STC employees as well. Employers who opt for work sharing as an alternative to layoffs should understand at the outset that a goal of the program (and a cost to the employer) is maintenance of existing health and retirement benefits for participating employees.

8. The employer must submit a written plan to the state UI agency describing how it will implement requirements of the STC program (including a plan to give advance notice, where feasible, to employees whose workweek will be reduced), as well as an estimate of the number of layoffs that would have occurred but for the STC program and such other information as the Secretary of Labor determines is appropriate.

Most state STC laws require the submission of a plan or an employer's application to participate in a work-sharing program. This new provision requires that the employer's written plan describe how the employer will implement program requirements. A typical plan, taking into account the new federal requirements, would include:

- (a) Identification of the unit of workers affected;
- (b) Certification that the reductions in hours are being implemented in lieu of layoffs;
- (c) An estimate of the number of layoffs that would have occurred if the employer did not implement work sharing;
- (d) Certification that the percentage of hours reduced will be within the range specified in the State STC law;
- (e) Certification that health and retirement benefits will continue for STC employees to the same extent as if their hours had not been reduced;
- (f) If applicable, how any related training program would operate;
- (g) How and when affected employees will be given advance notice of reductions in hours (including a collective bargaining representative, if applicable), and if advance notice is not feasible, an explanation of why it is not feasible;

- (h) Certification that the employer's STC plan is consistent with its obligations under state and federal law. (See Section (9) below.)
- (i) How the employer will comply with any other program requirements approved by the Secretary of Labor and enacted under state law. (See Section (10) below.)

9. The terms of the employer's plan and implementation must be consistent with employer obligations under applicable federal and state laws.

This provision effectively requires that the employer attest that its work sharing plan is consistent with any other obligations it has under state and federal law. For example, if the employer and workers in the affected unit are parties to a collective bargaining unit, federal or state labor law may apply with respect to whether changes in hours under the work sharing plan should be the subject of mandatory bargaining.

10. Upon request by the State and approval by the Secretary of Labor, only such other provisions are included in the State law that are determined to be appropriate for the purposes of the work-sharing program.

While provisions (1) through (9) are federal requirements under the Act, States may add such other provisions that are determined to be appropriate to the successful operation of their programs, but only if such provisions are approved by the Secretary of Labor. The twenty four states and the District of Columbia which enacted work-sharing laws before the passage of the Act included a range of provisions that are not reflected in the new federal requirements. Some of these provisions were included in guidance for model legislation that was issued by USDOL in 1983 and others are unique to certain states. States should carefully review their laws to determine if their existing STC provisions are consistent with new federal requirements, and whether they need to seek approval for unique provisions enacted prior to P. L. 112-96.

Recommended State Provisions

In addition to the federal requirements, state leaders should consider and adopt a set of other provisions that are intended to protect workers who participate in STC programs, set clear guidelines for employer participation, and ensure strong administration.

The provisions recommended in this section are modeled on those in more established state programs that carry out functions in addition to the approval of employer plans and the processing of workers' claims. These more robust state programs tend to:

1. Conduct outreach and promote the program with employers (and unions). For example, some states collaborate with business organizations and unions to publicize the program. Other states include information about the STC program in the materials and outreach conducted by rapid response teams that address major layoffs. The Layoff Prevention Act provides grants to states to support these activities.

2. Monitor implementation of the employer's plan and any changes during the life of the plan. Program officials in some states work with employers to ensure that plans are adapted as business conditions change. Many states have the authority to approve new or additional plans, modify existing plans and, in some cases, revoke a plan if program requirements are not met.

“Broader, more aggressive use of such (work share) programs could prevent job losses.”

DEAN BAKER,
Center for Economic and Policy Research

ABC News,
December 2, 2009

3. Collect data on program usage and trends and report information to state policymakers. Some state workforce agencies collect data on the number of employers filing STC plans, information about the size and sector of businesses using the program, the number of layoffs averted through use of STC, the amount of STC benefits paid and other program data.

The additional provisions recommended in this section are grouped into three categories: 1) safeguards for STC participants; 2) guidelines for employer participation in STC programs; and 3) state administration and other provisions.

Safeguards for STC participants:

Where employees are represented by a labor organization, the work sharing plan must be approved by the workers' collective bargaining agent.

The initial USDOL guidance (UIPL 39-83, July 29, 1983) for the temporary STC program specified that an employer's STC plan should only be approved if:

In the case of employees represented by an exclusive bargaining representative, the plan is approved in writing by the collective bargaining agent.

This is not a required element under the Act, but many states that operated STC programs prior to the date of enactment in February 2012 have this requirement in their laws, rules or practices. The original purpose of the provision was "to ensure that both labor and management are satisfied with the plan and to minimize possible problems in connection with the plan." While business interests worked to exclude this provision from the required elements of a state's STC law under the Act, there are still good policy reasons to include this provision (with the Secretary's approval):

- (a) Because reductions in hours (and wages) are a subject of mandatory bargaining under federal labor law, in most instances, a unionized employer will be bound to negotiate the changes in hours that come with a work-sharing plan anyway.
- (b) The original purpose of minimizing problems in labor-management relations remains an important policy goal.
- (c) The provision has worked without reported problems in the vast majority of states with active work sharing programs.

Model Provision: Texas state law requires an employer to obtain the approval in writing of the collective bargaining agent if an employee who participates in a shared work plan is covered by a collective bargaining agreement.

<http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.215.htm>

Even when there is no collective bargaining agent, employers should share the STC plan with employees and provide them with an opportunity for comment prior to submission to the state agency.

If there is no collective bargaining agent, workers should still have an opportunity to review the plan and submit any comments to the state agency. Workers affected by work sharing should have the opportunity to express their concern or support for the proposed reduction in hours. This requirement helps to ensure that both employers'

and workers' interests are taken into account when the plan is approved. It does not in any way limit an employer's authority to submit a work-sharing plan to the state UI agency, or impair the agency's authority to approve such plan.

Model Provision: Connecticut regulations require employers to share the plan with affected workers, if there is no collective bargaining agent, and provide a 7-day comment period prior to submission of the plan to the state agency.

http://www.ctdol.state.ct.us/progsupt/bussrvce/shared_work/swp-regs.htm

Wages from employers other than the STC employer are disregarded in the calculation of the work sharing benefit amount.

State unemployment insurance laws have provisions that call for some form of reduction in a claimant's UI weekly benefit amount when the claimant has wages from a part-time job; typically, the state law calls for a small amount of wages to be disregarded in some way so that the claimant is generally better off taking a part-time job than not. Deductions are made based on the claimant reporting these wages to the state UI agency on a weekly basis and the state then calculating a reduced entitlement based on a formula prescribed by state law.

Because STC claims are filed in many instances by employers (not claimants), the UI agency is receiving payroll records of the hours worked as the sole basis for calculating weekly STC payments. If an employee has a second part-time job with another employer, the STC employer does not have the claimant's wage information from that job to report, nor does its method of transmitting data to the UI agency allow for it to be provided in an easy or expedient way. From the employer's perspective, a critical feature for a successful STC program is a minimal administrative process that insures that employees are paid accurately and in a timely manner. An STC program starts to break down if employees do not receive their STC payments on a regular and predictable schedule.

For these reasons, states are advised to enact a provision that disregards wages from any non-STC employer in the calculation of an STC employee's weekly work sharing benefit amount. Any incidental savings derived from deducting outside earnings will be outweighed by the negative impact of the related process requirements, including: (a) delays while the employee secures outside wage information, (b) involving the STC employer in the handling and transmission of an employee's wage information from another employer, (c) the issues of culpability when mistakes are made in the submission of such information, (d) resultant delays in STC payments, and (e) the potential impact that these process issues can have in terms of negatively impacting the employer's (and workers') continuing interest in the program.

Model Provision: Connecticut regulations provide that STC employees are not subject to state UI law regarding partial unemployment benefits and that "wages from other than the shared work employer shall be disregarded in the calculation of the shared work benefit." (Conn Agencies Regs Sec 31-250-11 (b))

<http://www.ctdol.state.ct.us/appeals/ctregs.htm#31-250-11>

“...We applaud the employers who made the moral decision to keep their businesses going with fewer hours just so their workers can count on some income. If we act swiftly to pass Work Sharing legislation, workers in these companies could get unemployment for the lost hours that helped preserve jobs.”

GOVERNOR
EDWARD RENDELL,
Commonwealth of
Pennsylvania

2010 Annual Budget
Address

Employers should be precluded from adding employees to units subject to a work sharing plan.

Workers who are on a reduced work schedule should return to a full work week before new workers are added. The goal of STC is to avoid layoffs; this goal is undermined (or brought into question) if an employer hires new employees or transfers employees to a unit in which other employees are on a reduced work schedule. This provision should apply to the affected unit or the company if the STC plan is company-wide.

Model Provision: Michigan state law requires an employer’s assurance that new employees will not be hired in, or transferred to, an affected unit while an STC plan is in effect.

<http://legislature.mi.gov/documents/2011-2012/billenrolled/Senate/pdf/2012-SNB-1094.pdf>

STC participants who exhaust all of the STC and regular UI benefits available to them should be eligible for extended benefits.

During a recession, state extended benefit programs are triggered or the federal government is likely to authorize emergency unemployment assistance for workers who exhaust regular benefits. STC participants who exhaust STC and regular benefits should be eligible for the extended benefit program if it is in effect. Nearly every state law includes this provision, which ensures that workers will qualify for additional weeks of assistance at a time of high unemployment. (Note: In operation, because STC participants typically receive less than their maximum available state UI benefits, very few ever receive any form of state or federal extended benefits.)

Model Provision: Iowa state law requires that an individual who has received all of the STC and regular UI benefits available in a benefit year be considered an “exhaustee” for the purposes of the extended benefit program.

<http://search.legis.state.ia.us/NXT/gateway.dll?f=templates&fn=default.htm&vid=default>

Guidelines for Employer Participation in STC Programs:

STC benefits should be charged to employers (or attributed, in the case of reimbursing employers) in the same way as regular unemployment insurance benefits are charged.

Federal law requires that all state UI laws—of which STC is a special subcategory—charge employers based on their “experience with unemployment or other factors bearing a direct relationship to unemployment risk”¹¹. The experience rating principle provides that an employer’s unemployment tax rate will rise based on increased layoff activity (and UI claims by former employees) and will remain low when employment is stable and there are few UI claims.¹²

The 1983 USDOL guidance clearly stated that “STC benefits shall be charged to employers’ experience rating accounts in the same manner as unemployment compensation is charged under state law.” The rationale for this requirement was that “STC benefits are benefits paid from the state unemployment fund under special conditions.” In terms of the cost of the program to employers, this provision makes financial sense. Under

a typical STC plan, an employer is essentially substituting one personnel decision (lay off one worker) for another (reduce hours of five employees by 20 percent). The single worker who is laid off receives a full week of UI benefits; the five workers whose hours were reduced and lost a day's pay under the STC plan each receive 20 percent of the total UI benefit that the laid-off worker would have received. Application of the experience rating principle to STC benefits essentially maintains the symmetry between STC costs and those the employer would otherwise incur with regular UI. In other words, the employer's UI-related costs should be essentially the same under an STC plan as they would have been with a traditional layoff.

Non-charging option during federal reimbursement period. However, under the Layoff Prevention Act, there is a major exception to the experience rating requirement for STC benefits. Section 2162 of the Act provides that states operating an STC program that is consistent with the provisions of the Act will receive 100 percent federal reimbursement of all STC benefits paid for up to three years. The reimbursement provision gives states (and employers) a financial incentive to expand their STC programs. The logic is that while the state's unemployment trust fund incurs costs for UI benefits paid, there will be no trust fund cost for any unemployment that results in reduced hours (and corresponding STC claims) during the initial transition period. Since a majority of state UI trust funds are facing solvency problems, encouraging employers to elect work-sharing instead of layoffs when they are facing reduced demand is a way of protecting the trust fund from depletion during an economic downturn.

USDOL has interpreted the reimbursement provision as giving states the option to not charge employers during the 3-year reimbursement period. In UI Program Letter 22-12 (issued 6/18/12), USDOL interpreted section 2162 as providing legal authority for states *not* to charge employers for STC payments that are subject to federal reimbursement if permissible under state law. Thus, states may include provisions in their STC laws that relieve participating employers of any STC costs for as long as the federal reimbursement applies; once the reimbursement ends, states must again apply their charging provisions to STC payments.

States Should Consider Carefully Whether to Relieve Employers of STC Charges during the federal reimbursement period. In deciding whether to relieve employers of STC charges during the federal reimbursement period, state legislatures should weigh the relative benefits of expanding the STC program through a temporary "free trial offer" to employers against the trust fund savings to be derived by charging employers for STC in the same way they will be eventually charged for UI benefits after the federal reimbursement period ends. States that elect the non-charging approach are basically passing potential trust fund revenues back to the STC employer. This will likely generate greater employer interest in the program and increase the take-up rate for work sharing nationally since STC will become (during the reimbursement period) a no-cost alternative to UI. By giving states up to three years to enroll employers at no cost, USDOL has provided states a very substantial tool for selling the program, albeit one that is time-limited. On the other hand, a countervailing concern is whether non-charging could make STC *too* attractive for an employer on the fence about whether to implement a workforce reduction.

Approximately half the states have insolvent UI trust funds in the aftermath of the Great Recession and the high unemployment rates of the past four years. These states may elect to continue (or begin) applying normal experience-rated charging to STC payments during this period because federal reimbursements will help improve the solvency of the trust fund. The decision to keep charging provisions in place may be particularly easy for states with long-standing programs in which employers have become accustomed to the idea that STC costs are the same as UI costs for averted layoffs.

Negative balance and maximum-rated employers should be allowed to participate in STC programs.

State UI laws provide for a range of tax rates between a statutory minimum and maximum. Experience rating results in those employers who generate the highest levels of unemployment (and related UI claims) being taxed at the maximum UI tax rate. When an employer at the maximum rate pays less in UI taxes than its former employees are receiving in UI benefits, that employer is referred to as a “negative balance employer.”

Some state STC laws have special treatment for “negative balance employers.” Colorado and Kansas prohibit negative balance employers from participating in the STC program. Other states subject negative balance employers participating in STC to different rules; Florida sets the maximum UI tax rate 1 percent higher for STC employers, while Oregon subjects them to a separate reimbursement system to recover costs.

It is our view that states not adopt special charging rules for negative balance employers just because they are participating in work sharing. While states should make policy decisions that address any threat to solvency posed by maximum tax rates that are set too low, those decisions should be made in the context of the UI system and trust fund as a whole. An STC employer at the maximum tax rate (or with a negative balance) is no greater or lesser a problem for a state trust fund than any other non-STC employer. Employers should be encouraged to opt for reducing hours through work sharing instead of worker layoffs, and the tax rules and consequences should be the same whether STC or regular UI is used.

Employers with UI tax delinquencies should be prohibited from participating in an STC program.

A number of states (such as Connecticut and Kansas) prohibit employers with a UI tax delinquency from participating in the STC program. This provision is recommended because unlike the “negative balance employer”, businesses that are overdue in paying their UI taxes are out of compliance with state UI law.

The STC program should not be limited to employers with a large number of participating employees.

States with existing STC programs generally establish a minimum number of employees that must participate under an STC plan. Since, to date, the premise has been that at least one employee’s layoff is being averted, states have generally set the minimum number required for STC participation between 2 and 5 employees. The STC program and the option to reduce hours should be as accessible to employers facing a workforce reduction as the UI program is when the employers opt to implement layoffs. States should not adopt a minimum employee requirement like the one adopted by

Oklahoma that sets the threshold for participation at 50 employees, thereby making the program inaccessible to most employers and a large segment of the state's workforce.

STC should not subsidize seasonal employment.

STC provides employers with an additional tool to respond to a temporary decline in demand or deterioration in business conditions. It is not intended to subsidize seasonal employment or a fluctuation in economic activity that is an inherent part of the industry or occupation. A recent survey indicates that seasonal workers are excluded from STC participation in thirteen states.¹³ In addition, the Act prohibits federal reimbursements for STC benefits paid for individuals employed on a seasonal, temporary or intermittent basis.

Model Provision: New Hampshire state law says the STC plan “shall not serve as a subsidy of seasonal employment during the off-season, nor as a subsidy of temporary part-time or intermittent employment.”

<http://www.gencourt.state.nh.us/rsa/html/xxiii/282-a/282-a-mrg.htm>

State Administration and Other Provisions:

State UI Agencies should have strong rules for administering the STC program.

Many state agencies have the authority to approve and reject employer plans based on established criteria, to modify plans in response to changing business conditions, and to revoke approval if the plan is not being carried out according to its terms and intent. More specifically, states should have the necessary authority and clear guidelines for:

Approval/Rejection of STC Plans. In order for work sharing to work as an alternative to layoffs, an employer needs to know that the state UI agency can facilitate approval of its STC plan in time to use it for an anticipated workforce reduction. State UI agencies need enough time to review the employer's plan and put the necessary processes in place to make STC payments instead of UI payments. States should specify a time frame (no more than 30 days) within which a plan will be approved.

Generally, the following factors should be considered in approving a plan:

- Identification of an affected unit;
- Identification of participating employees;
- Employer certification that it will comply with all STC legal and program requirements;
- Employer certification that it is not delinquent in the payment of UI taxes.

Modification of plans. The state UI agency should provide for the circumstances under which it will approve an employer's request to modify its STC plan so long as the modification is not substantial and is consistent with the original purpose of the plan. Generally, employers should be able to adapt their plans in response to changing economic circumstances, but the UI agency should have the necessary latitude to preclude repeated manipulation of the program for purposes other than averting layoffs in a number roughly equivalent to the reduction in hours under the plan.

Adequate administrative authority to administer the STC program. In order to properly administer the program and ensure that STC plans are being implemented for their intended purpose and in compliance with STC and UI law, the state UI agency should

generally have the following authority, in addition to authority granted under state UI law:

- Authority to limit the number of approved STC plans for an employer;
- Authority to investigate employee complaints or potential non-compliance with STC plan;
- Authority to revoke an STC plan for good cause.

Model Provision: Washington state law specifies that the state agency shall approve or reject a plan within fifteen days of receipt. It allows for plan modifications if hours are increased or decreased beyond the level of the original plan or if there are other changes in conditions. It also establishes penalties for misrepresentation and provides authority to revoke approval of a plan for good cause. An additional state regulation stipulates that STC employers may have two plans within a three-year period and are not eligible for another plan until twelve months or more after the expiration of the second plan.

<http://apps.leg.wa.gov/RCW/default.aspx?cite=50.60>

State laws should include a severability clause to ensure that, if a particular provision is reviewed and not approved by the U.S. Department of Labor, the rest of the law is not affected.

If a particular provision in a state law is reviewed by the U.S. Department of Labor and not approved, the entire law may be put at risk. The STC program may have to cease operations, leaving employers and workers in limbo. To avoid such an adverse outcome, state laws should allow for individual provisions to be invalidated by federal action without undermining the entire statute. This may be particularly important in those states that have unique STC provisions that require approval by USDOL under subsection (v)(10) of section 3306 of FUTA.

Model Provision: Michigan's STC law provides that if any particular provision is held invalid by the U.S. Department of Labor, such provision shall not apply.

<http://legislature.mi.gov/documents/2011-2012/billenrolled/Senate/pdf/2012-SNB-1094.pdf>

Conclusion

Five years after the start of the Great Recession, the nation continues to struggle with slow job growth and high unemployment. Long-term unemployment in particular remains at historic levels. About 40 percent of the unemployed, or about 4.6 million workers, have been jobless for six months or more and roughly 3 million have been without work for a year or more.

States and the federal government should take action to address the challenge of high and sustained unemployment. Federal unemployment benefits should be continued beyond the end of 2012, and long-term unemployed workers should have better access to a comprehensive package of reemployment services, workforce training, individual supports and paid work opportunities that will help those who have exhausted UI to re-enter the workforce.

States should seize the opportunities provided by the Act to adopt, or revitalize, STC programs. Work sharing, if implemented widely, can become an integral part of a state's response to the unemployment crisis because it can help reduce layoffs and mitigate the effects of job losses on workers and communities. Economist Gary Burtless of the Brookings Institution recently wrote that "changes that spread the sacrifice associated with recessions broadly across the workforce" are likely to be instrumental, over time, in addressing long-term unemployment.¹⁴

Evidence from states with STC programs demonstrates that work sharing is likely to have its greatest impact at the onset of a recession. Responsible business planning at the start of an economic downturn involves a range of decisions about how to withstand reduced demand for products or services while keeping the employer's operations vital and nimble enough to respond to further changes. Whether altering a product line or just waiting for the next big production order, many employers want options that allow them to avoid layoffs during a down period so they will have a trained workforce when business demand returns. Work sharing enables employers to adopt a business model that prioritizes the value of productive employees and relies on use of layoffs only as a last resort. By reducing unemployment, work sharing keeps more employees connected to the workforce and engaged as active consumers in their communities.

The value of STC in maintaining employment stability is one of the important lessons to emerge from the Great Recession. With the incentives, support and guidance available through the new law, states should move swiftly to establish work sharing as a core economic security program that can benefit workers, businesses and communities. As state legislation is developed and enacted, leaders and advocates are urged to consider and incorporate the provisions identified in this guide, which are modeled on robust STC programs that work for employees as well as employers.

"I am hopeful tonight because I've seen the spirit at work in America. I've seen it in the family business whose owners would rather cut their own pay than lay off their neighbors, and in the workers who would rather cut back their hours than see a friend lose a job."

**PRESIDENT
BARACK OBAMA**

**November 6, 2012
(Election Night)**

ABOUT THE AUTHORS

NEIL RIDLEY, Senior Policy Analyst at the Center for Law and Social Policy (CLASP), has written extensively about the use of work sharing as an alternative to layoffs and other ways to respond to high unemployment.

GEORGE WENTWORTH, a Senior Staff Attorney at the National Employment Law Project (NELP), focuses on unemployment insurance issues and previously worked on the implementation and administration of work sharing in state government.

ENDNOTES

- 1 Jon C. Messenger, *Work Sharing: a Strategy to Preserve Jobs during the Global Jobs Crisis*, Geneva: International Labor Organization, June 2009.
- 2 The terms work sharing and STC are used interchangeably in this paper.
- 3 Katharine G. Abraham and Susan N. Houseman, *Short-Time Compensation as a Tool to Mitigate Job Loss? Evidence on the U.S. Experience during the Recent Recession*, Upjohn Institute Working Paper 12-181, Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2012.
- 4 Estimates of jobs saved due to work sharing provided by Sen. Jack Reed's office, based on data provided by the U.S. Department of Labor, Employment and Training Administration.
- 5 Dean Baker, "Work Sharing: The Quick Route Back to Full Employment," Center for Economic Policy and Research, June 2011.
- 6 Katharine G. Abraham and Susan N. Houseman, *Short-Time Compensation as a Tool to Mitigate Job Loss? Evidence on the U.S. Experience during the Recent Recession*, Upjohn Institute Working Paper 12-181, Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2012.
- 7 Abraham and Houseman, 2012.
- 8 A previous report prepared by CLASP and NELP, *A Breakthrough for Work Sharing*, summarized the Layoff Prevention Act.
- 9 UIPL 03-13 (December 4, 2012) http://wdr.doleta.gov/directives/attach/UIPL/UIPL_3_13_Acc.pdf
- 10 The 6 actors for determining that an activity is training rather than employment under the FLSA are:
 - a. 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;
 - b. The training is for the benefit of the trainees;
 - c. The trainees do not displace regular employees, but work under their close observation;
 - d. 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
 - e. The trainees are not necessarily entitled to a job at the conclusion of the training period; and
 - f. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training. (Training & Employment Guidance Letter 12-09, dated January 29, 2010)
- 11 Section 3303 (a), Federal Unemployment Tax Act.
- 12 Governmental and non-profit employers may opt out of the experience-rated tax system of state UI laws. Instead of paying quarterly unemployment taxes on employee wages like private sector employers, government and non-profit employers may elect to become "reimbursing" employers and pay dollar-for-dollar the cost of UI benefits paid to eligible former employees. This same principle applies to STC benefits paid when the participating STC employer is a governmental or non-profit employer. For purposes of the experience rating discussion above, the requirement to experience rate or not applies equally to the requirement of a governmental or non-profit employer to reimburse the unemployment trust fund dollar-for-dollar.
- 13 Derek Thomas, *Work Sharing: A Win-Win-Win Strategy for Avoiding Job Loss*, Indiana Institute for Working Families, December 2011, p. 28.
- 14 Gary Burtless, *Long-Term Unemployment: Anatomy of the Scourge*, The Cutting Edge, July 28, 2012.