The Fiscal and Legal Framework For Creating a Community Service Employment Program

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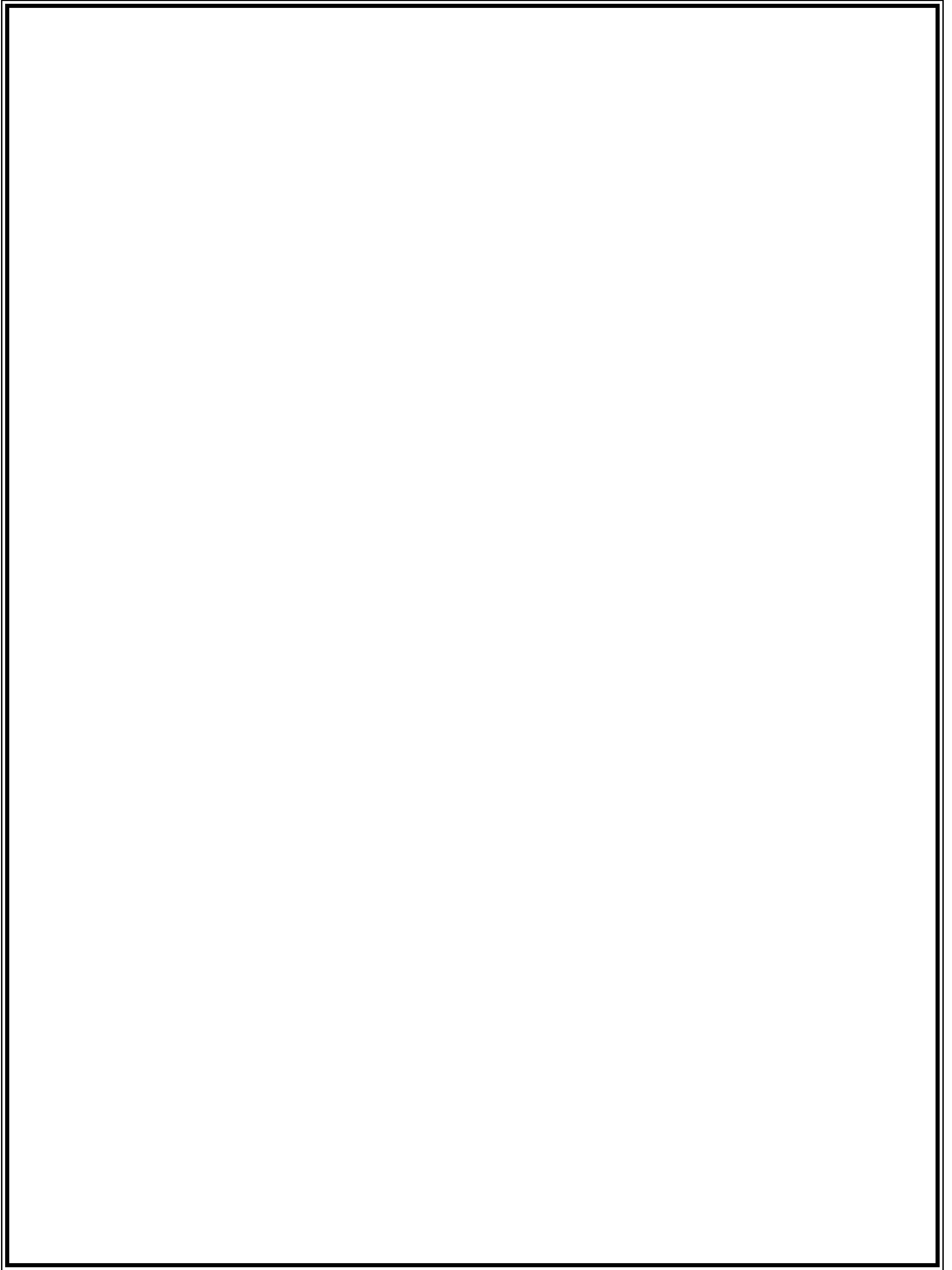

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Introduction

A community service employment program for TANF recipients - a program to create publicly funded, wage-paying jobs designed to provide employment for individuals, and to address unmet community needs - offers a number of potential advantages as compared to other work activities. A community service employment component could serve important state goals in TANF implementation by providing workforce experience and training for individuals; income from employment for families; and needed services for communities. At this point, wage subsidies to private employers and unpaid work experience programs are more familiar options for many states. However, it is doubtful whether private wage subsidies can effectively operate on the scale needed to provide work for a substantial number of the TANF families who are unable to find unsubsidized employment. And, as compared to unpaid work experience, a program of community service employment could generate the formal work history and self-esteem that flows from employment; greater income for affected families and their communities; and more extensive community participation and support.[1]

As state and local agencies continue the process of designing and implementing state programs under TANF, and begin the process of planning for the use of newly authorized Welfare to Work grant funds, community service employment is under active consideration in cities, counties and states in many parts of the country. In considering how a CSE program might be structured, a number of questions arise concerning the status of program participants under laws concerning employer-employee relations, the identity of a participant's "employer" for various legal purposes, and the costs associated with the jobs that would be created. This paper is intended to assist legislators and administrators by analyzing these issues both for a program that would create wage-paying positions, as well as for a work experience program in which participants work in exchange for the welfare grant that is ordinarily available through a state TANF program. Our conclusion is that the incremental costs and obligations of implementing a CSE program as compared to an unpaid work experience program are modest and likely to be quite manageable. To the extent that a program to create wage-paying positions will improve the financial security of participants and their families through receipt of the Earned Income Tax Credit and is more likely to improve their employment prospects, a CSE program is the preferable alternative.

Section I analyzes the legal and fiscal questions that will arise in developing and implementing a CSE

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[1] See, **Community Service Employment: A New Opportunity Under TANF**, (CLASP, Revised: November 1997), and **Shattering the Myth of Failure: Promising Findings From Ten Public Job Creation Initiatives**, (Center on Budget and Policy Priorities, November 1997).

program, with a particular focus on the requirements of federal law. Issues that may arise under state or local law will be highlighted in a more general fashion because in many cases the applicable rules and standards vary considerably from one state to another, and from one locale to another in a single state. Section II provides a comparable analysis of the legal and fiscal obligations associated with a work experience program in which a participant performs work in exchange for a welfare grant.

Taken together, Sections I and II show that a core set of workplace protections will apply equally to participants in both a CSE program and a work experience program. In both types of programs, basic protections under the Fair Labor Standards Act (federal minimum wage protection) will apply unless participants fall within narrow exemptions for "trainees" or "volunteers." Coverage under state Workers' Compensation programs is also likely in either type of program, and together with employer liability insurance, will be extremely advisable regardless of the applicability of any legal mandate. Finally, participants in both types of programs will enjoy protection under health and safety and antidiscrimination laws.

The principal difference between the two approaches involves the treatment of payments to participants for purposes of payroll taxes, income tax applicability, and eligibility for the federal Earned Income Tax Credit. In a CSE program, wages will almost certainly be subject to payroll taxes under FICA, and treated as earned income for purposes of income tax liability and eligibility for the EITC. Payments made to participants in a work experience program will not qualify as earned income in determining eligibility for the EITC, and it is extremely uncertain whether they will be subject to payroll taxes or income tax liability. It also appears more likely, although not certain, that CSE participants will be covered under state Unemployment Compensation laws, whereas work experience participants are not likely to be covered. However as discussed below, in Section, , it is unlikely that UC coverage will be a significant cost factor. Finally, CSE participants will have a stronger claim to coverage under federal and state labor laws.

In a CSE program in which gross wages are limited to the value of a family's welfare benefits, the principal incremental cost of a CSE program as compared to a work experience program will be the cost of payroll taxes. These costs, 15.3% of wages, will be modest in comparison to the 34% or 40% of wages that will be returned to participants through the federal Earned Income Tax Credit. In a program offering positions that will pay gross wages in excess of the welfare benefit, through higher wages, more hours of work, or both, the additional incremental costs will be higher and depend on the specific wage levels and hours made available to participants. A set of Tables is attached as Appendix A, which reflect cost comparisons between CSE and work experience.

Critical to an understanding of the issues addressed below, is familiarity with a guide published by the U.S. Department of Labor in May, 1997, **How Workplace Laws Apply to Welfare Recipients** (Guide). The Guide attempts to specify how federal laws such as the Fair Labor Standards Act, the Occupational Safety and Health Act, Unemployment Insurance, and various antidiscrimination laws affect welfare recipients participating in work programs under TANF. The Guide clarifies one important point that has many significant implications: the new welfare law does not exempt welfare recipients from federal employment laws. Whether a program participant is covered by a particular federal law will be determined based on the generally applicable standards for coverage and eligibility set forth in each law. The Guide's more specific statements about the likely applicability federal workplace laws will be discussed in greater detail below.

Taxpayer Relief Act Amendment to Federal Earned Income Tax Credit

Since issuance of the Guide, one change in federal law was enacted by Congress concerning the eligibility of certain work program participants for the federal Earned Income Tax Credit. A provision included in the Taxpayer Relief Act of 1997 (Section 1085(c)) as an amendment to the Internal Revenue Code specifies that payments made to participants in work experience or community service programs under Section 407(d)(4) or (7) of TANF are not to be considered earned income for purposes of calculating an individual's eligibility for the Earned Income Tax Credit. This restriction will only apply to the extent the payments are subsidized under the state's TANF program. However, if a CSE program is categorized more accurately as offering either, or both, "subsidized public sector employment" (Section 407(d)(3)) or "subsidized private sector employment" (Section 407(d)(2)) the newly enacted restrictions on EITC eligibility will not apply.

TANF-Related Funding Sources for CSE

Identifying a funding source for a CSE program is inevitably a critical concern for anyone considering the development of such a program. Funding for a CSE program designed to serve TANF recipients might come from one, or a combination of funding sources directly linked to TANF, including:

- federal TANF block grant funds;
- state maintenance of effort (MOE) funds under TANF;
- federal Welfare-to-Work grant funds; and
- state matching funds that are required as a condition for receiving Welfare-to-Work block grant funds.

Significant program design implications will result depending upon which of these four sources of funds are used, including among others the applicability of the 60-month time limit that applies to federal

TANF funds, and the targeting provisions that apply to federal Welfare-to-Work funds.[2] However, the legal and fiscal implications of designing and implementing a CSE program that are discussed below will generally not vary, no matter which of these four sources are used, or whether other non-TANF funding sources are used in addition to, or instead of TANF-related funding sources.

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[2] See, **The New Framework:** (CLASP, 1997) for a thorough analysis of the relationship between federal TANF block grant funds and state "maintenance of effort" (MOE) funds, and **The BBA...** (CLASP, 1997) for a detailed description of the federal provisions establishing the Welfare-to-Work block grant and the limitations on the use of federal Welfare-to-Work funds and required state matching funds.

I. The Fiscal and Legal implications of Creating a CSE Program

A. Background

There are three distinct areas in which the fiscal and legal implications of creating a CSE program should be considered, that is, where a participant will be considered to be an employee. These are:

- Requirements that have direct cost implications including minimum wage requirements, FICA payroll taxes, Workers' Compensation, Liability Insurance, and Unemployment Compensation;
- Legal responsibilities that create potential liability for wrongful conduct including non-discrimination, and safety and health laws; and
- Employer specific programs mandating rights and benefits including Civil Service, collective bargaining agreements, protections against displacement, and employer personnel policies.

While a participant may clearly qualify as an employee, the identity of his or her employer (or employers) may vary depending upon how the CSE program is structured, and the provisions of the particular law in question. In addition, regardless of the organization which is a participant's employer under a particular law, many of the costs that result from a participant's status as an employee can be assumed by the government agency which establishes the CSE program. That is, the costs of wages, payroll taxes, and required insurance coverage can all be borne by the government agency using public funds, and in most cases other organizations which might participate in the program can be indemnified against financial loss. Nonetheless, the organizations which participate in the program will want to understand their legal obligations and rights when they take on the status of a participant's employer. This will be especially true for a "worksite employer," the entity with which a participant is placed, and which assigns and supervises his or her daily work.

There are a number of options for structuring the administration of a CSE program.[3] The tasks that must be undertaken include:

- Project development - including identifying work projects and placements, and participant assessment and referral;

[3] Reference will also be made to two existing models for a CSE program, the Vermont CSE program, and the proposed Job Opportunities in Basic Services (JOBS) Program in Pennsylvania. These two options are described in Appendix B.

- Fiscal administration - including payroll and tax administration, arrangement of coverage for various types of insurance that might be required, e.g., Workers' Compensation, liability, and required reporting attendant upon these functions; and

- Direct supervision - the supervision of work by the organization with whom a participant is placed.

There are numerous configurations that might be developed for accomplishing the various tasks described above:

- A state or local <u>public agency</u> might assume responsibility for both project development and fiscal administration. In this model, the <u>worksite employer</u> provides and supervises the work of the participant. The Vermont CSE program uses this model.

- An <u>intermediary organization</u> might be established to take responsibility for project development and fiscal administration. Here, as in the first model, the <u>worksite employer</u> would have fewer of the administrative responsibilities normally the obligation of an employer. A number of former supported work projects operated in past years have relied on this model.

- The <u>worksite employer</u> might be responsible for fiscal administration, as it is for its regular employees, with project development being the responsibility of a <u>public agency</u> or <u>intermediary organization</u>. This model is the one typically used in current wage subsidy programs that focus on private sector employment.

The identity of the employer, or joint-employers, may vary for each of the three models and may also vary based on the particular law in question. Insofar as the state agency designs a program in which it assumes a set of costs ordinarily borne by an employer, e.g., FICA contributions, various forms of required insurance coverage, the legal identity of the employer for these purposes may not be critical, because the agency will insure that the obligations are met.

Certain employer obligations will be the responsibility of the worksite employer no matter which of the models is used, although the state agency or intermediary, or both might be considered to be joint employers with the worksite employer for some purposes. Legal obligations that may fall into this category include:

  - the obligation to treat workers in a non-discriminatory manner by reason of race, sex,

national origin, disability, etc.; and

- the obligation to provide working conditions that comply with laws protecting the safety and health of workers.

Finally, the identity of the employer may be critical insofar as both worksite employers and state agencies have regular employees and may provide for fringe benefits including health insurance, pension coverage, paid leave, and rights under grievance procedures and seniority systems. In the case of public entities these may be established under state or local law, and whether public or private, collective bargaining agreements may also establish a set of rights and obligations in this area.

The following sections analyze in more detail the set of legal issues that arise because participants will be considered employees, identify how the choice of program model may affect the rights and obligations of various parties, and identify the costs associated with the employee status of the participant, if any.

B. Legal Obligations with Significant Fiscal Implications

1. Wage Requirements

Under nearly all circumstances, a worker in a CSE program will be covered under the Fair Labor Standards Act (FLSA), which applies both to states and non-profits.[4] **The DoL Guide clarifies that participant will not be exempt from coverage because the position is funded with TANF-related funds, nor because it is included as part of a TANF work activity.** The definition of an "employee" under the FLSA is especially broad, focusing on the "economic realities" of the work, not the label assigned the worker by the employer. While there are FLSA exemptions for trainees and

[4] Many states have broader state wage and hour laws, including a higher minimum wage than required by federal law. Also, in some states, such as New York, there are "prevailing wage" requirements that apply to state "public works" projects and contractors who employ workers in these jobs. A lawsuit was recently filed on this issue, in which the state court issued a preliminary injunction requiring a determination of the prevailing wage for workfare participants employed in jobs similar to regular workers. Brukhman v. Guiliani, Case No. 407215/96 (New York County, Supreme Court) (Decision and Order, May 20, 1997). Finally, slightly different rules apply to the states in terms of enforcement of the FLSA. For example, according to a recent court case, states cannot be sued in federal court for back wages, only in state court. However, federal courts continue to have authority to issue injunctions regulating state practices with regard to the FLSA. These limitations are based on the 11th Amendment of the U.S. Constitution which regulates the "immunity" of the states. Adams v. State of Kansas, 934 F.Supp. 371 (D. Kansas 1996).

volunteers, these exemptions have been narrowly construed by the courts and DOL.[5] Nor is the worker's status as a part-time or temporary employee a factor which affects FLSA coverage.

There are, however, some specific issues of coverage and liability that may be implicated by working in a public job creation program. First, there is a broad standard of "joint employment" under the FLSA, so that the state, the intermediary and the worksite employer may share liability depending on the degree of the control exercised over the work and other considerations. For example, the DOL has issued guidelines stating that where intermediaries are involved, such as a temporary employment agency, both the agency and the worksite employer are jointly responsible for compliance with the FLSA if there are any violations. However, where there is an intermediary involved, the intermediary, rather than the worksite employer, has primary responsibility for compliance with the various record keeping requirements of the FLSA.

Whether the requirement that the minimum wage be paid will result in increased costs over and above the public assistance that is otherwise available will depend on several factors. The wages that must be paid will depend on the hours of work that are required or made available to participants. One approach that might be taken is to calculate the number of required hours by dividing the monthly benefits that are already available, by the applicable minimum wage, or prevailing wage standard. The Vermont CSE program has taken this approach. When individuals reach the time limit on AFDC/TANF assistance and enter the program, the monthly benefit they are receiving is recalculated based on the minimum wage to determine the number of hours they will be required to work. In this model, the gross wages paid to participants equal the welfare benefit they are otherwise eligible to receive.

One important consideration is the extent to which the state is depending upon being able to count CSE participants in meeting the TANF participation rates.[6] If a CSE program is initiated on a pilot or

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[5] For example, in Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985), the U.S. Supreme Court decided a case involving a non-profit, religious-based organization that employed "volunteers" (rehabilitating drug users and others) to provide various services in return for food, clothing, and shelter, rather than providing cash salaries. The Court found that the participants met the "economic realities" test, distinguishing court cases on "trainees" on the grounds that exempt training programs involved especially short periods of time, limited work, and "no immediate advantage [to the employer] from any work done by the trainees." Id. At 301. The key, as reflected in both the volunteer and trainee cases, is that the label assigned is not dispositive -- it is the nature of the work, the degree of work versus other activities, and the control exercised over the work by the employer , that determines the participant's employee status.

[6] See, **A Detailed Summary of Key Provisions of the Temporary Assistance for Needy**

demonstration basis, the ability to count participants toward the applicable participation rate may not be of great significance due to the small number of individuals involved. If it is important, several issues and options will need to be considered. Beginning in September, 1997, when the minimum wage increases to $5.15 per hour, a participant will have to be paid at least $446 per month in order to be required to work the average of 20 hours per week[7] that will be required of single-parent families.[8] In states where current benefits are not equal to the required hours multiplied by the applicable minimum or prevailing wage rate requirement states might: 1) combine a more limited number of hours of work with other countable activities including education and training to the extent permitted; 2) supplement the funds that are otherwise provided as cash assistance with public funds, a contribution from worksite employers, or both; or 3) operate the CSE program as a Food Stamp work supplementation program[9] which would allow Food Stamp benefits that would otherwise be provided to the family to be converted to cash and supplement funds available from cash assistance grants and any other sources.[10]

States may not wish to limit a program based on the value of the current cash assistance grant. For example, legislation that has been proposed in Pennsylvania would create jobs in public and non-profit agencies for recipients of public assistance.[11] Placements would be designed to "...ensure that all participants are engaged in activities that provide valuable work experience to the participant and

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Assistance Families Block Grant of H.R. 3734, (CLASP, August 1996), for a complete description of TANF participation rate requirements.

[7] Beginning in 1999, the minimum hourly requirement for single-parent families will increase to 25, and later reach 30 hours per week.

[8] For two-parent families in which an adult must participate in a limited set of activities for at least 30 hours per week, benefits would have to equal $664 per month. Two-parent families must participate for 35 hours per week in order to be counted.

[9] 7 U.S.C. Section 2025(b).

[10] A similar set of issues regarding the relationship between, monthly benefits and the minimum or prevailing wage will arise to the extent those requirements apply to work experience programs. These issues are more fully addressed in **The Implications of Applying Federal Minimum Wage Standards to TANF Work Activities**, (CLASP, May 1997).

[11] An Act Establishing the Job Opportunities in Basic Services (JOBS) Program.

produce demonstrable public benefit."[12] Each placement would be a full-time position paying a minimum of $6.00 per hour. The premise for this proposal is focused on providing full-time work and a significant increase in income over the amount available through the state's TANF program, and the incremental cost of wages as compared to public assistance reflect this broad goal.

2. Income Tax Treatment of Wages and Eligibility for the EITC, and Social Security Taxes

The earnings of participants in a CSE program are very likely to be considered taxable income and taxes (contributions) will be required under the Federal Insurance Contributions Act (FICA) for the Federal Old Age and Survivors Insurance, and Disability Insurance systems. In response to a recent inquiry, an IRS official describes the applicable standard as follows. "If the activity engaged in is the performance of services, then the payments are includable in gross income as compensation for services; otherwise the payments are for the promotion of the general welfare and are excludable."[13] The letter cites a 1975 revenue ruling which held that the wages of a CETA participant were to be treated as taxable income.[14] FICA taxes must be paid for state and local employees who are not participating in a public employee retirement system.

The EITC will be available to participants and will provide substantial benefits - 34% of the first $6,500 in annual earnings for a family with one child, and 40% of the first $9,140 of earnings for a family with two or more children. The value of these benefits in comparison to the incremental costs of a CSE program are shown in the Tables attached in Appendix A. **As noted in the introduction, an amendment to the Internal Revenue Code included in the Taxpayer Relief Act of 1997, specifies that payments to participants in work experience (Section 407(d)(4)) or community service programs (Section 407(d)(7)) under TANF will not be treated as earned income for calculating eligibility for the Earned Income Tax Credit (EITC). It is uncertain whether this provision was intended to apply when wages rather than a welfare grant is paid to a participant. However, it is clear that to the extent the program is classified as one offering**

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[12] Id., Section 6(b).

[13] Letter from Philip Corn, Office of the Associate Chief Counsel, Employee Benefits and Exempt Organizations, U.S. Department of Treasury, Internal Revenue Service, to David Riemer, City of Milwaukee, Department of Administration, March 27, 1997. See also, "What Constitutes Employer-Employee Relationship for Purposes of Federal Income Tax Withholding," 51 A.L.R. Fed. 50.

[14] Rev. Rul. 75-246, 1975-1 C.B. 24.

"subsidized private sector employment" (Section 407(d)(2)) or "subsidized public sector employment" (Section 407(d)(3)), wages paid will be treated as would any another earned income, and therefore provide the basis for eligibility for the EITC.

Joint employer liability as applied to payment of federal employment taxes is not the issue that it is with other employments laws. Rather, the entity that pays the FICA taxes -- whether the state, the intermediary or the worksite employer -- is usually held solely responsible.[15] The combined rate for these taxes is currently 15.3% of gross wages.[16] One-half, 7.65%, is required to be deducted from the employee's wages, and the balance must be paid by the "employer." At a minimum then, required employer contributions would yield a cost of 7.65% of gross wages. A program that followed the Vermont model and reimbursed the employee for the portion of the taxes deducted from gross wages would need to assume a net increase in cost of 15.3% of gross wages.

3. Workers' Compensation

Workers' compensation is a creation of state law which, in nearly all circumstances, will cover participants in a community service employment program. Workers' Compensation coverage is a necessary prerequisite for employers to avoid tort liability for a worker's injury on the job.
There are at least two issues that may arise in the context of a CSE program, which often vary from state to state. First, special rules often allow state employers and non-profits to pay workers compensation claims dollar for dollar, rather than a paying a set premium together with additional taxes incurred the more successful claims filed against the employer as private employers are required to do. This often has the effect of limiting costs of workers' compensation coverage for government employers and non-profits. However, there is a broad doctrine of "joint employment" under most workers' compensation laws. Some states laws go further and hold the worksite employer liable for a workers' compensation judgement even where an intermediary, such as an employee leasing firm, expressly

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[15] For example, in General Motors Corporation v. United States, Case No. 89-CV-73046-DT (E.D. Mich., December 20, 1990), it was held that the employee leasing firm, not GM, was responsible for the payment of federal employment taxes, overruling the opinion by IRS. The court held that, "the responsibility for withholding employment taxes is directed toward the person who pays the workers and not the person who has control over the workers' duties." **See also U.S. Department of Labor, Opinion Letter of Wage-Hour Administrator, No. 874 (October 1, 1968).**

[16] In 1996, taxes were due on the first $62,700 of wages. This amount is updated based on increases in average wages.

agrees to provide for coverage.[17]

4. Liability Insurance

A concern of some employers is the exposure to liability for lawsuits filed by third parties against the employer for the actions of the worker -- in this case the CSE participant. The employer's liability insurance for its regular workforce should cover most of these situations, although there may be an increase in insurance costs when adding new workers.

If the CSE worker is considered an "employee" of the state or local government entity, then special state and local laws regulating tort claims may apply. For example, in a CETA case, a CETA worker who inflicted an injury on another person (the accidental firing of a gun by a CETA police trainee) was found to be a "government employee" for the purposes of the Federal Tort Claims Act. According to the court, the key in determining whether the worker was an employee of the government was not the source of funding, but whether the workers' day-to-day operations were supervised by the government. In New Jersey, this issue was recently resolved for the purposes of the state's workfare legislation by requiring that any third party lawsuit in such cases be filed against the state and that the state may have available all defenses that apply under the New Jersey Tort Claims Act.

5. Unemployment Compensation

In general, participants in a publicly-funded jobs program will likely be covered by state Unemployment Compensation programs. However, as described below, the costs of providing unemployment benefits on the part of government entities and non-profits are significantly limited with regard to a CSE program.

States and most non-profits are required by federal law to cover their workers for unemployment benefits. There is a provision in the federal law which applies to government entities and non-profits exempting services performed in a "work relief or work-training program assisted or financed in whole or in part by any Federal agency or an agency of a state or political subdivisions."[18] This exemption, which is available at the state's option, would not appear to apply to jobs in a community service

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[17] In a workfare case decided on this issue, the court held that both the state and the municipal entity providing the job were the workfare participant's employer for the purposes of workers' compensation. Arntz v. Southwestern Wilbert Corp., 156 Mich.App. 309, 401 N.W.2d 358 (1986).

[18] 26 U.S.C. § 3309(5)(b).

employment program under the criteria established for "work relief or work-training" programs by the DOL.[19] However, the exemption has not to date been considered in the context of a program that provides wages, rather than requiring work in exchange for welfare assistance.[20] By contrast, several states have adopted this option as applied to their workfare programs.

State and local governments, and non-profit organizations, unlike private employers, are allowed by federal law to pay only on successful unemployment claims. Under federal law, these employers are allowed to, and often do, finance their unemployment benefits costs by reimbursing state funds for benefits charged instead of through the regular state experience-rated payroll tax system. As a result, such employers' costs are limited to the actual benefits paid to former employees. In addition to being excused from the regular state payroll tax system, such "self-insured" employers are also exempt from the Federal Unemployment Tax.[21]

Assuming CSE participants are covered for unemployment benefits, they may still fail to qualify due to certain restrictions based in state law. Most significantly, state laws require a worker to earn sufficient wages to qualify for unemployment benefits. As a result, minimum wage workers employed less than full time, which will include many CSE participants, do not qualify for benefits in many states. There are also strict rules in many states that restrict unemployment benefits for temporary workers. The structure of the CSE program will also be important. If a participant successfully completes a placement, eligibility will depend upon the subsequent participation requirement. If a participant is assigned to a period of job search, eligibility during job search is likely, assuming the earnings test has been met. However, once a participant is placed in another CSE position, or another substantive component, it is likely that he or she will not meet the ongoing job search requirement imposed on unemployment insurance claimants. Finally, to the extent a former CSE participant qualifies for unemployment benefits when he or she is also eligible for TANF assistance, the unemployment benefits may, at state option, be counted as income and reduce TANF assistance accordingly. If unemployment benefits exceed the TANF assistance available for the family in the absence of those benefits, the family would be ineligible

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[19] U.S. Department of Labor, Unemployment Insurance Service, Unemployment Insurance Program Letter No. 3-96 (August 8, 1996).

[20] Under CETA, Unemployment Compensation coverage was mandated and therefore the "work relief" exemption did not need to be considered.

[21] Private employers do not have the option of being "self-insured" and must pay a net federal tax (after a federal credit) of 0.8 percent yielding an employer cost of $56 per employee earning a minimum of $7,000, and a state unemployment tax, which must be least 5.4% of first $7,000.

for TANF.

Finally, there is the question of whether the CSE employer will be "charged" in the event that the participant applies for unemployment benefits after leaving the program and subsequently working in another unsubsidized job. If the CSE participant loses the new job after a short period of time, the question will be whether the CSE employer bears any of the costs of the participant's subsequent unemployment claim. The law in this area varies a great deal from state to state with some states applying a strict rule that only the "last employer" (i.e., the unsubsidized employment) will be charged for the unemployment claim even though the worker was mostly employed in the previous job (i.e., the CSE). Other states distribute the cost across all employers proportionate to the amount of employment with each employer. And some states look to which employer employed the worker longest, thus not charging for "incidental employment." In any event, any costs incurred by a worksite employer or intermediary can be reimbursed by the sponsoring agency.

C. Compliance with Employment Protections

1. Non-discrimination Laws

CSE workers will, in all likelihood, be considered covered for the purposes of non-discrimination laws, including Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA), which apply to states and non-profits. In fact, the scope of these discrimination laws is quite broad, extending not just to "employees" but also to "any individual" who suffers an unlawful employment practice.

There are, however, selected legal issues which arise in the context of a CSE program. First, to be covered under federal discrimination laws, the employer must have at least 15 employees, which is sometimes not the case with many smaller non-profits. Several state non-discrimination statutes have lower employee threshold requirements. The issue, then, is whether CSE workers will be counted in meeting the 15-employee threshold. While there has been very limited attention to this issue, one court has held that CETA workers could not be counted,[22] although other courts might rule differently. On the other hand, joint employer liability is very broad under discrimination laws, covering not only the worksite employer but also those who "control access to employment." For example, if there is an intermediary involved in the CSE placement, both the intermediary and the worksite employer would likely be responsible for providing a disabled worker with the necessary "reasonable accommodation" required under the ADA.

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[22] Dumas v. Town of Mount Vernon, 436 F.Supp. 866 (S.D. Alabama 1997).

2. Health & Safety Laws

Under the principal federal health and safety law, the Occupational Safety and Health Act (OSHA), CSE workers are likely to be considered employees. As with the FLSA, and in contrast to federal discrimination law, OSHA coverage is not limited to employers with a specified minimum number of workers. **The Welfare-to-Work provisions of the Balanced Budget Act further specify that both federal and state health and safety requirements will apply to programs funded with Welfare-to-Work grant funds.[23]**

The key issue with regard to health and safety law is that OSHA specifically exempts states from coverage, while covering private employers and non-profits. However, about one-half of the states have enacted public employee health and safety laws which fill in the gaps in coverage. While controlled by state law, CSE workers will often be covered for public employee health and safety protection. In New York, for example, workfare participants have been deemed employees for the purposes of the state's health and safety law. Compliance with OSHA law is also clearly the obligation of the worksite employer. For example, with regard to leased employees, it is the worksite employer, not the intermediary, who has primary responsibility and liability, including responsibility for record keeping, training, and compliance with the "hazard communication standard."

3. Labor Law

Coverage under labor law, regulating the right to organize collectively and join a union, will generally be available to CSE participants where these rights exist for other workers on the same job as provided under federal and state laws governing public and private sector employment.

Because federal labor law, the National Labor Relations Act (NLRA), does not apply to public employees, CSE placements in the public sector will depend on state and local public employee bargaining law, which does not exist in many states. Where public employee bargaining laws exist, however, CSE-type participants have been found to be covered employees, meaning that they can at a minimum be protected for engaging in collective action relating to their terms and conditions of employment. In appropriate cases, where they share

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[23] **"Health and safety standards established under Federal and State law otherwise applicable to working conditions of employees shall be equally applicable to working conditions of other participants engaged in a work activity under a program operated with funds provided under this paragraph." 42 U.S.C. Section 403(a)(5)(J)(ii)**

sufficient "community of interest" with the other workers, the CSE participant may also be "accredited" into an existing bargaining unit of other workers.[24] As a practical matter, the decision whether new workers will become members of an existing bargaining unit is often accomplished by "voluntary recognition" on the part of the employer in the public sector, which is not dependent on the limits of the bargaining unit. State laws implementing the new federal welfare law may specifically address the issues as well, as in the case of New York where the law extends the right to organize to participants in the state's grant diversion programs.

In contrast, the NLRA applies to private sector employers, including non-profit organizations. It is likely that CSE participants in non-profit agencies will be considered protected employees under the NLRA, meaning that they have the right to engage in collective or concerted action with regard to their terms and conditions of employment. As with public employees, whether they have the right to also accrete into an existing bargaining unit will depend on whether they share sufficient similarity with members of the existing bargaining unit in terms of their work and other job characteristics. Under CETA, for example, decisions of the National Labor Relations Board (NLRB) held sometimes in favor of, and sometimes against, accretion into existing bargaining units.

D. Employer Specific Rights and Benefits

It is far more difficult to generalize as to the broad range of rights and benefits that are not specifically governed by federal, state or local employment and labor laws, such as vacation or sick leave, health benefits, pension benefits, access to employee grievance procedures, and the like.

Where personnel policies or collective bargaining agreements exist, providing for sick leave or family leave for example, they may cover CSE workers if broadly worded. If not, CSE

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[24] **For example, prior to CETA, state legislation authorized localities to create CSE-type positions as part of the Work Relief Employment Project (WREP). In New York City, the WREP program provided wage-paying jobs in the public and private, not-for-profit sectors, totaling over 9,000 jobs at its peak in 1974. Pursuant to state and local labor law, the WREP workers were allowed to be "accreted" into the bargaining unit of existing public employees, represented by AFSCME, District Council 37. In re District Council 37, AFSCME, AFL-CIO, et al. (New York City Office of Collective Bargaining, Board of Certification, Docket # RU-465-74) Decision and Order, dated May 7, 1975.**

participants may face barriers to coverage based on provisions that commonly limit rights and benefits for probationary and temporary employees. Civil service rules, which vary significantly, will also play a key factor in determining the status of CSE workers, their rights to employee benefits, grievance rights, promotions and other protections. State and local civil service laws may make special provision to accommodate CSE-type placements. It is not uncommon, for example, for civil service rules to exempt certain categories of provisional employees, such as temporary workers, from civil service protections or, in some cases to waive such exceptions to cover these workers.

E. Non-Displacement Issues

Protection against displacement resulting from CSE placements in a public or private, not-for-profit agency is regulated both by federal and state and collective bargaining agreements that define permissible work within designated job categories.

Where federal TANF funds are part of the program, the federal welfare law set the minimum standards relating to displacement. At a minimum, TANF-funded participants cannot be placed in a job where another individual is on layoff or where the employer has terminated another worker to fill the vacancy then created with a TANF-funded participant. (Cite). Where federal Welfare-to-Work funding contributes to the program, another set of stronger protections against displacement applies. (cite). Several states have enacted laws that go further and also guard against the filling of works slots made available as a result of attrition and so-called "partial displacement", which is the partial reduction in wages, hours, benefits of other workers caused by TANF-funded placements.[25]

Separate from these legal mandates, displacement is protected against under collective bargaining agreements. The collective bargaining agreement may have its own anti-displacement language or, more often, the agreement defines the scope of bargaining unit work which cannot be interfered with by CSE workers outside the bargaining unit. There have been several decisions enforcing these protections in workfare settings, which would apply as well to CSE positions.

II. The Fiscal and Legal implications of Creating a Work Experience Program

[25] See National Employment Law Project, Survey of State & Local Workfare, Jobs & Low-Wage Worker Legislation (Revised July 14, 1997)

One question that is likely to arise in determining whether to initiate a CSE program for TANF recipients are its relative advantages and disadvantages in comparison to an unpaid work experience program in which participants work in exchange for welfare benefits. As noted at the outset, a CSE program is likely to have a distinct set of programmatic advantages over a work experience program.[26] Of course policy makers and administrators will also need to consider the relative costs of the two program models. This section attempts to identify which of the costs and legal issues applicable to a CSE program will also be applicable to a work experience program, and which will not.

A. Program Development and Administration

There are a set of costs that must be met in either model. These include the cost of activities designed to develop and monitor placements for participants, the cost of assessing and screening participants, and the cost of providing support services, such as child care and transportation to program participants. There are significant costs associated with each set of activities and services, but whether the placement is one in which the participant works for a wage, or for a welfare benefit, these costs are not likely to vary.

B. Wage Requirements

The DoL Guide clarifies that participants in work experience and community service programs under TANF are not exempt from FLSA coverage. Thus, unless such programs qualify for one of the narrow FLSA exemptions for training or volunteer activities, participants will have to be compensated at the applicable federal minimum wage rate, or possibly higher rates applicable under state or local laws.[27]

C. Income Tax Treatment of Wages and Eligibility for the EITC, and Social Security Taxes

As discussed above (Sec.), payments to participants will not be treated as earned income for purposes of eligibility for the EITC. It is unclear whether welfare benefits provided in exchange for participation in a work experience program will be considered income for purposes of income tax, and for purposes of FICA. In the recent letter referenced in Footnote 13, the Internal Revenue Service cites a 1971 revenue ruling which held that in a program in which participants were required to work as

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[26] See, Footnote 1, above.

[27] See, Footnote 4, above.

a condition of receiving a "welfare allowance", the welfare benefits were not to be considered taxable income, nor wages for FICA purposes.[28]

D. Workers' Compensation, Unemployment Compensation, and Liability Insurance

In many states, work experience participants are considered "employees" for the purposes of workers' compensation protection.[29] Whether required by law or not, a public or non-profit entity that accepts participants is likely to insist that workers compensation coverage be provided because such coverage protects the employer from potential liability if the participant is injured on the job. In addition, as described above, some states may assume responsibility for third-party lawsuits under their state tort claims act, thus expressly addressing the issue of liability for acts of work experience participants.

Work experience participants will often be exempt from coverage under state Unemployment Compensation programs under the federal "work relief" provision, (discussed above, Section B.5).

E. Anti-Discrimination and Health & Safety Laws

As described above in Section C.1., work experience participants are likely to be covered as employees under federal anti-discrimination and health and safety laws given the broad language and remedial intent of these statutes. **In addition, as discussed above, federal and state laws concerning safety and health conditions are explicitly made applicable under the terms of the new Welfare-to-Work grant program.**

F. Labor Law

As described above in Section C.3., labor law protections may vary depending on whether the workfare placement is one that is in the public sector, in which case state public sector bargaining law may apply, or in the private non-for-profit sector, where the NLRA applies. In addition, some state welfare laws now specifically indicate whether workfare workers may organize into a union (or not as the case may be). Workfare participants will have a weaker

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[28] Rev. Rul. 71-425, 1971-2 C.B. 76.

[29] The types of benefits for workfare participants may sometimes vary from other workers. However, in a recent Ohio case, decided by the state's Supreme Court, the court invalidated the provision of the workers' compensation statute which distinguished workfare participants from other workers with regard to the level of survivor's benefits.

claim to coverage under state and federal labor laws than CSE participants, which was the conclusion of one of the few legal decisions on the subject.[30]

G. Employer Specific Rights and Benefits

The claims of workfare participants with respect to benefits and protections provided under personnel policies, collective bargaining agreements or civil service rules, will be weaker than for CSE participants. As with CSE, the temporary nature of the workfare assignment and other factors may also limit access to these types of benefits and protections.

H. Non-Displacement Issues

Non-displacement requirements are not likely to vary substantially for CSE versus workfare placements, as discussed in Section E.

[30] **District Council 37, AFSCME, and the City of New York and Related Public Employers, (Office of Collective Bargaining, Board of Certification), Decision and Order, dated June 30, 1981.**