

Employment First State Leadership Mentoring Program

Modernizing State Use Programs to Align with *Employment First Principles:* *A Technical Resource for States*

Submitted by Lisa Mills

April, 2015

The Intersection between *Employment First* and State Use Programs

As an increasing number of states adopt a formal commitment to *Employment First*, making competitive, integrated employment the first, preferred, priority and expected outcome of public funding invested to benefit people with disabilities, efforts are being undertaken to ensure all state programs, initiatives and investments consistently support the state's *Employment First* law, executive order or policy. While many states often begin with examining their Medicaid programs and investments, they soon recognize that their State Use program is in conflict with *Employment First*.

State Use programs exist in most but not all states,¹ and were originally created to increase employment opportunities for individuals with significant disabilities. These programs set aside certain contracts and use a preferred source, non-competitive contracting approach to supply the state with needed goods and services, to entities that employ a minimum of 75% people with significant disabilities to fulfill these contracts. Each state determines which contracts will be included in the state use program and these can include contracts for goods and contracts for services needed by the state. Often these contracts, especially those providing goods rather than services, are awarded to and completed in sheltered workshops. Contracts that involve services (e.g. cleaning, highway rest area maintenance) are also typically awarded to agencies that operate sheltered workshops, and these agencies support individuals with disabilities to fulfill service contracts in community settings through work crew or enclave models. In most cases, these sheltered workshop agencies are also drawing down local public funding (e.g. county or school district funding), Medicaid prevocational services funding and/or Vocational Rehabilitation work adjustment training funds for the individuals with disabilities working on State Use contracts.

¹ As of 2011, 40 states were reported to have state use programs. Source: http://www.dhss.delaware.gov/dvi/files/sulc_2011_annual_report_finaldraft.pdf

While competitive wages are typically not required in State Use programs, and sub-minimum wages can be paid, some wage data available indicates that State Use service contracts pay higher wages than State Use contracts which involve the production of goods.²

While the issue of competitive wages is important, the far greater concern in terms of implementing *Employment First* strategies relates to the requirement that 75% of contract workers must be individuals with significant disabilities. This requirement, intended to ensure that people with significant disabilities would be the primary beneficiaries of these contracts, has led to inadvertent support for the segregation and congregation of people with disabilities that typifies sheltered workshops. This segregation and congregation of people with disabilities working on State Use contracts runs afoul of the state's overarching legal obligation, under Title II of the ADA and the *Olmstead v. L.C.* Supreme Court decision, which requires public funding to be used to serve individuals with disabilities in the most integrated setting appropriate. The most integrated setting is defined in federal law as the setting which enables the person with a disability to interact to the greatest extent with individuals who do not have disabilities. The U.S. Department of Justice has recently concluded that sheltered workshops are segregated settings and as such, are unlikely to be the most integrated setting appropriate for the vast majority of individuals with disabilities.

A compounding factor in many states is the fact that despite enabling state legislation which created the program to be a stepping stone to competitive, integrated employment, data is clearly demonstrating that most workers on State Use contracts in sheltered workshops do not transition later to competitive, integrated employment. So while a State Use program that shows consistent evidence, of individual workers moving on to competitive, integrated employment in a reasonable timeframe, might be considered consistent with the state's commitment to *Employment First*, most states are faced with State Use programs that make entry into competitive, integrated employment highly unlikely for individuals with disabilities working on the State Use contracts. Not only does this undermine what should, and in many states is, the intended purpose of the program, but it also significantly limits the number of people with disabilities who could otherwise benefit from participation in the State Use program.

These are serious and challenging dilemmas for states. Lack of changes in State Use program rules and operation creates a significant disincentive for sheltered workshop operators to embrace *Employment First*. Workshops that make a commitment to give up State Use contracts in order to fully embrace *Employment First* find that other workshops simply pick up

² For example, Indiana state use employees providing services earned an average of \$8.59 but those producing products earned \$3.79 (see http://www.smartpartnersalliance.org/uploads/2/5/5/0/25503242/1-30-14_provider_meeting_update.pdf).

those contracts, thus the program continues to reward workshops who remain invested in contracts that segregate and congregate people with disabilities.

Aligning State Use Programs to Reflect *Employment First* Principles: Key Recommendations for State Governments

In light of the fundamental contradiction between the rules governing many State Use programs and *Employment First*, the following are ten key recommendations states can implement to modernize their State Use programs and bring them into alignment with their *Employment First* goals.

1. *Employment First* states should examine their current statutes addressing the State Use program to ensure that the program is clearly intended to function as a stepping stone or springboard to competitive, integrated employment, either with the state or another public/private employer that is not eligible for State Use contracts. Statutory changes should be made if such expectations are not currently reflected in state statutes.
2. *Employment First* states should ensure that all State Use program participants are properly informed about the intended purpose of the State Use program both at initial entry into the program and annually thereafter. With appropriate and regular information and education about the purpose of the State Use program, participants and their guardians/families should not expect that the program will provide participants with permanent employment.
3. The state agency responsible for administering the program in an *Employment First* state, in collaboration with the the State Use Board (if one is in place), should establish targets for number/percentage of participants with significant disabilities that will annually transition to competitive, integrated employment with the state or another public/private employer that is not eligible for State Use contracts. In order for entities to remain eligible for State Use contracts, they should be required to:
 - Develop and submit annual plans for how they will achieve the targeted number of transitions to competitive, integrated employment;
 - Meet the annual targets established for their entity or in years where such targets are not met, develop and submit a remediation plan if the targets are not met in a given year; and
 - If a period of three consecutive years passes and the entity has failed to meet the established target numbers for transitions to competitive, integrated employment, to refund to the state a certain pre-determined percentage of contract income paid to the entity through State Use contracts. The percentage to be refunded should be increased each subsequent year that the entity continues to fail to meet the established target numbers for transitions to competitive, integrated employment.

4. The state agency responsible for administering the State Use program in an *Employment First* state should be required, through statute or rule, to collect data on annual number/percentage of participants with severe/significant disabilities transitioning to competitive, integrated employment with the state or another public/private employer, and should be required to publish an annual report detailing this data both at the state level and for each individual sheltered workshop that participates in the State Use program. The report should further detail each sheltered workshop's target numbers, their actual placement rates and the list of workshops who were required to submit remediation plans and/or repay a portion of their State Use contract income for failure to meet targets set for the year covered by the report.
5. An *Employment First* state should require entities receiving set aside contracts to maintain an active relationship with their local Vocational Rehabilitation office and with their local Workforce Investment agency (e.g. Job Center). The active relationship should at minimum require the entity to:
 - Be an enrolled provider of competitive, integrated employment services (including supported employment services) for the Vocational Rehabilitation and Workforce Investment programs;
 - Maintain adequate personnel, in relation to the number of individuals with disabilities working on State Use contracts, who are specifically trained to provide placement and supported employment services and certified in supported employment and/or customized employment by an entity that grants certification; and
 - Have a signed Memorandum of Understanding addressing:
 - How individuals with disabilities working in State Use contracts will at least annually receive information regarding how the Vocational Rehabilitation and Workforce Investment programs can assist them to obtain competitive, integrated employment;
 - How referrals of individuals working on State Use contracts to the Vocational Rehabilitation and Workforce Investment programs will occur.
6. An *Employment First* state that has a State Use program should prioritize setting aside contracts that will allow participants with significant disabilities to work in integrated, community settings other than Sheltered Workshops or similar segregated settings. A state can do this by adopting a systematic process and plan to ensure that contracts which will be completed in segregated settings (e.g. sheltered workshops) are limited to the greatest degree while contracts that allow participants with significant disabilities to work in integrated, community settings are maximized. As previously mentioned, data from some

states suggests this also assures higher average hourly wages for workers with significant disabilities.

- Among contracts that are performed in integrated settings, priority should be given to identifying contracts for set aside that allow individuals with significant disabilities to work in individualized situations. An example can be found in Delaware where there is a State Use contract to provide temporary staffing for certain types of state government positions. Not surprisingly, these contracts increase the likelihood that participants will ultimately be hired into permanent positions by the state.
- Contracts in integrated settings which require small groups of State Use participants should be limited to groups of no more than four, with the 75% requirement being implemented so that three of the four workers would be individuals with significant disabilities. Larger groups create added stigma and reduce the opportunities for the individuals with disabilities to interact with non-disabled people in that setting.
- It is also important to prioritize contracts that allow State Use participants to do the work in integrated setting at times when people without disabilities are present. After hours cleaning crews and similar arrangements isolate State Use participants and do not allow them to learn how to interact with others without disabilities while in the setting.

7. An *Employment First* state that has a State Use program should ensure that data collection and reporting is required which annually tracks how many individuals with disabilities were employed (and for how many hours) on State Use contracts completed in Sheltered Workshops, how many were employed (and for how many hours) on small group contracts completed in integrated community settings, and how many were employed (and for how many hours) on individual placement contracts completed in integrated community settings.
8. An *Employment First* state that has a State Use program should ensure that eligible entities are non-profit organizations whose missions are consistent with promoting and prioritizing the outcome of integrated, competitive employment.
9. An *Employment First* state that has a State Use program should ensure the percentage of direct labor that must be done by individuals with significant disabilities be no less than 75%. If State Use contractors cannot meet this target for one or more particular contracts, the contract should no longer be a set aside for State Use; however a special provision should be added to the open contracting process that gives preference to bidders, based on the specific percentage of people with significant disabilities the bidder proposes to employ as sources of direct labor.

10. An *Employment First* state that has a State Use program should have an oversight body in place (e.g. a State Use Board). This board should not be dominated by entities that receive State Use contracts and/or that operate Sheltered Workshops. This board should include a sufficient number of members who have expertise competitive, integrated employment strategies for people with significant disabilities. This board should also have required representation from the following:
- At least 20% of member(s) will be individuals with a significant disability who have experience of working on State Use contracts and who have successfully transitioned from this work to competitive, integrated employment;
 - A member representing the state’s designated Protection and Advocacy agency; and
 - A member from each of the Medicaid program agencies who have service recipients working on State Use contracts and receiving Medicaid-funded services during performance of work on these contracts.