

**DEPARTMENT OF LABOR****Employment and Training Administration****20 CFR Parts 651, 652, 653, and 658**

[Docket No. ETA-2019-0004]

RIN 1205-AB87

**Wagner-Peyser Act Staffing Flexibility**

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Final rule.

**SUMMARY:** The U.S. Department of Labor (Department or DOL) is issuing this final rule to give States increased flexibility in their administration of Employment Service (ES) activities funded under the Wagner-Peyser Act (the Act). This flexibility includes the grants allocated to the States for the traditional labor exchange and related services, and for the foreign labor certification program, including the placement of employer job orders, inspection of housing for agricultural workers, and the administration of prevailing wage and practice surveys.

**DATES:** This final rule is effective February 5, 2020.

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**SUPPLEMENTARY INFORMATION:****I. Executive Summary**

This final rule reflects changes made in response to public comments received on the Notice of Proposed Rulemaking (NPRM) that was published on June 24, 2019, at 84 FR 29433. The Department received many comments from the public, States, and advocates for Migrant and Seasonal Farmworker (MSFW) populations. The Department took into account these comments in reaching this final rule, and the changes made to the regulatory text are detailed below in the Department's responses to related comments.

The regulatory changes made in this final rule modernize the regulations implementing the Wagner-Peyser Act<sup>1</sup> to align them with the flexibility allowed under the Workforce Innovation and Opportunity Act

(WIOA), and to allow States to choose the service delivery model that can best meet their goals for the ES program. This could include a focus on services for individuals with barriers to employment, improved employment opportunities for Unemployment Insurance (UI) recipients and other job seekers, better services for employers, and improved outreach to individuals in rural areas. The changes also give States the flexibility to staff employment and farmworker-outreach services in what each State finds is the most effective and efficient way, using a combination of State employees, local government employees, service providers, and other staffing models in a way that makes the most sense for them. This, in turn, may leave more resources to help employers find employees and to help employees find the work they need. The changes are also consistent with Executive Order (E.O.) 13777, which requires the Department to identify outdated, inefficient, unnecessary, or overly burdensome regulations that should be repealed, replaced, or modified.

The modifications made in this final rule require conforming amendments<sup>2</sup> to the specific Wagner-Peyser Act references in 20 CFR 678.630, 34 CFR 361.630, and 34 CFR 463.630 of the U.S. Departments of Labor and Education's joint WIOA regulations (Workforce Innovation and Opportunity Act; Joint Rule for Unified and Combined State Plans, Performance Accountability, and the One-Stop System Joint Provisions Final Rule, 81 FR 55792 (Aug. 19, 2016)). Neither this conforming change nor any of the changes discussed in this final rule will affect other programs' staffing requirements, such as those for the Vocational Rehabilitation (VR) program, because all changes discussed in this final rule, including these conforming changes, apply only to the ES programs authorized under the Wagner-Peyser Act which includes the Monitor Advocate System activities.

The Wagner-Peyser Act does not mandate specific staffing requirements. Section 3(a) of the Wagner-Peyser Act requires the U.S. Secretary of Labor (Secretary) to assist in coordinating the ES offices by developing and prescribing minimum standards of efficiency. Historically, the Department has used the authority in this provision to require States to provide labor exchange services with State merit staff,

<sup>2</sup> Although this final rule requires that conforming amendments be made to 20 CFR 678.630, 34 CFR 361.630, and 34 CFR 463.630, these amendments are not contained in this final rule. DOL and the U.S. Department of Education will make these conforming amendments in a separate regulatory action.

*i.e.* State staff employed according to the merit system principles in 5 CFR part 900, subpart F—Standards for a Merit System of Personnel Administration.<sup>3</sup> However, this is not the only reasonable interpretation of this provision and, in finalizing this rule, the Department is adopting an interpretation that allows States the flexibility to use staffing arrangements that best suit their needs. This flexibility will allow States to provide Wagner-Peyser Act services through State merit staff, other State staff, subawards to local governments or private entities, a combination of these arrangements, or other allowable staffing solutions under the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance). Consistent with the Uniform Guidance, all of these staffing arrangements, other than using State-employee staff, would be considered subawards and the entities providing services would be considered subrecipients. The Department received comments on the NPRM asserting that the Department did not have the authority to provide this flexibility under the Wagner-Peyser Act. The Department has responded to those comments, and others, below.

This final rule is not subject to the requirements of E.O. 13771 because this rule results in no more than *de minimis* costs.

**II. General Comments Received on the Notice of Proposed Rulemaking**

The Wagner-Peyser Act Staffing Flexibility NPRM proposed changes to 20 CFR parts 651, 652, 653, and 658. The Department received 126 comments within the 30-day comment period. Of these, the Department received comments expressing general support for the changes proposed in the NPRM, as well as several comments expressing opposition to these changes. Additionally, the Department received one untimely comment that pertained to issues also raised by timely commenters. Some commenters requested the Department to extend the comment period, but after considering their requests, the Department determined that the original 30-day comment period provided adequate time for the public to comment on the proposed rule. The Department appreciates the input from all commenters.

Multiple commenters, including private individuals, local workforce

<sup>3</sup> Throughout this rule the Department uses the term "merit staff" and similar phrases to refer to staff that are part of a merit personnel system that complies with 5 CFR part 900, subpart F.

<sup>1</sup> This statute was originally titled the Act of June 6, 1933. Section 16 of the statute instructs that it may be called the Wagner-Peyser Act.

development boards, and several States, supported the flexibility in the rule because, they stated, it would allow for staffing flexibility and that “privatization,” as some commenters characterized it, at the State and local levels would help agencies address local needs. Multiple commenters also supported the allowance for what they termed “privatization” as enabling the alignment of WIOA title I and ES staffing. One commenter agreed with the proposed rule’s assessment that staffing flexibility could result in savings that could be reinvested elsewhere in ES activities. Another commenter wrote that, in the commenter’s State, staffing flexibility could help integrate services and ensure that local job centers have sufficient onsite staff. Some commenters, including a local workforce development board, stated that Michigan has operated a pilot program that allocates funding to local workforce development boards, and that further flexibility would be beneficial. Some commenters supported the flexibility because, they wrote, the private sector would better provide employment services due to its adaptability to modern technologies and circumstances, including tracking job placements.

The Department appreciates these comments and agrees that staffing flexibility puts States in the best position to determine what is the most effective, efficient, and cost-effective way to provide the services under the Wagner-Peyser Act. The Department recognizes the value of the three State pilot projects, which provided important information on the use of alternative staffing models. With the staffing flexibility provided to the programs covered by this final rule, States will now have significant discretion and flexibility to tailor their service-delivery models to their local needs and circumstances.

Many commenters described this rule’s new flexibilities for States as “privatization.” That is not an accurate term. This rule does not privatize Wagner-Peyser Act services. States retain responsibility to provide Wagner-Peyser Act services, and this rule provides flexibility to States to offer these services using the best staffing approach available to them.

Similarly, many commenters used the term “contractors.” As explained more fully below, the word “contractor” is a defined term under the Uniform Guidance, which governs how States can expend their Wagner-Peyser Act grant funds. To allay confusion, the Department has used the term “contractor” only where appropriate in

this preamble, such as when describing the content of a comment.

Several commenters opposed the proposed staffing flexibility because, they wrote, the proposed rule lacks support demonstrating the effectiveness of non-merit-staffing alternatives for ES activities and claimed that available evidence indicates that merit-staffing is the most efficient way of staffing ES programs. In support of these views, several commenters referenced Jacobson et al., “Evaluation of Labor Exchange Services in a One-Stop Delivery System Environment” (2004),<sup>4</sup> as a study showing the benefits of maintaining a merit-staff-based ES program. According to several commenters, this study concludes that the demonstration States for alternative staffing models (Colorado, Massachusetts, and Michigan) did not improve ES operations compared to the merit-staffing model as studied in Oregon, North Carolina, and Washington. Several commenters stated that the study demonstrates that merit-staffing was highly cost-efficient.

The Department appreciates the comments citing the Jacobson study related to the Wagner-Peyser Act ES. However, the Department disagrees with the characterization of the study’s results. In particular, the Department does not agree that the study found a strong correlation between merit-staffing and the study’s conclusions, as the Jacobson study did not focus on merit-staffing.

The Jacobson study assessed how public labor exchanges funded under the Wagner-Peyser Act have evolved with the development of one-stop centers (also known as “American Job Centers” or “AJCs”). Parts of the study compared the performance of “traditional” public labor exchanges, which maintained State-level control of ES programs, with “non-traditional” public labor exchanges, which devolved control of ES programs to local or county governments. The study identified three States that modified their public exchange structure substantially by devolving State control and staffing to local areas (Jacobson et al., 101–08). Colorado devolved responsibility for ES activity to the counties through workforce development boards (called workforce investment boards at the time), while one-stop centers in Michigan were run

by a mix of State and local government agencies. Only one of the States (Massachusetts) ultimately permitted individual workforce development boards to opt out of the traditional State-run public labor exchange system and devolve service delivery to local government, non-profit, or for-profit entities. See Jacobson et al, at 45–46. The limited findings—which did not specifically focus on merit-staffing—should not be used to draw conclusions regarding merit-staffing systems nationwide.

The study concluded that in the States evaluated, State-controlled one-stop centers helped many UI claimants rapidly return to work; however, one-stop centers controlled by non-State entities tended to focus on serving economically disadvantaged populations, tailored job listings to the specific skills of those in most need, and effectively used the case management approach to service.

It is also important to note that this study evaluated service delivery under the Workforce Investment Act (WIA). Its successor, WIOA, made significant reforms to the federally funded workforce development programs and provides States greater flexibility to achieve their goals, making the study less relevant to the current rulemaking than suggested by the commenters.

The Jacobson study can be informative when viewed holistically. One of the goals of providing staffing flexibility is to give States more options in designing their workforce development systems, including the ES program, to more closely align with other WIOA partner programs. The results of this study show that it is possible to more closely align services provided by the ES program with WIOA’s focus on serving individuals with barriers to employment, which is a key goal of this rulemaking. While the Department acknowledges the commenters’ concerns about whether particular staffing arrangements would be optimal in any individual State, the Department considers States to be in the best position to determine whether to implement the staffing flexibility provided in this regulation. States are able to determine the most effective, efficient, and cost-effective way to provide the services under the Wagner-Peyser Act.

Several commenters referenced a 2012 study from Michaelides et al., “Impact of the Reemployment and Eligibility Assessment (REA) Initiative in Nevada,” as an additional study showing the benefits of maintaining a merit-staff-

<sup>4</sup> Louis Jacobson, Ian Petta, Amy Shimshak, and Regina Yudd, “Evaluation of Labor Exchange Services in a One-Stop Delivery System Environment,” prepared by Westat for the U.S. Department of Labor, Employment and Training Administration Occasional Paper 2004–09 (Feb. 2004).

based ES program.<sup>5</sup> According to commenters, this study found that, in the Reemployment and Eligibility Assessment (REA) evaluation in Nevada, the merit-staffed REA program led to UI claimants collecting fewer benefits. The Department recognizes the value of evaluations and encourages States to consider any relevant research or to conduct their own evaluations or pilot projects to best determine their staffing approaches.

The objective of the Michaelides et al. study was to address specific questions related to the efficacy of the Nevada REA program, including whether REA reduced UI benefit duration and benefit amounts received, whether it expedited reemployment of UI claimants, and whether REA led to UI Trust Fund savings exceeding REA program costs. The study was not measuring the efficacy of merit staff delivering the services. While State merit staff provided the services analyzed in the study, the study did not specifically look at the staffing model, but rather it evaluated the services provided. The study never analyzed or determined whether the positive results were attributable to State merit-staffed employees providing the services. Therefore, the study's findings cannot be viewed as illustrative of the relative benefits of merit-staffing for this rulemaking.

The Department notes that this regulation does not require States to change their staffing structure for providing services under the Wagner-Peyser Act, but rather it provides much needed flexibility in developing their staffing structure to staff these services. The Department considers States to be in the best position to determine whether to implement the staffing flexibility provided in this regulation. States may review this and other studies in making such a decision. States are able to determine the most effective, efficient, and cost-effective way to provide the services under the Wagner-Peyser Act.

Two commenters recommended the Department conduct an independent assessment showing the effectiveness of alternative staffing models before implementing the rule. The Department recognizes the value of evaluations in helping States determine the most effective, efficient, and cost-effective way to provide ES activities and encourages States to consider all

available data in determining their staffing strategies.

For example, there is no merit-staffing requirement in the WIOA title I Adult and Dislocated Worker programs. As explained in the NPRM, when crafting this flexibility, the Department considered the results and outcomes for WIOA title I programs, which do not have a merit-staffing requirement, to show that career services, including labor exchange services, can be provided effectively through non-merit staff employees.

The Department sponsored the Workforce Investment Act Adult and Dislocated Worker Programs Gold Standard Evaluation, which found that intensive services (now called individualized career services under WIOA) were an effective service intervention for job seekers. States can use their ES funds to provide individualized career services, similar to the ones evaluated in this study. Therefore, the Department has concluded that it is not necessary to have State merit-staffing to provide effective ES activities.

The Department considers States to be in the best position to determine whether to implement the staffing flexibility provided in this regulation. The Department encourages States to consider any relevant research or to conduct their own evaluations or pilot projects when determining whether to implement the staffing flexibility provided for in this regulation. It should be noted that the Department was not and is not required to conduct the assessment suggested by the commenter.

Several commenters stated that the NPRM failed to describe the contracting process and would leave ES open to potential conflicts of interest. The Department makes grants to the States to carry out the Wagner-Peyser Act requirements, making the States the Department's grantees. The Department and the States are subject to the Uniform Guidance at 2 CFR part 200, as well as the Department's implementing regulations at 2 CFR part 2900. If a State determines it will use the flexibility offered by this final rule to obtain a service provider to deliver the State's ES activities, this service provider will be characterized as a subrecipient, as defined in 2 CFR 200.93, under the Uniform Guidance. See 2 CFR 200.330. This makes the agreement between the State and the service provider to deliver Wagner-Peyser Act activities a subaward. See 2 CFR 200.92. While States have the flexibility to characterize their agreements with any ES providers as "contracts," the service provider cannot be considered a contractor as

that term is defined and used in the Uniform Guidance, as the service provider does not have the characteristics of a contractor described in 2 CFR 200.330(b). See also 2 CFR 200.22. Because the Wagner-Peyser Act service provider will be a subrecipient, the service provider will be subject to the requirements of the Uniform Guidance, including the financial and program management, monitoring, and cost principle requirements.

The Uniform Guidance does not impose any particular process or procedure States must use when making a subaward to a subrecipient. Therefore, to give the States the maximum flexibility in choosing the staffing method that is the most efficient for each State, the Department declines, at this time, to prescribe a particular process or procedure that States must use in determining who will provide ES activities in the State.

The Department does not agree that the staffing flexibility would leave the ES open to potential conflicts of interest. 2 CFR 200.112 requires the Department to establish conflict of interest policies for the use of Wagner-Peyser Act grant funds. Consistent with this requirement, the Department promulgated 20 CFR 683.200(c)(5)(iii), which governs ES activities and requires States to disclose any potential conflicts of interest to the Department and the State's subrecipients to disclose any potential conflicts of interest to the State. 20 CFR 683.200(c)(5)(iii) requires that States, as Federal award recipients, disclose in writing any potential conflict of interest to the Department. The Department considers potential conflicts of interest to include conflicts of interest that are real, apparent, or organizational. Therefore, whether or not a State uses the flexibility in this final rule to provide ES activities, the State and its subrecipients will be required to disclose potential conflicts of interest.

The Department also notes that, consistent with 20 CFR 683.400, the Department will continue to conduct monitoring to ensure States are complying with all of the requirements of the Wagner-Peyser Act, its implementing regulations, and 2 CFR parts 200 and 2900. This will include monitoring to ensure States are complying with all applicable requirements on conflicts of interest.

Some commenters opposed the rule, contending that a private entity would be less likely to provide assistance to rural areas and customers who are less comfortable with technology, noting the time and investment that staff need to devote to these job seekers and employers. One commenter stated that a

<sup>5</sup> Marios Michaelides, Eileen Poe-Yamagata, Jacob Benus, and Dharmendra Tirumalasetti, "Impact of the Reemployment and Eligibility Assessment (REA) Initiative in Nevada," prepared by IMPAQ for the U.S. Department of Labor (Jan. 2012).

private entity would be less willing to devote that time because the profit incentives would dictate their service delivery strategy.

The Department appreciates the commenter's concern regarding access for job seekers in rural areas and those customers with technological barriers. Under this regulation, States will be given the flexibility to select the best service delivery strategy to meet their unique needs and requirements, including the needs of a State's rural residents and residents with technological barriers. The Department does not agree that job seekers in rural areas and those with technological barriers would necessarily receive worse services if a State takes advantage of the staffing flexibility provided in this final rule. The ES program is a universal access program requiring certain services be available to all employers and job seekers, which includes the customers identified by the commenter. States, even if they take advantage of staffing flexibility, still must meet the universal access requirement found at 20 CFR 652.207.

Additionally, the Department notes there is no evidence that State merit staff are better suited to serving rural areas or specific populations than others. Notably, many local areas are wholly or partly located in rural areas and deliver WIOA title I-funded career services to a range of job seekers under a variety of staffing models; the Department anticipates States would adopt similar strategies for ES activities. Additionally, the Department notes that States have the flexibility to structure their agreements with their Wagner-Peyser Act service providers in a way that ensures all job seekers and employers receive effective services from the ES program.

Regarding the commenter's concern that private entities would be less motivated to serve rural areas and individuals who require more time or assistance because of a profit motive, the Department does not agree that private entities necessarily will be less willing to provide quality services to individuals who may require more time. States have flexibility to create agreements with their ES service providers that encourage serving those who may have technological barriers, may need additional time or assistance, or who live in rural areas. States are ultimately accountable for ensuring universal access to all job seekers, including those in rural areas and those who require more time and assistance.

States are required to oversee all operations of the Wagner-Peyser Act in their States, whether or not they

ultimately decide to exercise this final rule's staffing flexibility, and States are still subject to Federal monitoring under 20 CFR part 683, subpart D—Oversight and Resolution of Findings. Consistent with 20 CFR 683.400, the Department will continue to conduct monitoring to ensure States are complying with all of the requirements of the Wagner-Peyser Act, its implementing regulations, and 2 CFR parts 200 and 2900.

Some commenters stated that a uniform, federally mandated service delivery-staffing model helps prevent inconsistency in service delivery. The Department has concluded that a uniform staffing model does not necessarily ensure consistency of services, and the Department encourages States to establish policies on service delivery to improve quality and consistency regardless of staffing model. The Department notes that, regardless of how States staff their ES program, they are still obligated to provide all of the services the Wagner-Peyser Act requires and uniformity of service is still ensured by other Wagner-Peyser Act rules found in 20 CFR parts 651, 652, 653, and 658. For example, 20 CFR 652.3 establishes minimum requirements for public labor exchange systems and 20 CFR 653.101 establishes minimum requirements for the provision of services to MSFWs. Additionally, the ES program is a mandatory one-stop partner program, and consistency across service locations is supported by the one-stop center certification requirements in the WIOA regulations at 20 CFR 678.800.

In addition, States, as Wagner-Peyser Act grantees, are still required to oversee all operations of the Wagner-Peyser Act, regardless of whether or not they ultimately decide to take advantage of the staffing flexibility provided by this final rule. Consistent with 20 CFR 683.400, the Department will continue to conduct monitoring to ensure States are complying with all of the requirements of the Wagner-Peyser Act, its implementing regulations, and 2 CFR parts 200 and 2900.

Some commenters stated that private entities would provide inferior service because they are motivated by profit, rather than service. A commenter cited instances of communications challenges with participants served by some contractors in non-DOL administered programs. Some stated that, for example, as a result of profit or outcome incentives, "privatization efforts," as described by the commenter, could result in "contractors" referring only the most employable workers to employers, which could lead to poorer employment outcomes for individuals with the

highest barriers to employment. One commenter added that the proposed rule would have a disproportionate, adverse impact on Black and Hispanic workers. Another commenter stated that publicly administered public services reduce inequality.

The Department appreciates the concerns of commenters and agrees that the quality of services is important. This rule does not privatize Wagner-Peyser Act services, but rather it provides flexibility to States to offer Wagner-Peyser Act services using the best staffing approach available to them to provide these services. States, working with local workforce development boards as appropriate, must ensure that proper policies and processes are in place to deter inadequate communication and services and that the workforce system continues to provide effective and meaningful services to all participants. Regarding the commenter's concern about private entities being motivated by profit and thus not willing to provide services to those individuals with barriers to employment, the Department notes that there is flexibility in how States can structure their agreements with their service providers. Included is the ability to align the goals of the agreement with the goals of the Wagner-Peyser Act, including serving UI claimants, dislocated workers, MSFWs, and other individuals with barriers to employment.

The Department disagrees that staffing flexibility would result in adverse impact on Black and Hispanic workers. Staffing flexibility may allow local organizations, closer to the communities in which job seekers live, to deliver culturally competent services to a local community instead of workers managed by a central State office. Rather than negatively affecting services to these communities, this final rule will permit States to provide more tailored staffing models to address the needs of these unique communities, as needed.

The Department notes that States, as Wagner-Peyser Act grantees, are required to oversee all operations of the Wagner-Peyser Act, whether or not they ultimately decide to exercise this final rule's staffing flexibility. This includes ensuring that the State is meeting the universal access requirements of the Wagner-Peyser Act in 20 CFR 652.207, which ensures services are available to all workers and not just the most employable ones. The Department also notes that the non-discrimination requirements of WIOA sec. 188 apply to the services provided under the Wagner-Peyser Act regardless of the staffing model a State may choose to implement.

Consistent with 20 CFR 683.400, the Department will continue to conduct monitoring to ensure States and their subrecipients are complying with all of the requirements of the Wagner-Peyser Act, its implementing regulations, and 2 CFR parts 200 and 2900.

A commenter stated that public employment offices belong in the public sphere because they provide employment services without fees and on an impartial basis, and that the proposal threatens the unbiased nature of ES referrals and remove public employees from the actual offices (especially given that UI employees often work off-site in call centers). The commenter expressed concern that if a “contractor” were providing ES activities, the contractor would charge a fee and may jeopardize unbiased referrals.

This final rule gives States flexibility to staff ES programs in a manner they believe is best tailored to meet the unique needs of the workers who will use the services. The Department does not share the commenter’s concerns. The Wagner-Peyser Act program is a universal access program requiring that labor exchange services be available to all employers and job seekers, per 20 CFR 652.207. Such fees would not be permissible and a service provider could not charge a fee for offering ES activities. Additionally, 20 CFR 678.440(b) prohibits charging a fee to employers for career services, specifically labor exchange activities and labor market information, which are the primary services under the Wagner-Peyser Act.

The Department notes that it has been permissible for non-merit staff to carry out similar functions, such as reviewing compliance with State work search requirements, for example, as part of the REA program for many years. The Department recognizes the importance of the connection between the UI and Wagner-Peyser Act programs, and considers the flexibility this regulation provides to States as an opportunity for States to test and improve strategies for serving unemployed individuals.

Some commenters opposed the staffing flexibility in the proposed rule because they stated that “privatization,” as termed by the commenter, is inefficient, citing Supplemental Nutrition Assistance Program (SNAP) efforts in Texas and Indiana. One commenter likewise opposed the staffing flexibility in the proposed rule, arguing that “privatization” of services within Temporary Assistance for Needy Families (TANF) in Wisconsin resulted in poorer services for the public, with “contractors” retaining a substantial

amount of their budget rather than using it to provide services. While the Department appreciates commenters’ concerns over potential inefficiencies that could arise if States adopt the additional flexibility in this final rule, the Department notes that SNAP and TANF are different programs with different statutory and regulatory requirements. States considering using this final rule’s staffing flexibility are encouraged to consider the range of experiences other programs have had, including those noted in relevant research, or to conduct their own evaluations or pilot projects. States can also use lessons learned from other efforts as they decide whether to use the staffing flexibility in this final rule.

Regardless of how States choose to provide ES activities, they are still Wagner-Peyser Act grantees, so they must oversee all operations of the Wagner-Peyser Act activities and are still subject to 20 CFR part 683, subpart D—Oversight and Resolution of Findings. Consistent with 20 CFR 683.400, the Department will continue to conduct monitoring to ensure States are complying with all of the requirements of the Wagner-Peyser Act, its implementing regulations, and 2 CFR parts 200 and 2900. The Department will hold States responsible for violations of the ES implementing regulations, the statute, and the Uniform Guidance.

Some commenters were concerned that allowing the flexibility in staffing provided under this final rule, which they characterized as privatization, would result in overall cost increases, as UI programs require merit-staffing and often rely on ES staff in performing their functions. A commenter likewise stated that providing services through the use of what they termed private contracts would harm Trade Adjustment Assistance (TAA) and veterans’ programs that currently require merit-staffing and benefit from being able to draw on ES resources. Some commenters also stated that merit-staffing allows for the efficient management and protection of a claimant’s UI information, benefit delivery, and job search. Some commenters stated that changing ES staff would change the “public face” of UI programs, undermining public trust in the organization. The Department has determined States are in the best position to determine what funding and staffing structure is the most efficient and effective for their programs, as States are most familiar with their own particular needs. The Department encourages States to consider costs when determining whether they will

use the staffing flexibility provided in this final rule.

The Department notes that this final rule does not change the merit-staffing requirement in the UI program. Additionally, nothing in this final rule changes UI requirements related to a claimant’s UI information, benefit delivery, and job search. States wishing to use this final rule’s flexibility for the provision of ES activities will need to consider how to ensure the State remains in compliance with all UI requirements.

The Department appreciates the considerations that States need to take into account, such as the effects on partner programs, when deciding whether to use this final rule’s staffing flexibility. States, as Wagner-Peyser Act grantees, are still required to oversee all operations of the Wagner-Peyser Act whether or not they ultimately decide to use this final rule’s staffing flexibility.

One commenter stated that “privatization introduces new data security issues” because of the differing security standards at private companies, the risk that such companies may attempt to monetize confidential information, and the possibility of disgruntled “contractors” misusing confidential information. Another commenter provided an example of a disgruntled contractor misusing confidential information. Similarly, a different commenter agreed that the proposal could reduce information security.

The Department appreciates the considerations, such as data security, that States need to take into account when deciding whether to take advantage of this final rule’s staffing flexibility. States are required to comply with all applicable data confidentiality restrictions, such as those found at 20 CFR 683.220 and 2 CFR 200.303(e). 20 CFR 683.220(a) requires States to have an internal control structure and written policies that provide safeguards to protect personally identifiable information. In considering whether to use a service provider to deliver ES activities, States must consider any implications using a service provider will have on these policies. Likewise, 2 CFR 200.303(e) requires States to take reasonable measures to safeguard protected personally identifiable information and States must consider how a service provider will comply with this requirement when determining if it would be appropriate to take advantage of this final rule’s staffing flexibility for providing ES activities. As appropriate, the Department will continue to provide guidance of the specific requirements

grantees must follow pertaining to the acquisition, handling, and transmission of personally identifiable information.

One commenter opposed the staffing flexibility in the proposed rule because, the commenter stated, agreements for “bureaucratic functions” require such long terms that they lose the competitiveness necessary to drive down costs. The Department appreciates the considerations that States need to take into account when deciding whether to exercise staffing flexibility under the Wagner-Peyser Act, including the structure of the agreement, duration, costs, and services. The Department does not agree with the commenter that there will be no cost savings associated with staffing flexibility for providing ES activities. As explained in the economic analysis accompanying the NPRM and this final rule, the Department has concluded that there will be cost savings. Moreover, the Department considers States to be in the best position to determine the appropriateness of adopting the staffing flexibility for ES activities and whether the flexibility will drive down costs.

One commenter opposed the flexibility in the proposed rule because the commenter stated that the NPRM failed to explain how “contractors” could fulfill the essential functions of the Wagner-Peyser Act’s accountability, fiscal control, and operational responsibilities. The Department appreciates the considerations that States need to take into account when deciding whether to take advantage of the staffing flexibility under the Wagner-Peyser Act the Department is providing. The Department did not include in the NPRM nor in this final rule prescriptive requirements regarding how a service provider could fulfill these requirements. States are in the best position to determine whether a service provider could meet these obligations, and this rule is intended to encourage innovative and flexible approaches to service delivery, customized to the unique populations each State serves and each State knows best. Overly specific requirements on State-level service providers would disserve those important policy goals. The Department notes, however, that even if a State chooses to use a service provider to deliver these services, States, as the Wagner-Peyser Act grantees, are required to provide all of the services under the Wagner-Peyser Act consistent with the accountability, fiscal control, and operational responsibilities dictated by the Act, its implementing regulations, including 20 CFR 683.200, and the Uniform Guidance. A State using a service

provider to deliver ES activities will have to ensure as part of its obligations that these requirements are being met.

One commenter stated that WIOA title I programs should not be used to judge the efficacy of what the commenter termed “privatization” of Wagner-Peyser Act services, as the ES serves more customers and at a lower cost per customer. This rule does not privatize Wagner-Peyser Act services, but rather it provides flexibility to States to offer Wagner-Peyser Act services using the best staffing approach available to them to provide these services. The Department acknowledges that the ES has a lower “cost per participant” than the WIOA title I programs; however, the programs deliver a different set of services. Further, the Department does not consider cost per participant to be the only relevant factor in determining program efficacy. An important factor the Department considered and discussed in the NPRM is the performance indicators for the Wagner-Peyser Act as required under WIOA sec. 116. As part of its justification for proposing staffing flexibility, the Department noted that when isolating similar services provided by the Wagner-Peyser Act and the WIOA Adult and Dislocated Worker programs, the outcomes on those performance indicators were comparable. Cost per participant is one of the factors a State may use when determining whether it is efficacious to use different staffing models for Wagner-Peyser Act services, but, for reasons stated in the NPRM, the Department reiterates that the comparison to the WIOA title I Adult and Dislocated Worker programs is appropriate.

The Department received several comments recommending the Department consider the average cost per participant data of the Wagner-Peyser Act services compared to the WIOA Dislocated Worker program as part of its economic analysis.

The Department recognizes the value of average cost per participant data and anticipates that States will consider this information when determining the most cost-effective approach to delivering ES activities. In the economic analysis, the Department did not compare the average cost per participant receiving Wagner-Peyser Act services to the average cost per participant receiving WIOA Dislocated Worker services due to the differences between the two programs. As part of its justification for merit-staffing flexibility, the Department noted that when isolating similar services provided by the Wagner-Peyser Act and the WIOA Adult and Dislocated Worker programs, the outcomes were

similar. However, the cost of the totality of services available in the Dislocated Worker program cannot be usefully compared to the cost of the totality of services available through the Wagner-Peyser Act. The Dislocated Worker program provides more comprehensive services, such as individualized career services and training services, which cost more individually than Wagner-Peyser Act-funded services cost collectively. Therefore, the Department does not include these Dislocated Worker program services in its economic analysis of the rule.

Another commenter stated that, because the allotments to States under the Wagner-Peyser Act are often less than their WIOA title I allotments and the outcomes are similar, if cost savings are the goal, the Department should require that WIOA title I services be provided by merit staff. The Department declines this suggestion because it is outside the scope of this rulemaking. This rulemaking is focused specifically on Wagner-Peyser Act services, not WIOA title I services. Further, as explained in the NPRM, cost savings are not the only goal under this rulemaking. The Department laid out several other goals in providing staffing flexibility, including aligning the provision of Wagner-Peyser Act services and activities with WIOA’s service delivery model so the programs work better together and allowing maximum flexibility to States to encourage innovative and creative approaches to deliver employment services with limited resources.

The Department notes that as part of the explanation for staffing flexibility in the NPRM, the Department explained that when isolating similar services provided by the Wagner-Peyser Act and the WIOA Adult and Dislocated Worker programs, the outcomes on the primary indicators of performance were comparable. However, it is not appropriate to compare the cost of the totality of services provided in the title I programs with the cost of the services available through the Wagner-Peyser Act, in part because the WIOA title I Adult and Dislocated Worker programs provides more comprehensive services, such as individualized career services, as well as training services. Therefore, contrary to what the commenter suggested, this was not part of the justification for staffing flexibility in the ES program.

One commenter opposed the proposed staffing flexibility because they stated that “privatization,” as termed by the commenter, would reduce accountability and transparency. This rule does not privatize Wagner-Peyser

Act services, but rather it provides flexibility to States to offer Wagner-Peyser Act services using the best staffing approach available to them to provide these services. The Department does not agree that staffing flexibility necessarily would reduce accountability or transparency. For example, a State may find it easier to hold an individual service provider accountable for performance than a State agency. Additionally, States can design agreements with service providers to require accountability and information reporting resulting in increased accountability and transparency. The Department notes that States, as Wagner-Peyser Act grantees, are still required to oversee all operations of the Wagner-Peyser Act whether or not they ultimately decide to use the staffing flexibility provided by this final rule. States will be responsible for holding their service providers accountable for the delivery of services under the Wagner-Peyser Act consistent with their responsibilities found in 20 CFR part 683, subparts B (Administrative Rules, Costs, and Limitations) and D (Oversight and Resolution of Findings). Further, consistent with 20 CFR 683.400, the Department will continue to conduct monitoring to ensure States are complying with all of the requirements of the Wagner-Peyser Act, its implementing regulations, and 2 CFR parts 200 and 2900.

One commenter opposed the staffing flexibility proposed in the rule, stating that State employees are more efficient than their private counterparts and mentioning greater accountability of the former and costlier overhead for the latter. Other commenters opposed the staffing flexibility proposed in the rule because they stated that any possible cost-savings would be outweighed by the costs of contract training and oversight. The Department appreciates the considerations that States need to take into account when deciding whether to use the staffing flexibility under the Wagner-Peyser Act. The Department recognizes that there may be administrative costs associated with obtaining a service provider to deliver ES activities. However, the Department has determined there could be a reduction in costs due to the diminished need for management and oversight of State employees. States should consider any additional costs that may result from obtaining a service provider, as well as cost savings, when determining the appropriate staffing model for their State. Regardless of how States staff the ES program, the Wagner-Peyser Act

requires grantee States to oversee all operations of the Wagner-Peyser Act.

One commenter opposed the proposed rule because, in the commenter's view, it would increase the risk of conflicts of interest and violations of lobbying and ethical rules. Conversely, another commenter stated that the proposed rule could reduce conflicts of interest by separating the service provision functions from the oversight functions at the State level. This rule does not privatize Wagner-Peyser Act services, but rather it provides flexibility to States to offer Wagner-Peyser Act services using the best staffing approach available to them to provide these services. The Department appreciates the considerations that States need to take into account when deciding whether to use the staffing flexibility this final rule provides for delivering services under the Wagner-Peyser Act. The Department does not agree that staffing flexibility necessarily increases the risk of conflicts of interest and violations of lobbying and ethical rules as States will still be bound to follow the same requirements they currently follow. For example, 20 CFR 683.200(e) imposes restrictions on lobbying using Wagner-Peyser Act funds and paragraph (c)(5) of this section requires disclosures of conflict of interest. The Uniform Guidance, which States are required to follow, also imposes restrictions on using Wagner-Peyser Act funds for lobbying. See 2 CFR 200.450.

The Department notes that States, as Wagner-Peyser Act grantees, are still required to oversee all operations of the Wagner-Peyser Act whether they ultimately decide to use a service provider to staff these services or not. Further, consistent with 20 CFR 683.400, the Department will continue to conduct monitoring to ensure States are complying with all of the requirements of the Wagner-Peyser Act, its implementing regulations, and 2 CFR parts 200 and 2900.

Some commenters stated that non-merit-staffing would result in political, corrupt, and/or nepotistic employment decisions. The Department appreciates the commenters' concerns regarding corruption and/or nepotistic employment decisions, and it works to ensure such acts do not take place in DOL-funded grant programs, regardless of the staffing model in place. The Department appreciates the considerations that States need to take into account when deciding whether to exercise staffing flexibility under the Wagner-Peyser Act and how they structure their agreements and conduct oversight to prevent corruption or

nepotism. The Department expects States—both those that continue to use merit staff and those that do not—to have policies and internal controls in place that prevent corruption or nepotism. Further, consistent with 20 CFR 683.400, the Department will continue to conduct monitoring to ensure States are complying with all of the requirements of the Wagner-Peyser Act, its implementing regulations, and 2 CFR parts 200 and 2900. As explained above, the Department anticipates that conflict-of-interest disclosure requirements will help guard against the kind of corruption and nepotism the commenter mentioned.

One commenter opposed the staffing flexibility proposed in the rule, stating that public employees tend to be more knowledgeable and have more experience than “contractor” who lack expertise and have additional costs associated with bidding on contracts. Likewise, other commenters stated that allowing the proposed staffing flexibility could dismantle current infrastructure and relationships between State merit staff currently carrying out the Wagner-Peyser Act and other service providers, other agencies, and employers. One commenter stated that the diminished competency of the ES would undermine the public's trust in the program.

Commenters argued that contracting or privatizing (as they termed it) the ES would be inefficient because it would cause turnover and loss of institutional knowledge. Commenters mentioned specific areas of expertise that require substantial time and dedication to master, such as the TAA program and the State-specific case-management system. Another commenter added that, as a result of “contractor” turnover, service procedure can change, confusing job seekers. This rule does not privatize Wagner-Peyser Act services, but rather it provides flexibility to States to offer Wagner-Peyser Act services using the best staffing approach available to them to provide these services. The Department appreciates the considerations that States need to take into account when deciding whether to exercise the staffing flexibility under the Wagner-Peyser Act. States should consider any impacts to service quality, impacts on partner programs, and staffing turnover that may result from their decision, as well as consider establishing policies and oversight functions that ensure service quality and partner program relationships regardless of the staffing model chosen. States, as Wagner-Peyser Act grantees, are still required to oversee all

operations of the Wagner-Peyser Act, regardless of the staffing model chosen.

Other commenters expressed concern about how the proposal could affect MSFWs and outreach services specifically. One commenter recommended that the Department consider National Farmworker Jobs Program (NFJP) grantees as partners for MSFW outreach. One commenter stated that changes in outreach staffing requirements would disrupt beneficial relationships and lead to a reduction in reporting on employment law violations. The commenter further stated that the proposal could harm MSFWs by diminishing the status and responsibilities of the Monitor Advocate System, sending a message that MSFW rights are not a priority. Finally, some commenters stated that providing ES to MSFWs is a very complicated task, and is becoming more so. The commenters described increasingly complicated job postings, requirements of matching such postings against Wagner-Peyser Act and H-2A criteria, and migrant housing regulations. The commenters stated that the proposal would reduce the experience of ES staff and thus their ability to perform their duties. The Department acknowledges that there may be distinct effects of staffing flexibility on the Monitor Advocate System. In response to the recommendation that the Department consider NFJP grantees as partners for MSFW outreach, the Department notes the requirement at § 653.108(k) for the State Monitor Advocate (SMA) to establish an ongoing liaison with NFJP grantees, in addition to the requirement at § 653.108(l) to establish a Memorandum of Understanding (MOU) with NFJP grantees. The staffing flexibility does not change these requirements and States still must establish this relationship.

Additionally, the NFJP grantees are a required partner of the one-stop delivery system, which requires States to provide access to those services at one-stop centers in the local areas where the NFJP program is carried out. The Department encourages State Workforce Agencies (SWAs) to coordinate outreach with NFJP grantees, but notes that outreach to NFJP grantees alone is not a substitute for the SWAs' required outreach obligations pursuant to 20 CFR 653.107. However, under this final rule, States can consider the outreach staffing option that works best for them, which may include having NFJP grantees be subrecipients of the Wagner-Peyser Act funds and provide ES activities, including outreach activities.

In response to the commenter who maintained that staffing flexibility could

lead to disruptions in beneficial relationships and a decrease in reporting employment-related law violations, the Department notes that it is the choice of the State whether to use the staffing flexibility. This rule does not privatize Wagner-Peyser Act services, but rather it provides flexibility to States to offer Wagner-Peyser Act services using the best staffing approach available to them to provide these services. If the State chooses to adopt staffing flexibility, the State, as the Wagner-Peyser Act grantee, is still required to oversee all operations of the Wagner-Peyser Act activities, including oversight to avoid any disruptions in service. In regards to a potential decrease in reporting violations, regardless of the staffing method used, the new staff must be trained pursuant to 20 CFR 653.107(b)(7), which includes training on protections afforded to MSFWs, and training on sexual harassment and human trafficking awareness. These trainings are intended to help outreach workers identify when such issues may be occurring in the fields and how to document and refer the cases to the appropriate enforcement agencies.

Lastly, SWAs must continue to comply with 20 CFR 653.107(b)(6), which requires outreach workers to be alert to observe the working and living conditions of MSFWs and, upon observation or upon receipt of information regarding a suspected violation of Federal or State employment-related law, to document and refer information to the ES Office Manager for processing. If an outreach worker observes or receives information about apparent violations, the outreach worker must document and refer the information to the appropriate ES Office Manager. These requirements remain in effect and nothing in this final rule changes these State obligations.

In response to the statement that the rulemaking could harm MSFWs by diminishing the status and responsibilities of the Monitor Advocate System, sending a message that MSFW rights are not a priority, the Department makes clear in this preamble that the Monitor Advocate System continues to be a priority for the Department to ensure farmworkers receive equal access to resources and protections. Similarly, across all titles, WIOA focuses on serving individuals with barriers to employment, which includes eligible MSFWs as defined in WIOA sec. 167(i)(1) through (3). Staffing flexibility is an option afforded to States; however, States will continue to be required to carry out the duties set forth in the ES regulations and to provide services to

farmworkers on a basis that is qualitatively equivalent and quantitatively proportionate to the services provided to non-MSFWs. As part of the Monitor Advocate System, the States will continue to provide an SMA to ensure MSFWs are being provided the full range of employment and training services through the one-stop delivery system, as well as outreach staff to provide information to MSFWs on this system.

In response to the concerns that staffing flexibility would reduce the experience of ES staff and thus their ability to perform their duties, the Department reiterates that States may choose to maintain merit staff, and notes that turnover can and has occurred among merit staff. All staff, regardless of whether they are State employees or employees of a service provider, must be trained to carry out the duties set forth in the ES regulations. The Department further affirms its commitment for the National Monitor Advocate (NMA) and Regional Monitor Advocates (RMAs) to continue to provide technical assistance to ensure services are offered to MSFWs on an equitable basis.

### III. Section-by-Section Discussion of Public Comments and Final Regulations

The discussion below responds to section-specific comments, as well as details any changes made in response to those comments. If the Department did not receive comments regarding a particular section, that section is not discussed below, and the final rule adopts that section as proposed. The Department also has made some non-substantive changes to the regulatory text to correct grammatical and typographical errors, in order to improve the readability and conform the document stylistically, that are not discussed below.

#### A. Part 651—General Provisions Governing the Wagner-Peyser Act Employment Service

§ 651.10 Definitions of Terms Used in This Part and Parts 652, 653, 654, and 658 of This Chapter

Section 651.10 establishes terms and definitions used throughout the Wagner-Peyser Act regulations. The Department received several comments regarding the changes to terms and definitions proposed in the NPRM, which are responded to below. If no commenter addressed a specific term, that term is not addressed below and has been published in the regulatory text as proposed in the NPRM.

#### Employment Service (ES) Office

Noting that WIOA envisions an integrated workforce development system that provides streamlined service delivery of the WIOA core programs, including ES activities, one commenter questioned the necessity of defining an ES office separately from a one-stop center. The commenter suggested that the Department instead use the term “one-stop center” in the regulations. While it is true that WIOA envisions an integrated workforce development system, including the ES as a core program, the Department is not removing the definition of “Employment Service (ES) office,” because the Wagner-Peyser Act, WIOA, and their implementing regulations use the term. Therefore, a definition of the term is helpful to clarify States’ obligations in administering these programs. For example, sec. 121(e)(3) of WIOA provides that “the employment service offices in each State shall be colocated with one-stop centers.” The Department uses and defines the term “Employment Service (ES) office” to make clear what is required to be colocated—any site where Wagner-Peyser Act ES activities are provided. This helps ensure that States provide and align ES activities with WIOA services as part of the workforce development system.

#### Employment Service (ES) Office Manager

One commenter noted the term “Employment Service (ES) Office Manager” may not be necessary if the Department removes the term “ES office,” as ES activities are provided in a one-stop center. The commenter suggested using the term “One-Stop Center Manager.” As explained above, the Department will retain the definition of “Employment Service (ES) office,” because the term is used in WIOA and the Wagner-Peyser Act, and it helps clarify States’ responsibilities in providing ES activities. Likewise, the Department is retaining the definition of “Employment Service (ES) Office Manager,” because this term is used in the Wagner-Peyser Act and WIOA’s implementing regulations to describe the individual in the ES office who carries out key responsibilities in providing services to job seekers and employers. Therefore, this is a necessary term to include in the regulation for the effective management and oversight of local ES staff.

#### Employment Service (ES) Staff

The Department will remove the term “contractors” from the definition of ES

staff in finalizing the rule. As explained above, States using a service provider to deliver ES activities will be making a subaward to a subrecipient under the Uniform Guidance. See 2 CFR 200.92, 200.93, and 200.330. While the State may call its agreement with its service provider/subrecipient a contract, the service provider does not meet the definition of a contractor under the Uniform Guidance. See 2 CFR 200.23 and 200.330. Therefore, to avoid confusion, the Department is removing the term “contractors” from the definition of ES staff.

One commenter requested the Department modify its definition of “Wagner-Peyser Act Employment Service staff (ES staff)” to remove the term “Wagner-Peyser Act” so the definition is alphabetically in the definitions and for consistency with its use in the regulation. The commenter noted the definition does not appear to need the lead-in “Wagner-Peyser Act,” as the other definitions that contain “Employment Service” do not include similar language. The commenter also noted that removing “Wagner-Peyser Act” would make all “Employment Service” definitions alphabetical for ease of identification. The Department agrees with the commenter and has changed the definition of “Wagner-Peyser Act Employment Service staff (ES staff)” to “Employment Service (ES) staff.” The Department agrees that using the term ES staff is clearer and more user-friendly.

One commenter requested the Department define the term “staff of a subrecipient” in the Department’s proposed definition for “Wagner-Peyser Act Employment Service (ES) staff” in this regulation, because it is unclear how this category is applicable to State employees or subrecipients. The Department clarifies that the term “subrecipient” in the definition of ES staff has the meaning given to that term in the Uniform Guidance at 2 CFR 200.93. As explained above, because States using a service provider to deliver ES activities will be making a subaward, the individuals providing these services will be the staff of a subrecipient. Therefore, the Department has chosen to leave this term in the definition of the term ES staff. However, because the term is defined in the Uniform Guidance, the Department has decided it is not necessary to define it here in 20 CFR 651.10.

#### Field Checks

One State agency questioned if the intent of the revised definition of “field checks” was to not allow SWA personnel to conduct field checks, as

the added reference to “through its ES offices” appeared to limit the field checks function to only local staff and, as added, Federal staff. The Department clarifies that it is not the intent of the Department to exclude SWA officials (individuals employed by the SWA or any of its subdivisions) from conducting field checks. The Department intends for all ES Staff, including the SMA and other SWA officials, to conduct field checks. The Department is removing the language providing that field checks be conducted through ES offices to make this clarification. The final regulatory text is, “Field checks means random, unannounced appearances by ES staff and/or Federal staff at agricultural worksites to which ES placements have been made through the intrastate or interstate clearance system to ensure that conditions are as stated on the job order and that the employer is not violating an employment-related law.”

#### Respondent

One commenter requested the Department define the term “service provider” as it is used in the Department’s proposed definition of “respondent” in this regulation. The Department does not consider a definition for the term “service provider” to be necessary. In the context of this regulation, the service provider is the entity or entities that deliver services under the Wagner-Peyser Act. The Department clarifies that it is adding this term to the definition of “respondent” to ensure that all individuals or entities providing services are held accountable.

#### *B. Part 652—Establishment and Functioning of State Employment Service*

Part 652 discusses State agency roles and responsibilities; rules governing ES offices; the relationship between the ES and the one-stop delivery system; required and allowable Wagner-Peyser Act services; universal service access requirements; provision of services and work-test requirements for UI claimants; and State planning. The changes in this section increase the flexibility available to States in providing Wagner-Peyser Act-funded services and activities by allowing them to use alternative staffing models.

§ 652.215 Can Wagner-Peyser Act-funded activities be provided through a variety of staffing models?

Section 652.215 governs how States may staff the provision of Wagner-Peyser Act-funded services. The Department received comments regarding the flexibility provided in the

regulation and has responded to them below. The Department is publishing § 652.215 as proposed.

Several commenters opposed the rule because they did not agree that removing the requirement that States provide Wagner-Peyser Act-funded activities with staff other than merit-staffing rule was a legally permissible policy. The commenters explained that, although the Department stated in the WIA and WIOA rulemakings that the imposition of the merit-staffing requirement was a policy choice and interpretation of the Wagner-Peyser Act, nothing in either of these rulemakings indicated (explicitly or implicitly) that the policy was not legally required by the statute or that the Department was free to choose a different interpretation of the Act. Section 3(a) of the Wagner-Peyser Act requires the Secretary to develop and prescribe “minimum standards of efficiency.” As explained in the WIA and WIOA rulemakings, and acknowledged by commenters, the Department interprets this provision to give the Department the discretion to impose a merit-staffing requirement.

In the 1998 case *Michigan v. Herman*, the U.S. District Court for the Western District of Michigan found that the Wagner-Peyser Act “does not explicitly require merit-staffing” and determined that the language of sec. 3(a) of the Act is “broad enough to permit the [Secretary] to require merit-staffing.” 81 F. Supp. 2d 840, 847–48 (W.D. Mich. 1998). However, the court noted that “there is ample basis for a conflicting interpretation of the Wagner-Peyser Act’s requirements,” suggesting that the Department has latitude to interpret sec. 3(a) to permit the flexibility afforded in this regulation. If the court believed that sec. 3(a) was limited to the Department’s previous interpretation—that it required the use of merit staff—it would have explicitly so stated.

In the WIA Interim final rule preamble, the Department stated that the “regulations reflect[ed] the Department’s interpretation of the Wagner-Peyser Act, affirmed in [*Michigan v. Herman*], to require that job finding, placement and reemployment services funded under the Act . . . be delivered by public merit-staff employees.” 64 FR 18662, 18691 (Apr. 15, 1999). The Department described its interpretation as that affirmed in *Michigan v. Herman*, which held that the Department could require merit-staffing, but not that it must. And the opinion in that case describes the Department’s own interpretation of the statute as one giving “discretion to the Secretary” to require merit-staffing. *Herman*, 81 F. Supp. 2d at 846. The

Department’s statement in the WIA preamble, therefore, should not be construed as denying the Department discretion over the merit-staffing question.

In the WIA final rule, the Department did not address whether the Wagner-Peyser Act obligated the Department to impose a merit-staffing requirement for Wagner-Peyser Act-funded services. 65 FR 49294, 49385 (Aug. 11, 2000). Instead, the Department simply noted that the final WIA regulation imposed a merit-staffing requirement reflecting the Department’s authority under the Wagner-Peyser Act, as affirmed in *Michigan v. Herman*, to require Wagner-Peyser Act-funded services be provided by merit staff. Thus, in the WIA final rule, the Department did not opine on whether sec. 3(a) mandated the imposition of a merit-staffing requirement for Wagner-Peyser Act-funded services.<sup>6</sup>

Finally, in the WIOA NPRM, the Department explained that the Department has maintained the policy of requiring merit-staffing since the earliest years of the ES and that *Michigan v. Herman* upheld this policy. 80 FR 20805 (April 16, 2015). The Department explained that it would continue this policy from WIA to WIOA. *Id.* Notably, the WIOA NPRM did not suggest that there was a statutory requirement in the Wagner-Peyser Act for merit staff. *Id.* The language in the WIA and WIOA rulemakings demonstrates that since the decision in the *Michigan v. Herman* case, the Department has not read the Wagner-Peyser Act to include a statutory requirement that Wagner-Peyser Act services be delivered by State merit staff. Instead, as the Department explained in the NPRM for this final rule, the Department has previously read this provision to give it the discretion to impose a merit-staffing requirement.

The commenters indicated that they thought the Department had an obligation in prior rulemakings to state that the policy was not legally required in order to make the change in this final rule. The Department disagrees. Throughout this rule’s NPRM and final rule preambles, the Department has amply explained its legal authority and its policy bases for providing new staffing flexibility under the Wagner-

<sup>6</sup> Here, the Department’s interpretation of the Wagner-Peyser Act should be distinguished from its description of its own regulations. The Department described its regulations as “mak[ing] clear that Wagner-Peyser Act services must be delivered by merit-staff employees of a State agency.” 65 FR 49385. But that is different from stating that the Act itself requires merit-staffing.

Peyser Act. That is sufficient. The Department does not agree with commenters that there is an additional requirement to notify the public in prior rulemakings (or in other ways) that it is within the Department’s discretion to revise, through notice-and-comment rulemaking, its interpretation of the Wagner-Peyser Act.

A number of commenters opposed the flexibility in the proposed rule that would allow States to provide Wagner-Peyser Act-funded services with staff other than State merit staff explaining that the proposal would remove a long-standing and legally required merit-staffing requirement. The Department acknowledges that it has had a long-standing policy of requiring States to deliver Wagner-Peyser Act labor exchange services with State merit staff. However, as explained above, the Wagner-Peyser Act does not contain a statutory requirement to impose a merit-staffing requirement on States. Instead, the Department’s imposition of a requirement that ES activities be provided by State merit staff was the Department’s policy decision, and one that is permissible under the Act.

It is within agencies’ authority to change long-standing policies, such as the merit-staffing requirement. In making the change, agencies are required to “display awareness” that they are changing their position and show that there are good reasons for the new policy. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016). The Department’s proposal did so. In the NPRM, the Department acknowledged the policy change and explained the reasons for the change: (1) Allows States to align the provision of ES activities with WIOA’s service-delivery model so the programs work better together; (2) allows States to develop innovative and creative approaches to delivering ES activities with limited resources; and (3) frees resources to assist job creators and workers more effectively. In the NPRM, the Department also explained that it has found that services similar to those provided through the ES program can be delivered effectively through systems without the specific Federal regulatory requirements regarding State merit-staffing.

Several commenters stated that the Department’s analysis had not justified a reversal of the Department’s long-standing position that the Wagner-Peyser Act legally requires the delivery of ES activities through merit staff. The policy reasons for the Department’s decision to allow States flexibility in staffing ES programs are discussed at length throughout the NPRM’s preamble

and include the benefits of granting States flexibility to fit the unique needs of their particular workers, employers, and ES programs; freeing up resources to better serve job creators and job seekers; better integrating the ES program with services under WIOA; and the successful functioning of flexible staffing arrangements in the provision of other, comparable services. Notably, the regulatory changes that this final rule adopts do not require the States to change their staffing mandates for ES programs. Rather, States will be free to choose the staffing model that best fits their needs.

Another commenter stated that the Department was not legally justified in making the changes proposed in the NPRM. The Department disagrees. First, in the NPRM, the Department explained that the Wagner-Peyser Act does not dictate particular staffing models. 84 FR 29433, 29436 (June 24, 2019). Instead, sec. 3(a) of the Wagner-Peyser Act requires the Department to develop and prescribe “minimum standards of efficiency” in the provision of ES programs. The Department noted that the broad scope of sec. 3(a) has been recognized in court, and it explained that in *Michigan v. Herman*, the court recognized that, while this provision is broad enough to permit the Department to impose a merit-staffing requirement, there was more than enough basis for a conflicting interpretation of the Wagner-Peyser Act. *Id.*

Second, the Department explained in the NPRM preamble that, while it may have previously cited sec. 5(b) as support for imposing mandatory merit-staffing, that section “does not require the imposition of such a requirement.” *Id.* Instead, the NPRM explained that this provision merely conditions States’ Wagner-Peyser Act funds on merit-staffing in the administration of UI programs. *Id.*

Third, the Department also explained its interpretation of the Wagner-Peyser Act in the WIA and WIOA rulemakings, stating that while the Department continued to require State merit-staffing in these rulemakings, this was maintained as a policy choice. *Id.*

A number of commenters opposed the proposed rule, because they stated it is contrary to how Congress interprets the Wagner-Peyser Act. Some commenters stated that over the years, Congress has taken several actions to require merit-staffing in the ES system or that reaffirmed the Wagner-Peyser Act’s statutory requirement to have merit-staffing. Commenters gave several examples of these actions: (1) The Intergovernmental Personnel Act of 1970 (IPA) named the Wagner-Peyser

Act as one of the two acts administered by the Department that transferred merit authority to the Civil Service Commission (now the Office of Personnel Management); (2) the regulations implementing the IPA demonstrated there is a statutory requirement to have merit-staffing in Wagner-Peyser Act-funded programs; (3) in 2006, when the Department attempted to change its legal interpretation of the Act, Congress blocked the proposal through a provision in the appropriation; and did so for several years afterwards until the proposed rule was withdrawn; and (4) the Department issuing Training and Employment Guidance Letter (TEGL) No. 11–12, Using Funds Authorized Under Section 7(a) of the Wagner-Peyser Act of 1933 for Intensive Services as Defined by the Workforce Investment Act (Jan. 3, 2013). The Department does not agree that the IPA and its implementing regulations prevent the Department from allowing added staffing flexibility under the Wagner-Peyser Act. Section 208 of the IPA transferred the authority of the Department and other agencies to prescribe standards for a merit system of personnel administration in various Federal grant-in-aid programs. 42 U.S.C. 4728. In particular, the IPA transferred the Department’s duties under the Wagner-Peyser Act and sec. 303(a)(1) of the Social Security Act (SSA), to the extent that the functions, powers, and duties under these laws relate to the prescription of personnel standards on a merit basis. 42 U.S.C. 4728(a) and (a)(2). The OPM regulations implementing the IPA provide a list of programs with a statutory or regulatory requirement for merit staff. The “Employment Security (Unemployment Insurance and Employment Services)” program, which cites as authority the SSA and the Wagner-Peyser Act, is listed as having a “statutory requirement” for merit staff. 5 CFR part 900, subpart F, Appendix A.

However, there is no indication that Congress, in including the Wagner-Peyser Act in sec. 208 of the IPA, intended to affirm a merit-staffing requirement not found in the Act itself, or to impliedly amend the Act to include one, rather than simply reflecting existing merit system functions being carried out by the Department at that time. The Department notes that the question of Congress’s intent in enacting the IPA was considered by the court in *Michigan v. Herman*. After reviewing the text and legislative history of the Wagner-Peyser Act and the IPA, among other arguments, the court concluded that the

Wagner-Peyser Act “does not explicitly require merit-staffing” and that “Congress has never clearly ratified or rejected the Department’s inclusion of a merit-staffing requirement.” *Michigan v. Herman*, 81 F. Supp. 2d at 847–48.

Similarly, there is no indication that OPM’s regulations at 5 CFR part 900 are intended to be authoritative or interpretive of other statutes, rather than merely descriptive. The predecessor to the current part 900 regulations was issued jointly in 1963 by the Department of Health, Education and Welfare, the Department of Labor, and the Department of Defense, prior to the passage of the IPA and its resulting transfer of functions. It was codified at 45 CFR part 70. In prescribing merit standards under the Wagner-Peyser Act at that time, the regulations at part 70 cited as authority a provision in the Department’s yearly congressional appropriation requiring merit-staffing (former 29 U.S.C. 49n). This provision was not repeated in the Department of Labor Appropriations Act, 1965 (Pub. L. 88–605, 78 Stat. 959, 960 (1964)), or in any such act thereafter. Thus, the current OPM regulations, as they relate to the Wagner-Peyser Act, originated not only from a former departmental interpretation of the Wagner-Peyser Act, but also in a long-expired appropriations rider. Notwithstanding DOL’s imposition of a merit-staffing requirement at the time of the IPA’s enactment, there was no longer any corresponding statutory requirement in the Wagner-Peyser Act.

Further, while Appendix A in the current part 900 lists the ES as having a “statutory requirement” for merit-staffing, the accompanying citation is to sec. 5(b) of the Wagner-Peyser Act, 29 U.S.C. 49d(b). Section 5(b) does not impose any such requirement, but merely requires the Secretary to certify that States are complying with sec. 303 of the SSA (requiring, among other things, use of merit staff by States in administering their UI programs) and that States are coordinating ES activities with the provision of UI claimant services. The provisions administered by OPM constitute a transfer of functions and apply only to the extent the Department imposes an underlying merit-staffing requirement, which, as discussed above, the Wagner-Peyser Act does not impose. Indeed, OPM has previously revised Appendix A to reflect programmatic changes of the type effected by this final rule. Neither the IPA nor the OPM regulations contain an independent legal requirement for merit-staffing in the ES.

The Department does not agree that the language in the Revised Continuing

Appropriations Resolution, 2007 (Pub. L. 110-5) (Feb. 15, 2007)—the 2006 appropriation commenters referred to—demonstrated that Congress was reaffirming a merit-staffing statutory requirement for the ES. In 2007, the appropriation for fiscal year 2007 provided that none of the funds made available were to be used to finalize or implement any proposed regulation under WIA, the Wagner-Peyser Act, or the Trade Adjustment Assistance Reform Act of 2002 (TAARA) until legislation reauthorizing WIA and TAARA was enacted. Nothing in this language indicates that Congress thought the Department did not have the legal authority to give States the flexibility to provide Wagner-Peyser Act-funded services with non-merit staff. Instead, the Department views this appropriation language as Congress's disapproval of the Department's policy choice, rather than a definitive statement on the Department's legal authority.

As explained above, the Wagner-Peyser Act does not contain a statutory requirement that State merit staff perform ES activities. The Department now interprets the Wagner-Peyser Act to give States the flexibility to determine whether providing Wagner-Peyser Act-funded services through merit staff is the best way to deliver these services for their State. States are free to continue to have merit staff provide these services or to adopt other staffing models that may work better for their State.

Several commenters opposed the proposed rule, because, they stated, merit-staffing is a statutory requirement and the Department does not have discretion to rescind this statutory requirement. These commenters pointed to TEGL No. 11-12 as affirming that the merit-staffing requirement is statutorily mandated in the Wagner-Peyser Act or for the proposition that the Department does not have the authority or discretion to rescind the statutory requirement that Wagner-Peyser Act-funded activities be provided by merit-staffed employees.

The Department agrees that Federal agencies do not have the discretion to rescind statutory requirements. However, as explained in response to other commenters, it is the Department's position that the Wagner-Peyser Act does not contain a statutory requirement for State merit staff to provide ES activities. Because the Department only interprets the Wagner-Peyser Act to *permit* the Department to impose such a requirement, it is within the Department's discretion to provide States the flexibility to deliver these services through merit staff or otherwise.

Additionally, the Department notes TEGLs are guidance documents issued by ETA. They are interpretations of the statutes the Department administers and the regulations the Department promulgates to implement these statutes. TEGL No. 11-12, released in 2013, states that the guidance did not change the requirement that State merit staff employees deliver Wagner-Peyser Act labor exchange services, and it addresses the use of Wagner-Peyser Act funds to provide intensive services under WIA. The TEGL simply reminds States that nothing in the guidance changes the regulatory requirement in the WIA regulations that States provide Wagner-Peyser Act-funded services with merit staff. The TEGL does not, as commenters suggested, state that there is a statutory requirement to provide Wagner-Peyser Act-funded services with merit staff. Nor does it address the Department's authority or discretion to rescind a statutory requirement.

Several commenters opposed the rule because they stated the history and origins of the Wagner-Peyser Act and the inherently governmental nature of the Wagner-Peyser Act functions show Congress's intention to require merit-staffing as a foundation of the ES system. Relatedly, a number of commenters opposed the rule because of the integration between the UI work test and the ES staff. These commenters explained that ES staff perform the UI work test as provided under sec. 7(a)(3)(F) of the Wagner-Peyser Act to ensure that claimants are able to work, available for work, and actively seeking work. The commenters stated these are federally required conditions of State UI eligibility and, in this relationship, the ES staff function as gatekeepers, making the role of the ES staff inherently governmental. Because these commenters viewed this activity as inherently governmental, they stated these activities can only be handled by State merit staff. Similarly, some commenters stated that the UI work test duties are inherently governmental in nature, so they cannot be privatized. Other commenters stated that because the ES administers the work test to determine if individuals are able and available to work and actively seeking employment, the ES worker is in the position of determining eligibility for UI. The commenters stated that eligibility determination is a government function properly carried out by merit-based staff.

The Department appreciates the history and development of the Federal ES beginning in the early twentieth century. Following years of a two-tiered, underfunded, and largely ineffective

network of employment offices, the Wagner-Peyser Act was passed in 1933 in order to promote greater cooperation and coordination between the Federal and State programs, to avoid active competition between the two, and to ameliorate wastefulness in the system. See S. Rep. No. 73-63, at 3-4 (1933). This final rule is in keeping with the spirit of Federal-State cooperation that undergirds the Wagner-Peyser Act, by allowing States the choice to staff their ES program activities and services as they deem most effective.

To the extent that the system of State-run employment offices was created in order to put a stop to the abuses of private employment agencies,<sup>7</sup> the Department notes that this final rule in no way marks a return to a private system of employment firms. All ES activities and services nationwide will continue to be provided through the public ES. Nor will the States be subject to any risk of patronage that may have been a concern in the early years of the program, prior to the development of many of the legal safeguards that are currently in place. States that opt to use alternative staffing methods will continue to be accountable, subject to all of the obligations found in the ES regulations regarding effective service delivery, including oversight and monitoring, as well as all other applicable laws, in administering the program.

The Department does not agree with commenters that the functions of the Wagner-Peyser Act are inherently governmental. The Office of Management and Budget (OMB) has defined inherently governmental functions as those functions "so intimately related to the public interest as to mandate performance only by Federal employees." OMB, Performance of Commercial Activities, Circular No. A-76 (August 4, 1983 (Revised 1999)). Inherently governmental functions, according to this guidance, normally fall into two categories: (1) Acts of governance; and (2) monetary transactions and entitlements. Acts of governance are the discretionary exercise of government authority, such as criminal investigations, prosecutions, and other judicial functions. Monetary transactions and entitlements include functions such as tax collection and revenue disbursements.

Section 7 enumerates the services the ES provides. These services include, among others, job search and placement

<sup>7</sup> This history is detailed in Henry P. Guzda, "The U.S. Employment Service at 50: it too had to wait its turn," *Monthly Labor Review*, 12-19 (June 1983).

activities for job seekers, appropriate recruitment services for employers, and developing linkages between services under the Wagner-Peyser Act and other Federal or State legislation. None of these activities are inherently governmental because they do not involve governance or monetary transactions and entitlements. Indeed, one of private firms' core functions is finding the employees they need, and there are innumerable private firms offering job-search and job-placement services. In addition, many of these services, such as the job search and placement activities, are similar to the services WIOA provides. That WIOA does not have a merit-staffing requirement supports the Department's position that these activities are not inherently governmental.

The Department acknowledges that there are important linkages between the ES program and the UI program. Section 7(a)(3)(F) of the Wagner-Peyser Act requires ES staff to conduct the work test for the UI program, including making eligibility assessments. In the UI program context, the Department has previously explained that States may not use a service provider for inherently governmental functions and that these functions must be performed by State merit staff. See Unemployment Insurance Program Letter (UIPL) No. 12-01, *Outsourcing of Unemployment Compensation Administrative Functions*, Dec. 12, 2000. In this UIPL, the Department listed a number of UI functions that are considered inherently governmental and thus must be performed by State merit staff. One such function is determining whether to pay (or not pay) UI benefits.

20 CFR 652.209(b)(2) requires the ES to administer the work test and conduct eligibility assessments for UI claimants. The UI work test includes activities designed to ensure that an individual whom a State determines to be eligible for UI benefits is able to work, available for work, and actively seeking work in accordance with the State's UI law. In providing these services, it is possible ES staff may detect eligibility issues for UI claimants. However, the Wagner-Peyser Act implementing regulations and guidance make clear that only UI merit staff members may adjudicate UI eligibility issues. Therefore, 20 CFR 652.210(b)(3) requires ES staff to provide UI program staff with information about a UI claimant's ability or availability for work or the suitability of work offered to UI claimants. This ensures that UI merit staff have the information they need to adjudicate any eligibility issues detected during the work test or eligibility assessment.

UIPL No. 14-18, *Unemployment Insurance and the Workforce Innovation and Opportunity Act* (Aug. 20, 2018), further explains how ES staff meet the requirements to provide these services to UI claimants and offer information about any eligibility issues the ES detects while providing these services. Specifically, the UIPL explains how States ensure that the necessary information about a UI claimant's ability, availability, or the suitability of work offered is referred to the State's UI staff. First, States are required to have in place an "effective feedback loop" to inform UI staff whether the claimant reported as directed and participated in the appropriate eligibility assessment and/or services. Second, States must ensure ES staff are trained to conduct a thorough eligibility assessment to identify potential eligibility issues for referral to UI staff. Third, States must ensure that ES staff are trained to properly document information for use by UI staff in adjudicating any eligibility issues. Finally, this feedback loop must be in place and clearly documented. *Id.* at 10.

The work test and eligibility assessments themselves do not involve making a determination on whether to pay (or not pay) unemployment compensation; instead, the individuals conducting the test and assessment gather information and then share that information through the above-mentioned feedback loop with the UI program staff who make the determination about an individual's eligibility or continuing eligibility for unemployment compensation. *Id.* The Department requires a clearly documented feedback loop that advises UI staff whether the individual reported as directed and participated in the eligibility assessment and/or services. *Id.* Sending this information to UI staff ensures that only UI merit staff members are adjudicating UI eligibility issues, consistent with the requirement in sec. 303(a)(1) of the SSA that the UI program maintains personnel standards on a merit basis.

One commenter opposed the proposed rule because, the commenter stated, that Congress envisioned at the Wagner-Peyser Act's inception, and affirmed over the years, a professional cadre of State government ES employees selected by merit to avoid favoritism or partisanship in the delivery of services. As discussed above, the Wagner-Peyser Act does not reflect any express intent to require merit-staffing in the ES. Congress could have chosen to insert such a requirement in the Wagner-Peyser Act at the time of its passage, or at any time thereafter, as it did in other

legislation—for example, sec. 303(a)(1) of the SSA. Further, while a merit-staffing requirement has been included in a number of previous departmental appropriations acts, Congress specifically chose not to make this a permanent feature of the Wagner-Peyser Act. Instead, since its passage in 1933, the Wagner-Peyser Act has explicitly given the Secretary discretion under sec. 3(a) to develop and prescribe "minimum standards of efficiency" in the administration of the ES program. This discretion was affirmed in *Michigan v. Herman*, where the court found no conclusive evidence that Congress had intended to impose a merit-staffing requirement, or had affirmed or rejected such a requirement in the ensuing decades.

Several commenters opposed the proposed rule because they viewed it as inconsistent with the reasons Congress initially created the ES. They contended that before Congress passed the Wagner-Peyser Act, there was corruption, political patronage, and inequities in private employment offices nationwide and that in passing the Act, Congress envisioned a State merit system to prevent favoritism and promote equality in the delivery of services. This final rule is consistent with the purposes of the Wagner-Peyser Act, which was passed primarily to strengthen the overall structure, value, and effectiveness of the ES system in the United States through innovation. The Department recognizes the history of ES offices in the United States, and the problems that first prompted States to create their own free, public employment offices. This final rule does not detract from the public nature of an ES system that offers universal access to job seekers, nor does it vest in private entities the ultimate responsibility for effective service delivery to the public. The myriad of obligations to which the States are subject as conditions for receipt of funding under the Wagner-Peyser Act, as well as obligations imposed by other applicable laws, remain unchanged by this final rule.

One commenter viewed the history of the Wagner-Peyser Act and the inherently governmental nature of its functions carried out by merit staff as a foundation of the ES system and that Congress's actions to protect merit-staffing in the ES since the law's New Deal-era passage show Congressional intent for and support of merit-staffing for ES. The Department agrees that the staff who provide Wagner-Peyser Act-funded services are key to the success of the program and job seekers and employers' use of the ES. However, the Department views the foundation of the

ES to be the services provided to job seekers and employers. Each State has unique needs from the ES and a one-size-fits-all staffing model may not be able to take these needs into account. Therefore, the Department has determined it would be most appropriate to give States the flexibility to determine which staffing model provides the most effective services to their customers.

The Department acknowledges that Congress has taken actions related to merit-staffing of Wagner-Peyser Act-funded services. However, as explained above, while the imposition of a merit-staffing requirement is a permissible interpretation of sec. 3(a) of the Wagner-Peyser Act, it is not required by the Act.

Likewise, several commenters opposed the flexibility in the proposed rule to provide Wagner-Peyser Act-funded services with staff other than merit staff, because they believed Congress would not approve of the flexibility. Specifically, the commenters explained that Congress's actions since the bill's passage show the original intent of the authors of the Wagner-Peyser Act and Congress's intent to require merit-staffing in the ES. Similarly, some commenters opposed the proposed rule because, they stated, there was a pattern of Congressional action to prevent the "privatization" (as they termed it) of ES activities, revealing that Congress has a critical role in supporting and maintaining the ES merit-staffing requirement. This rule does not privatize Wagner-Peyser Act services, but rather it provides flexibility to States to offer Wagner-Peyser Act services using the best staffing approach available to them to provide these services. The Department acknowledges that Congress has taken actions since the enactment of the Wagner-Peyser Act that maintained the Department's regulatory requirement that States provide ES activities with State merit staff. For the reasons discussed above, there is no current statutory merit staff requirement in the Wagner-Peyser Act. Since the enactment of the Wagner-Peyser Act in 1933, a number of years have passed during which Congress could have either amended the Wagner-Peyser Act to make it a statutory requirement that States provide Wagner-Peyser Act-funded services with merit staff or continued to require use of merit staff in the ES system via appropriations rider, as was done for a number of years. But Congress has not done so.

Most notably, on May 15, 1998, in *Michigan v. Herman* the court held that there was no explicit statutory mandate in the Wagner-Peyser Act to require

States to deliver Wagner-Peyser Act-funded services with State merit staff. 81 F. Supp. 2d at 847. On August 7, 1998, a little over two months later, Congress enacted WIA, which included a number of amendments to the Wagner-Peyser Act. Thus, as of May 15, 1998, Congress was aware that a court had concluded there was no explicit merit-staffing requirement in the Wagner-Peyser Act. Had Congress wanted to make it a statutory requirement, Congress could have used the 1998 amendments to include one. However, Congress did not include such a requirement in these 1998 amendments. Similarly, in 2014, Congress again re-authorized the workforce development system and amended the Wagner-Peyser Act. Like the 1998 amendments, these amendments also did not include a statutory requirement to provide ES activities with State merit staff.

Commenters also stated that later congressional actions can demonstrate the original intent of the authors of the Wagner-Peyser Act. The Wagner-Peyser Act was enacted in 1933. It is questionable whether congressional actions taken later, sometimes decades later, should have much relevance to the intent of the Act's authors. Regardless, the key language of the Act itself, which Congress has not amended, shows no congressional intent to impose a permanent merit-staffing requirement.<sup>8</sup>

Several commenters opposed the proposed rule because they believe the ES system only qualifies as a "public employment office" if the employees are State merit-staffed employees. The commenters noted that sec. 1 of the Wagner-Peyser Act requires the establishment of a "national system of public employment service offices," and the commenters contended that a principal component of such a system are "employees of State government [who are] hired and promoted on the basis of merit under a civil service system." They believe this is what makes the offices "public." Without merit-staffed State government employees, the commenters asserted, the public nature of the ES is given to private control and is no longer a

<sup>8</sup> The original Wagner-Peyser Act employed this language: "The bureau shall also assist in coordinating the public employment offices throughout the country and in increasing their usefulness by developing and prescribing minimum standards of efficiency . . . ." Public Law 73-30 § 3(a), 48 Stat. 113, 114 (1933). The Act, as amended, uses the same "minimum standards of efficiency" language: "The Secretary shall assist in coordinating the State public employment service offices throughout the country and in increasing their usefulness by developing and prescribing minimum standards of efficiency . . . ." 29 U.S.C. 49b(a) (2018).

"public employment office." These commenters interpreted the term "public" in the phrase "public employment office" in sec. 1 of the Wagner-Peyser Act to refer to the employment relationship between the individuals providing Wagner-Peyser Act-funded services and the State. However, nothing in the Wagner-Peyser Act indicates this was the intent of Congress in establishing the ES. As explained above, the history of the Wagner-Peyser Act's passage indicates Congress established the ES to promote greater cooperation and coordination between the Federal and State programs, to avoid active competition between the two, and to ameliorate wastefulness in the system. See S. Rep. No. 73-63, at 3-4 (1933). To the extent that the ES was created to end the abuses of private employment agencies,<sup>9</sup> the Department notes that this final rule in no way marks a return to a private system of employment firms. All ES activities and services nationwide will continue to be provided through State-administered offices, with services universally available and financed with public funding via a grant from the Department, which will continue to oversee that States meet their obligations under the Wagner-Peyser Act. Accordingly, contrary to the commenter's assertion, the Department will continue to administer a national system of public employment service offices under this final rule.

The Department notes that sec. 2(6) of the Wagner-Peyser Act provides that the term "employment service office" means a local office of a State agency. The Department interprets this to mean that an ES office is any local office where the State agency provides ES activities (be it through State employees or a service provider). This is consistent with the definition the Department proposed for "ES office" in the NPRM and finalized in this rule.

Several commenters opposed the flexibility provided in the proposed rule because they stated it contradicts the Department's long-standing position. They contended that it has been a long-standing position of the Department, as the Department argued in *Michigan v. Herman*, that the Wagner-Peyser Act requires merit-based staffing. Commenters explained that in the *Michigan v. Herman* case, the Department argued that Congress intended merit-staffing to be a key component of a public ES at the outset

<sup>9</sup> This history is detailed in Henry P. Guzda, "The U.S. Employment Service at 50: it too had to wait its turn," *Monthly Labor Review*, 12-19 (June 1983).

and described how Congress has reaffirmed this principle over time. The Department acknowledges that it has required States to provide labor exchange services with State merit staff. However, as explained elsewhere in this final rule, the Department is now changing its policy and is giving the States the flexibility to determine what staffing model works best for their State's needs. In *Michigan v. Herman*, the Department contended that its construction of the Wagner-Peyser Act to require merit staffing was supported by the language of the statute and was consistent with Congressional intent. However, the court ruled that it "cannot state, as a matter of law, which of the various interpretations presented more accurately reflects Congressional intent" and concluded that sec. 3(a) was broad enough to permit the Department to require merit-staffing. *Michigan v. Herman*, 81 F. Supp. 2d at 847–48. Implicit in the court's decision is that it would also be a permissible read of this provision to not require merit-staffing. Now, consistent with the decision in *Michigan v. Herman*, the Department is exercising its discretion to interpret sec. 3(a) of the Wagner-Peyser Act and will no longer require States to use State merit staff to deliver labor exchange services. As explained above, the Department notes that it is permissible for Federal agencies to change their interpretations as long as they provide a reasoned explanation for the change. *Encino Motorcars, LLC*, 136 S. Ct. at 2125. This includes "display[ing] awareness" that the agency is changing its position and showing that there are good reasons for the change. *Id.* at 2126. As required, in the NPRM for this rule, the Department acknowledged that its proposal was a departure from the requirement to use merit staff and provided four reasons for this change. See 84 FR 29433, 29434 (June 24, 2019). No commenters expressed that the prior rule engendered substantial reliance interests, and even if they had, as noted, the Department has provided a substantial justification for this change.<sup>10</sup>

One commenter asked if private entities receiving Wagner-Peyser Act funds would be required to comply with State and Federal freedom of information act rules and regulations. The Freedom of Information Act (FOIA) establishes a statutory scheme for members of the public to use in making requests for Federal agency records.

<sup>10</sup> The Department also notes that the flexibilities permitted by this rule are purely optional, and the Department's monitoring and requirements of States' service delivery remain in place.

Only agencies within the Executive Branch of the Federal government, independent regulatory agencies, Amtrak, and some components within the Executive Office of the President, are subject to the FOIA. See 5 U.S.C. 551(1) and 552(f)(1) and 49 U.S.C. 24301(e). Therefore, if a private entity receives Wagner-Peyser Act funds from a State that entity is not subject to the FOIA or its implementing regulations.

However, the Department notes that each State has its own open record law. The Department is not the appropriate entity to interpret the application of a State's laws. Entities receiving Wagner-Peyser Act funds from a State must conduct their own analysis to determine the applicability of a State's freedom of information laws and regulations.

One commenter opposed the proposed rule, arguing in part that it could lead to politicization, which the commenter stated is currently prohibited, because most State employees are covered by the Hatch Act. The Hatch Act of 1939 (Pub. L. 76–252) restricts the political activity of individuals principally employed by State, District of Columbia, or local executive agencies and who work in connection with programs financed in part by Federal loans or grants. The Department acknowledges that some individuals providing ES activities may no longer be covered by the Hatch Act, as they may no longer be principally employed by a State, the District of Columbia, or a local executive agency. However, the ES is a universal access program that requires that labor exchange services be available to all employers and job seekers. See 20 CFR 652.207. States, regardless of who is providing the services, must ensure that this requirement is met. If a State decides to use the staffing flexibility in this final rule to provide these services, the State's monitoring will include ensuring the universal access requirement is met. In turn, the Department's monitoring of the State will also focus on this requirement.

One commenter opposed the proposed rule because the commenter stated that recognizing the inherently governmental functions of the ES, Congress has acted many times in the 85-year history of the Wagner-Peyser Act to require merit-staffing in the ES and has recognized that any changes require congressional action. The Department does not agree that changes in the merit-staffing requirement can only be made through congressional action. As explained above, the Wagner-Peyser Act permits the Department to require States to deliver Wagner-Peyser Act-funded services with State merit

staff, but it does not impose a statutory requirement that such services be merit-staffed. Because the merit-staffing requirement is not mandated by statute, as noted above, it is within the Department's authority to provide States with this flexibility.

One commenter opposed the proposed rule because of the potential impact on the Reemployment Services and Eligibility Assessment (RESEA) program. The commenter explained that "[p]rivatizing the public Employment Service" could jeopardize the effectiveness of RESEA. The commenter noted that many States have launched RESEA models that rely on ES staff being cross-trained in UI to a level that they can deliver legally accurate guidance on the State's UI law and qualifying requirements. The commenter expressed concerns that allowing what they described as the privatization of services under RESEA grants would amount to privatizing key components of the UI program, a result that Congress did not intend when it expanded RESEA last year, and that is not permissible under current law. This rule does not privatize Wagner-Peyser Act services, but rather it provides flexibility to States to offer Wagner-Peyser Act services using the best staffing approach available to them to provide these services. The Department does not agree that the proposed flexibility given to States would negatively impact the RESEA program. The RESEA program assesses the continued eligibility and reemployment needs of UI claimants for the program's targeted populations. As the Department explained in its guidance on RESEA, UI staff, Wagner-Peyser Act-funded State ES staff, WIOA staff, or other AJC staff may deliver these services. See UIPL 07–19, Fiscal Year (FY) 2019 Funding Allotments and Operating Guidance for Unemployment Insurance (UI) Reemployment Services and Eligibility Assessment (RESEA) Grants (Jan. 11, 2019). Therefore, the Department currently permits non-merit staff to carry out RESEA, as many WIOA staff are not merit staff. Additionally, the Department has provided guidance to States on handling eligibility issues that are detected in the course of providing RESEA services. Similar to how the ES program administers the work test, States are required to have feedback loops from the AJC to the UI system on whether claimants reported as directed and participated in the minimum activities outlined in their reemployment plans. This ensures that any eligibility issues are referred to the UI agency and that eligibility issues are

adjudicated by State merit staff, consistent with the requirement in sec. 303(a)(1) of the SSA.

The Department supports efforts that States have already made in launching RESEA programs and encourages States to continue to create the RESEA program that best fits each State's needs. The Department notes that this final rule does not require States to use non-merit staff to deliver their ES activities; instead, it gives the States the discretion to choose the staffing model that best meets each State's needs.

A commenter cited the Federal law that created the cabinet-level U.S. Department of Labor in 1913, which states that the Department's purpose is to foster, promote, and develop the welfare of working people in order to improve their working conditions and enhance opportunities for profitable employment. The commenter stated that the proposed regulations are in step with the trend to reduce civil service protections, and they are out of step with the Department's purpose. This final rule is consistent with the Department's purposes, one of which, as the commenter noted, is to enhance opportunities for profitable employment. States are in the best position to decide what is the most effective, efficient, and cost-effective way to provide services under the Wagner-Peyser Act; this final rule recognizes this and gives States the flexibility to determine what staffing model best suits the States' needs without sacrificing the quality of Wagner-Peyser Act services. Additionally, this flexibility may allow States to align the provision of Wagner-Peyser Act services with WIOA service delivery models so the programs work better together. Consistent with the Department's purpose, this will enhance opportunities for profitable employment.

One commenter suggested that adoption of the additional flexibility in the proposed rule would undermine current or existing efforts to align and integrate services provided to job seekers and employers. The commenter noted existing efforts made in the operation of the Wagner-Peyser Act since the enactment of WIOA; these efforts include the alignment of service delivery with WIOA, including cross-training of workforce programs, electronic systems, and a customer centered approach to service delivery. According to the commenter, States' efforts have resulted in more efficient offices and a more holistic approach to service delivery for customers. The Department commends the commenter's efforts to align and integrate services

provided to job seekers and employers. The Department notes that this final rule does not impose any requirements on States to change their service delivery models and States may continue to use State merit staff to deliver Wagner-Peyser Act-funded labor exchange services if the State prefers this model. This final rule provides flexibility to States to consider and choose alternative staffing models if they determine it to be a more effective approach to serving the job seekers and job creators they serve.

One commenter noted that contracted services under WIOA have resulted in a high turnover rate for staff and expressed concern that this turnover may happen in the Wagner-Peyser Act-funded labor exchange services if the merit-staffing requirement were removed. The commenter expressed concern that "clients would suffer while contractors get 'up to speed,'" and that the networks developed over time cannot be replicated by a new service provider. The commenter also suggested that if the flexibility provided by this final rule were adopted, staffing retention would decrease and for-profit companies may generate "false numbers."

Another commenter noted that contracting services may result in fewer services for individuals with barriers to employment and individuals who may require more services in order to obtain employment, because the "contractors" may perceive these individuals to be more costly to assist. The commenter appeared to suggest that service providers would be concerned more about profit than ensuring individuals receive individually appropriate services. Additionally, some commenters noted concerns about services to rural communities, if services are contracted out, because providing services in these communities may not be as profitable in a contract-for-service system. Other commenters expressed concerns about additional costs associated with contracting services provided under the Wagner-Peyser Act, which, according to the commenters, may result in reduced services to customers.

A few commenters also noted their concerns that a service provider may have incentives inconsistent with the Wagner-Peyser Act goal of providing universal access to all job seekers. One stated that if a contracted firm is given a flat fee, there may be an incentive to "dump clients." Multiple commenters also stated another potential risk associated with contracted services is if a success-related incentive is provided, service providers may screen for the

cases most likely to succeed regardless of intervention and have "little incentive to consider whether they are referring candidates of diverse nationalities and races or simply referring the most employable workers." One commenter stated there is a "potentially damaging incentive" when it comes to job placement. The commenter stated that "contractors" may be able to use the Worker Profiling and Reemployment Services system to identify those most likely to obtain employment and serve only those easier to serve individuals.

The Department appreciates the considerations that States will need to take into account when deciding whether to use the staffing flexibility provided in this final rule, including how services and process changes are staffed and integrated at the local level. States, as Wagner-Peyser Act grantees, are required to oversee all operations of the Wagner-Peyser Act activities, regardless of how they choose to use this final rule's additional staffing flexibility. States are responsible for the operations and performance of the State's Wagner-Peyser Act ES program, including the quality provision of services to employers and job seekers. These responsibilities continue to include the requirement at 20 CFR 652.207 to provide universal access to Wagner-Peyser Act services for all employers and job seekers to receive labor exchange services, not just those easiest to serve.

The Department considers States to be in the best position to decide what is the most productive, efficient, and cost-effective way to provide services under the Wagner-Peyser Act. This regulation does not require States to change their staffing structure for providing services under the Wagner-Peyser Act, but it provides them flexibility in how they staff the delivery of these services. As stated above, States are ultimately responsible for the operations and performance of the State's Wagner-Peyser Act program. The Department encourages States to ensure the incentives of any agreements with service providers align with the goals and requirements of the Wagner-Peyser Act.

One commenter was supportive of the proposed rule, but requested guidance related to the operations of the Wagner-Peyser Act, including on the services provided, colocation, referrals, farmworker services, and services to veterans. The Department recognizes there may be need for additional guidance on implementing staffing flexibility once this rule is finalized. The Department will continue to

provide guidance to States and the workforce system as needed through webinars, WorkforceGPS, TEGLs, and other means to ensure effective operations of Wagner-Peyser Act activities. Currently, the Department has provided guidance on the provision of career services by ES staff in TEGL No. 19–16, guidance on veterans' priority of service including in the ES in TEGL No. 10–09, and guidance on the reporting of services to farmworkers by the ES in TEGL No. 14–18.

One commenter asked how one-stop infrastructure costs and other shared one-stop operational costs will be handled if a State contracts for the delivery of its labor exchange Wagner-Peyser Act-funded services. Another commenter requested that local workforce development boards be consulted when services provided under the Wagner-Peyser Act are contracted out, in order to ensure one-stop financial commitments continue to be addressed. The Department recognizes the importance of addressing one-stop infrastructure costs and other shared operational costs for ES programs and notes that this final rule does not make any changes to obligations of WIOA required one-stop partners on infrastructure costs. The Department has provided guidance and technical assistance on the sharing and allocation of infrastructure costs among one-stop partners. All one-stop partners, including State ES programs, are still required to contribute to the infrastructure costs of AJCs. If a State's adjustments in ES staffing impact the cost allocation methods in the MOU, than the parties must modify the MOU as appropriate, consistent with 20 CFR part 678, subpart C. For more information and guidance on one-stop operations and infrastructure funding of the one-stop delivery system, see TEGL No. 16–16, One-Stop Operations Guidance for the American Job Center Network (Jan. 18, 2017), and TEGL No. 17–16 Infrastructure Funding of the One-Stop Delivery System (Jan. 18, 2017). The Department will continue to provide guidance and technical assistance as needed.

One commenter recommended that the Department require States to accept comments and consult with local workforce development boards and local elected officials if services provided under the Wagner-Peyser Act will be contracted to an entity other than a local workforce development board. The Department acknowledges that some States will want to consult with local workforce development boards and local elected officials, who have gained experience over the years

with alternative staffing methods for the provision of WIOA services, as they determine the most appropriate staffing model for their State. However, the Department has chosen not to require States to accept comments or consult with local workforce development boards or local elected officials if the State implements staffing flexibility under this final rule. The flexibility in the final rule is based on the State's responsibility to oversee operations of ES activities including delivering effective services, and the State is in the best position to determine whether and how to consult with local workforce development boards.

One commenter stated that onsite monitoring of Federal programs has been reduced, and that the changes to the merit-staffing requirement may result in less oversight of the Wagner-Peyser Act regulations. The commenter noted that less monitoring may lead to less "fidelity to impartiality and fairness in the staffing of ES activities under the administrative flexibility." Based on this, the commenter recommended that merit-staffing of Wagner-Peyser Act-funded staff be maintained to ensure the fair and equitable delivery of ES activities to job seekers, UI claimants, MSFWs, and employers. The commenter suggested that, if the proposed flexibility is approved, the Department should add additional regulatory language to require onsite annual Federal reviews of State adherence to unbiased and impartial delivery of employment services, and prohibition of patronage in the selection and promotion of AJC ES and UI staff members.

As explained above, States, as Wagner-Peyser Act grantees, are required to oversee all Wagner-Peyser Act operations, whether or not they decide to use alternate staffing methods, and are ultimately responsible for the operations and performance of the State's Wagner-Peyser Act program. These responsibilities continue to include the requirement at 20 CFR 652.207 to provide universal access to Wagner-Peyser Act services, and the Department expects States to ensure that services are delivered fairly and impartially.

The commenter suggested including regulatory language requiring the Department to conduct onsite annual reviews of States. The Department has not included this as a requirement in the regulation, because, consistent with 20 CFR 683.400, the Department already conducts monitoring at the State and local levels, including onsite monitoring, on a regular schedule. Additionally, States are required to

conduct regular onsite monitoring of its Wagner-Peyser Act program, consistent with 20 CFR 683.410. As the Department's grantees, States must continue to oversee, provide guidance, and ensure compliance of its Wagner-Peyser Act operations and service delivery, regardless of whether they ultimately decide to take advantage of staffing flexibility or not.

#### Unemployment Insurance and the Wagner-Peyser Act

The Department notes that this regulation does not change the requirement in sec. 303(a)(1) of the SSA that UI services be provided by merit staff.

Several commenters opposed the proposed rule because they stated that title III of the SSA authorized the payment of Federal Unemployment Tax Act funds to administer UI benefits through public employment offices. They asserted that the integration of the financing and administration of UI and the public employment offices led to housing these two offices within the same State agency, thus, extending the merit-staffing requirements to the ES. The Department does not agree that the financing structure of the UI and ES programs extends the UI merit-staffing requirement to the ES. Section 901(a) of the SSA establishes an employment security administration account (ESA) and sec. 901(c)(1)(A) authorizes use of the funds in this account for certain enumerated purposes, including assisting the States in the administration of their UI laws and the establishment and maintenance of systems of public employment offices in accordance with the Wagner-Peyser Act. Although the financing for the ES and the State's UI program come from the same source, the ESA, the administration requirements of the two programs are not the same. Specifically, sec. 901(c)(1)(A)(ii) of the SSA provides for the establishment of public employment offices in accordance with the Wagner-Peyser Act's requirements. The Department interprets this to mean that the ESA funds used for the administration of the Wagner-Peyser Act are subject to the requirements of the Act. As explained above, the Department does not interpret the Wagner-Peyser Act to contain a statutory merit-staffing requirement. Therefore, the Department does not agree with commenters that the financing structure of the ES and UI program extends the merit-staffing requirement of sec. 303(a)(1) of the SSA for the UI program to the ES program.

The Department acknowledges that in many States, the State agency administering the UI program is the

same agency administering the ES program. The Department supports the close alignment of the ES and UI program, because the ES program plays a key role in UI, helping connect job seekers with employers so as to return UI recipients to work as soon as possible. The ES, however, does not administer the UI program. While it is reasonable for States to locate these functions within the same State agency, there is no requirement to do so. This final rule does not prohibit States from extending merit-staffing to the delivery of ES labor exchange services.

One commenter noted that this proposed rulemaking would create a staffing disconnect between the Wagner-Peyser Act and UI programs, and not having these activities performed by State merit-staff employees would complicate the administration of UI benefit eligibility. Another commenter stressed the importance of keeping the connection between UI benefits and the labor exchange system funded by the Wagner-Peyser Act. The Department does not agree that the final rule will hamper the coordination of employment services and UI claimant services. Consistent with 20 CFR 652.209, States must provide reemployment services to UI claimants for whom such services are required as a condition for receipt of UI benefits. Even if States choose to use a service provider for the provision of Wagner-Peyser Act-funded services, States are still responsible for fulfilling the requirements of 20 CFR 652.209. The Department considers States to be in the best position to develop business processes designed to ensure coordination between UI and the Wagner-Peyser Act in serving unemployed job seekers. The Department monitors States to ensure they are fulfilling these statutory and regulatory requirements.

Multiple commenters stated they opposed the flexibility provided in the rule because past reemployment initiatives have relied on the UI programs' ability to use ES staff, which would not be possible if ES programs were not merit-staffed. The Department recognizes that States may find value in having ES staff cross-trained and able to carry out UI functions, particularly in an economic downturn when UI workload can spike quickly. This rule does not prevent States from continuing this practice as long as any staff with responsibility for determining UI benefit eligibility are merit-staffed.

Some commenters noted a concern regarding the accuracy in the administration of employment systems by non-State-merit staff under the proposed regulation and that it may

complicate efforts to reduce the error rate in the administration of UI benefits. The Department appreciates the considerations that States need to take into account when deciding whether to use the staffing flexibility this final rule provides, including ensuring using accurate information to administer UI programs. States are in the best position to ensure staffing and procedures are in place to support the accurate administration of UI benefits, including ensuring that staff carrying out the UI work test under the Wagner-Peyser Act are properly trained. Regardless of whether or not a State takes advantage of the flexibility this final rule provides, the Department will still require States to properly and efficiently administer the UI program so as to ensure accuracy of benefit payments, including reporting on the accuracy of their payments through the Benefit Accuracy Measurement (BAM) under 20 CFR part 602 and ensuring that all eligibility determinations meet the payment timeliness requirements at 20 CFR part 640.

Additionally, States, as the Wagner-Peyser Act grantees, are required to oversee all operations of the Wagner-Peyser Act activities, whether they ultimately decide to use staffing flexibility to provide these services or not. Consistent with 20 CFR 683.400, the Department will continue to conduct monitoring at the State and local levels.

A few commenters noted concerns regarding impartiality of the staff providing the services under the Wagner-Peyser Act. They expressed concern that non-merit staff would jeopardize its future as an impartial program connecting job seekers to UI benefits and job referrals. The Department appreciates the considerations that States will need to take into account when deciding whether to use staffing flexibility under this final rule, including how the program will maintain its impartiality in connecting job seekers to UI benefits and job referrals. ES staff have specific obligations in serving UI claimants and in carrying out services to job seekers, which include: Coordination and provision of labor exchange service; targeting UI claimants for job search assistance and referrals to employment; administering State UI work test requirements; and providing meaningful assistance to individuals seeking assistance in filing a UI claim. States, as the Wagner-Peyser Act grantees, are required to oversee all operations of the Wagner-Peyser Act activities, whether or not they ultimately decide to use the staffing flexibility provided by this final

rule, because States are still subject to 20 CFR part 683, subpart D—Oversight and Resolution of Findings.

One commenter noted that there may be challenges stemming from data privacy requirements in having contracted staff providing ES activities, as they related to UI and TAA administration. They noted that constraints associated with confidentiality of UI and TAA data remain intact. The commenter stated that in this new proposed system, which purportedly streamlines the provision of employment services to individuals, additional layers (obtaining written informed consent, monitoring "contractors" to ensure compliance with the Wagner-Peyser Act requirements) would have to be added. The Department appreciates the considerations that States will need to take into account when deciding whether to use staffing flexibility, including the confidentiality concerns associated with confidential UI and TAA data. States, as the Wagner-Peyser Act grantees, are required to oversee all operations of the Wagner-Peyser Act activities, whether they ultimately decide to take advantage of the staffing flexibility provided by this final rule for these services or not. The Department has issued guidance to support States in their efforts to integrate UI and WIOA programs, including the ES program in UIPL No. 14–18, Unemployment Insurance and the Workforce Innovation and Opportunity Act. This guidance includes information related to UI confidentiality requirements found in 20 CFR part 603 and the interaction between those requirements and the operation of WIOA programs, including the ES program, and the Department encourages States to review this guidance. In addition, WIOA partner programs have experience integrating services within an AJC while maintaining the confidentiality of individual participants' data; therefore, States adopting this final rule's flexibility should be able to ensure privacy requirements are maintained.

Some commenters noted concerns regarding the administration of State UI programs, including a concern that the work-test function of UI eligibility being performed by non-State-merit staff under the proposed regulation would result in inaccuracies or process delays of UI benefits. One commenter mentioned concerns about the services provided to unemployed job seekers, including the long-term unemployed, since they are the most vulnerable job seekers. The commenter was concerned about the impact of non-merit staff being involved in the provision and

reporting of services, because negative results have serious economic impact on the individual due to it causing a delay or denial of their UI benefits. The commenter noted it is important that the individuals reporting these results be held accountable for the accuracy of their reports and stated that merit-based employees best exemplify this level of accountability.

One commenter asked what safeguards would be implemented to ensure that the work readiness test performed by ES staff for UI purposes would not be compromised and will continue to be administered fairly and equitably. The Department recognizes the importance of the connection between the UI and Wagner-Peyser Act programs, and considers the flexibility this regulation provides to States as an opportunity for States to test and improve strategies for serving unemployed individuals. To assist with this, the Department continues to place an emphasis on planning across the Wagner-Peyser Act and UI programs, through the required WIOA State Plan process. As part of that process, States are required to address strategies developed to support training and awareness across core programs and the UI program, including on the identification of UI eligibility issues and referrals to UI staff for adjudication. Additionally, as part of this process the States are required to describe strategies for providing reemployment assistance to UI claimants and other unemployed individuals. These requirements can be found at OMB Control Number 1205–0522, Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act.

Regarding the commenter's concerns about UI benefit delays or inaccuracies and what "safeguards" would be implemented to ensure that the work readiness test performed by ES staff for UI purposes is not compromised, the Department notes that it has been permissible for non-State merit staff to carry out similar functions, for example, reviewing compliance with State work search requirements, as part of the RESEA program and its predecessor, the REA program, for many years. The service delivery staff must be trained to identify any potential UI eligibility issues that come to their attention, or that are identified when staff are providing such services, and refer any such issues to UI merit staff to adjudicate, as appropriate, potential UI eligibility issues. Additional guidance can be found in UIPL No. 12–01, Outsourcing of Unemployment

Compensation Administrative Functions, UIPL No. 12–01, Change 1, Outsourcing of Unemployment Compensation Administrative Functions—Claims Taking, and UIPL No. 14–18, Unemployment Insurance and the Workforce Innovation and Opportunity Act.

Additionally, regardless of whether or not a State takes advantage of the flexibility this final rule provides, the Department will still require States to properly and efficiently administer the UI program so as to ensure accuracy of benefit payments, including reporting on the accuracy of their payments through the BAM under 20 CFR part 602 and ensuring that all eligibility determinations meet the payment timeliness requirements at 20 CFR part 640.

§ 652.216 May the one-stop operator provide guidance to Employment Service staff in accordance with the Wagner-Peyser Act?

Section 652.216 governs how one-stop operators provide guidance to ES staff. The Department received comments on this section and responds to them below. The Department is finalizing this section as proposed.

One commenter requested the Department include a requirement in the regulation that States that continue to use State merit-staffing models must follow all applicable State personnel laws and regulations, because the commenter was concerned that not including this would potentially allow non-State entities to determine personnel actions that are solely the responsibility of the SWA. The Department recognizes that some States will continue to use State merit-staffing models. However, the Department declines to include language in the regulation instructing States to follow applicable State personnel laws and regulations because it is unnecessary; States are already bound to follow their applicable State personnel laws and regulations. The Department notes that States that choose to continue providing ES activities with State merit staff may consider developing policies or including terms in the local MOU to clearly delineate what responsibilities the one-stop operator may have or not have within the State's personnel system.

*C. Part 653—Services of the Wagner-Peyser Act Employment Service System*

Part 653 sets forth the principal regulations of the Wagner-Peyser Act ES concerning the provision of services for MSFWs consistent with the requirement that all services of the workforce

development system be available to all job seekers in an equitable fashion. This includes ensuring MSFWs have access to these services in a way that meets their unique needs. MSFWs must receive services on a basis that is qualitatively equivalent and quantitatively proportionate to services provided to non-MSFWs.

In part 653, the Department changed the language throughout to reflect States' new flexibility in staffing. In addition to what was proposed in the NRPM and in response to commenters' concerns, the Department made three additional notable changes in part 653: (1) Strengthening the recruitment criteria for outreach staff and ES staff at significant MSFW one-stop centers by requiring that SWAs seek such staff who speak the language of a significant portion of the MSFW population in the State; (2) strengthening the outreach staff identification card requirement by ensuring the SWAs provide outreach staff members with an identification card or other materials identifying them as representatives of the State; and (3) clarifying that the SMA may recommend the onsite review be delegated only to a SWA official.

§ 653.107 Outreach and Agricultural Outreach Plan

20 CFR 653.107 governs the outreach requirements States must carry out to ensure services are provided to MSFWs on a qualitatively equivalent and quantitatively proportionate basis as services provided to others in the ES program. The Department is finalizing the changes proposed in 20 CFR 653.107 except for the changes described below.

First, the final rule adds a new paragraph to 20 CFR 653.107(a) on SWA responsibilities. Newly added 20 CFR 653.107(a)(6) makes clear that it is the State's obligation to ensure outreach staff receive an identification card or other materials identifying them as representatives of the State. The existing regulation contains a long-standing requirement at § 653.107(b)(10) for outreach staff to be provided with, and carry and display, upon request, identification cards or other material identifying them as employees of the SWA. However, there was no corresponding requirement to issue the badge or other materials in paragraph (a) of 20 CFR 653.107 that outlines the SWA's responsibilities. Therefore, while it was always the State's responsibility to provide a badge or these other materials, the Department is adding this paragraph to § 653.107(a) for clarity.

The new paragraph will read, "SWAs must ensure each outreach staff member is provided with an identification card

or other materials identifying them as representatives of the State.” States can meet this requirement in a variety of ways. For example, the SWA could issue a template for service providers to use in creating the badge or identification materials. Alternatively, the State could issue identification cards to all outreach staff, including any who are employees of service providers. States may also use any other method that ensures outreach staff have a card or other materials identifying them as representatives of the State. The Department is making this clarifying change to ensure that, if a State chooses to use merit staff flexibility, this responsibility of the State is clear and all outreach staff will continue to have the same level of authority and access when conducting outreach to MSFWs.

Second, and relatedly, the Department is amending paragraph (b)(10) of § 653.107 to state that outreach staff must be provided with, carry, and display, upon request, identification cards or other material identifying them as representatives of the State. This change clarifies that the outreach staff are representatives of the State. This addition is intended to help outreach staff retain access to and trust with agricultural employers. It gives all outreach staff, whether they are a State employee or the employee of a service provider, an official identification to assuage concerns from agricultural employers who may be cautious about letting unknown representatives on their property. It will also demonstrate to MSFW customers that the outreach staff member is an official representative of the State who can be trusted to provide services and receive complaints.

Finally, in response to concerns that outreach staff of a service provider would not have the experience and characteristics necessary to serve MSFWs, the Department is strengthening the criteria that SWAs must use to seek qualified outreach staff. The current regulations require SWAs to seek outreach staff who: (1) Are from MSFW backgrounds; (2) speak a language common among MSFWs in the State; or (3) are racially or ethnically representative of the MSFWs in the service area. See 20 CFR 653.107(a)(3)(i) through (iii).

The NPRM proposed to require SWAs to ensure that outreach staff candidates were sought using the same criteria used for SMAs. Those criteria are located in § 653.108(b)(1) through (3) and are as follows: (1) Who are from MSFW backgrounds; or (2) who speak Spanish or other languages of a significant proportion of the State MSFW

population; or (3) who have substantial work experience in farmworker activities.

While the Department proposed to align the hiring criteria with that of the SMA in the NPRM, in response to commenters’ concerns about effective services for MSFWs, the Department has determined it could better strengthen the recruitment criteria for language requirements at § 653.107(a)(3) to mandate that SWAs must seek qualified candidates who speak the language of a significant proportion of the State MSFW population, and who are either from MSFW backgrounds or have substantial work experience in farmworker activities.

This change will help ensure outreach staff speak the language spoken by a significant proportion of the State MSFW population, and that the outreach staff sought will be from an MSFW background or have work experience in farmworker activities. The Department interprets the requirement that the outreach staff sought be from an MSFW background to mean that they or a family member have worked in farmwork as defined at 20 CFR 651.10. The Department interprets the requirement that the outreach staff sought have work experience in farmworker activities to mean that they have worked with farmworkers, either as a service provider or through other means. These changes will enable new outreach staff to connect confidently with MSFWs.

The final rule maintains the same recruitment requirements for the SMA position, a position that has a wide range of responsibilities, as those in the existing regulation. However, for positions that require daily direct interaction with farmworkers, the Department has considered the concerns of commenters and strengthened the recruitment requirements to include language, paired with either farmworker background or experience, instead of just one of these three qualifications. The Department further strongly encourages States to recruit SMAs who speak the language of a significant proportion of MSFWs in their State.

Many commenters expressed concerns about the effects that changes in the staffing requirements for outreach workers would have on MSFWs. Commenters stated that outreach staff play an important role in assisting farmworkers to access ES activities and that for many MSFWs, outreach staff are their principal source of contact with the ES system. Commenters who opposed changes in the staffing requirements cited many reasons for their opposition. Commenters stated the

changes would erode the Judge Richey Court Order in *NAACP, Western Region v. Brennan*, No. 2010–72, 1974 WL 229 (D.D.C. Aug. 13, 1974), by allowing SWAs to use less experienced individuals with little or no knowledge of the MSFW population to conduct MSFW outreach and perform required monitoring activities.

The Department has concluded that the Judge Richey Court Order is no longer in effect. Regardless, the Department is still committed to ensuring that MSFWs have equal access to the ES program and therefore has decided to retain the key requirements of the Judge Richey Court Order to ensure that MSFWs receive ES services on a qualitatively equivalent and quantitatively proportionate basis. The Department has concluded the changes in this final rule will not undermine this commitment.

The Department will continue to hold SWAs accountable to ensure MSFWs are offered the full range of employment and training services on a basis that is qualitatively equivalent and quantitatively proportionate to the same services offered to non-MSFWs. Moreover, SWAs must continue to seek qualified outreach staff who have the characteristics identified at 20 CFR 653.107(a)(3). Lastly, if a State chooses to change its staffing arrangements, the State must ensure that new staff are trained and familiarized with the position and the corresponding duties. The SWA must continue to comply with 20 CFR 653.107(b), including the training of outreach staff as required at 20 CFR 653.107(b)(7). This will help equip new staff with the knowledge necessary to provide quality services to MSFWs and meet MSFWs’ employment needs.

Commenters stated that “outside contractors” will lack the established relationships with employers, MSFW service agents, community ties, and extensive knowledge of the local labor market that longtime outreach staff have developed over the years. Commenters also asserted that the proposal will disrupt well-established and productive relationships. The Department acknowledges that States may want to consider the potential impact on established relationships that staffing flexibility may have as they are deciding if using staffing flexibility is the right approach for their State. The Department notes that States may choose to retain existing staff as nothing in the regulation requires States to change their current staffing for these services. As previously stated, if a State chooses to change its staffing arrangements the State must ensure that

new staff are trained and familiarized with the position and the corresponding duties. The SWA must continue to comply with 20 CFR 653.107(b), including the training of outreach staff as required at 20 CFR 653.107(b)(7).

Commenters stated that contracted outreach staff will not understand the unique needs of MSFWs. The Department does not agree with these commenters. The Department anticipates that outreach staff will be familiar with the unique needs of MSFWs because States must seek to hire outreach staff that meet the characteristics identified at 20 CFR 653.107(a), which include individuals who are from MSFW backgrounds or have significant experience in farmworker activities.

Commenters stated there will be a reduction in reports of apparent violations of employment-related laws. Commenters stated the new hires will lack the current outreach staff familiarity with relevant employment-related laws, built up through numerous training sessions and years of monitoring employer compliance. One commenter stated that, when abusive labor practices occur, farmworkers often first seek out the outreach staff to report an issue and ask for assistance. The contact outreach staff have with MSFWs becomes only more important as the number of available agricultural job opportunities through the ES system grows, and the potential for labor abuses increases.

The Department does not anticipate that there would be a reduction in reports of apparent violations of employment-related laws if States take advantage of the staffing flexibility provided in this final rule. The Department notes 20 CFR 653.107(b)(7) does not change with this final rule. This section states, in part, that outreach staff must be trained in the benefits and protections afforded MSFWs by the ES, as well as the procedure for informal resolution of complaints. The regulatory text further clarifies that trainings are intended to help outreach staff identify when such issues may be occurring in the fields and how to document and refer the cases to the appropriate enforcement agencies.

Moreover, 20 CFR 653.107(b)(6) requires that outreach staff be alert to observe the working and living conditions of MSFWs and, upon observation or upon receipt of information regarding a suspected violation of Federal or State employment-related law, document and refer information to the ES Office Manager for processing. Additionally, if an outreach staff member observes or

receives information about apparent violations (as described in § 658.419 of this chapter), the outreach staff member must document and refer the information to the appropriate ES Office Manager. Therefore, States are required to ensure that outreach staff, even if they are not State merit staff, are trained to identify and report potential violations of the ES regulations and employment-related laws.

One commenter noted that contracted outreach staff may not be fully committed to the work, stating that public sector employees are more motivated by responsibility, growth, and feedback, and less motivated by financial rewards or earning a good salary. Another commenter asserted that the staffing flexibility will result in a deterioration of services to MSFWs. The commenter stated that, when outside entities operate one-stop centers, they only occasionally retain the former State employees who had previously held the jobs. According to this commenter, much of the turnover is due to for-profit businesses that reduce compensation and benefits to employees to cut operating costs. The commenter stated that this results in worse service and that similar results are likely if the outreach staff positions are contracted out.

Some commenters expressed support for the staffing flexibility for outreach staff. One commenter stated that the proposed rulemaking would give States flexibility to staff employment and farmworker outreach services in the most effective and efficient way, using a combination of State employees, local government employees, contracted services, and other staffing models, which could make more resources available to help employers find employees and help job seekers find work. Another commenter stated the resources allocated to worker outreach for the extension of services, while they are important and may impact a potential employee's ability to work, should be considered secondary to the effort devoted to securing gainful employment for unemployed/underemployed workers.

The Department appreciates the considerations States must take into account when considering if exercising the staffing flexibility provided in this final rule is best for their State. However, the Department notes that, regardless of who is providing the services, the State, as the Wagner-Peyser Act grantee, is responsible for ensuring the services provided to MSFWs meet the requirements of these regulations. The Department continues to require State Administrators to ensure their

SWAs monitor their own compliance with ES regulations in serving MSFWs on an ongoing basis and notes that the State Administrator has overall responsibility for SWA self-monitoring, as required by § 653.108(a). Regardless of how a State chooses to staff positions, it will be held accountable for delivering services in accordance with the ES regulations. Moreover, the Department at the national and regional levels will continue to monitor and assess SWA performance and compliance with ES regulations. See 20 CFR 658.602(j) and 658.603(a).

#### § 653.108 State Workforce Agency and State Monitor Advocate Responsibilities

20 CFR 653.108 governs the obligations of the SWA and the SMA in providing ES activities to MSFWs. The Department is finalizing this section as proposed, except for the changes noted herein.

The Department is making one change to the criteria at § 653.108(b)(2), which currently provides that, among qualified candidates, SWAs must seek persons who speak Spanish or other languages of a significant proportion of the State MSFW population, by removing the reference to Spanish. As finalized, the rule reads, in part, “[w]ho speak the language of a significant proportion of the State MSFW population.” The Department is removing the reference to speaking Spanish, because some MSFWs do not speak Spanish and the Department wants to ensure recruitment for these positions focuses on seeking to hire individuals who can speak the language common to MSFWs in the State to facilitate communication and the provision of services.

Several commenters expressed general opposition to the proposed changes at 20 CFR 653.108. Other commenters expressed general support for the changes at § 653.108. One commenter agreed that it would be more appropriate for the SMA to be a State employee and that flexible staffing models would allow for more responsive staffing determinations and ultimately ensure that MSFWs receive ES activities that are qualitatively equivalent and quantitatively proportionate to the services provided to other job seekers. Other commenters supported the change noting their support for general staffing flexibility.

The Department notes that the proposed changes mean that States have the flexibility to staff the provision of Wagner-Peyser Act-funded services in the most effective and efficient way. Therefore, the SMA's compensation may or may not change, depending on the decision of the State. The

Department does not intend for the role of the SMA to be reduced in any way, or change beyond the staffing flexibility, given that the SMA must remain a SWA official with extensive responsibilities, identified at 20 CFR 653.108.

One commenter opposed the proposed rule because, the commenter stated, the Department's proposed changes for the SMA would reduce the SMA's prestige, influence, and likely the compensation of the SMA. The commenter stated that the Department had not provided sufficient justification for these changes. The final rule provides States with additional flexibility in the delivery of ES activities. States will be free to choose the staffing model that best fits their needs. The final rule allows the States to create a staffing model that works best for their unique circumstances, taking into consideration all relevant factors for effective implementation of ES programs, including the prestige, influence, and compensation of the SMA. The Department notes that this regulatory change, by itself, will do nothing to reduce the SMA's prestige, influence, or compensation, as States will not be obligated to make any changes to staffing requirements for ES programs. The Department further notes that the preamble to the NPRM provided substantial justification for the changes to this section.

Regarding 20 CFR 653.108(b), one commenter expressed opposition to the proposed elimination of the requirement that the SMA be State merit staff. This commenter stated that a State merit employee is required to ensure direct employment services are provided to migrant workers and employers that are qualitatively equivalent and quantitatively proportionate to the services provided to other job seekers. The Department notes that the State agency has the flexibility to choose to maintain the SMA as merit staff, if it so desires. Moreover, SWAs must continue to ensure the services provided to MSFWs are qualitatively equivalent and quantitatively proportionate to the services provided to non-MSFWs. The Department notes it will continue to monitor SWA compliance with the ES regulations.

Regarding 20 CFR 653.108(c), where the Department proposed to remove the requirement that the SMA must have status and compensation as approved by the civil service classification system and be comparable to other State positions assigned similar levels of tasks, complexity, and responsibility, some commenters pointed to the settlement arising from the court order in *NAACP, W. Region*. Commenters

stated that the consent decree in that case took care to ensure that SMAs were afforded unfettered access to State ES officials on matters impacting services to the MSFW population. Commenters further stated that the consent decree gave the SMA position the same degree of influence within the State agency as other senior policy positions with similar levels of tasks, complexity, and responsibility, which has been in regulations since 1980.

Commenters stated that the Department did not provide an explanation for proposing to remove the requirement and that the role of the SMA has not diminished in importance. Commenters further stated that the role of the SMA to ensure that the SWAs comply with their obligations is even more essential today than in 1980, due to the increase in H-2A workers in the country, the need to ensure that wages and working conditions offered to H-2A workers are at least equal to those prevailing in the area of employment, and that the housing offered meets Federal regulations. Lastly, they asserted that close monitoring is also required of U.S. workers referred to jobs with H-2A employers, because U.S. workers often suffer discriminatory treatment in favor of the guestworkers. In contrast, some commenters stated that they supported the proposed changes to the status of the SMA, because they support flexible staffing for activities conducted under the Monitor Advocate System.

As the Department explained in the NPRM, this change is intended to give States the flexibility to determine what is appropriate for the SMA position and is consistent with other changes proposed in the NPRM. For the SMA position in particular, which the Department deemed appropriate to maintain as a SWA official, the Department notes that States have the discretion to determine their employee's status and compensation. There is nothing in the final rule that requires States to change the status, compensation, or the influences of the SMA.

The Department also notes it is not suggesting that the role of the SMA has diminished in importance. Rather, States determine how to compensate SMAs appropriately. The SMA will continue to have the same responsibilities under these regulations, even if a State chooses to remove the SMA from its merit system, and the Department anticipates States will compensate the SMA accordingly.

In response to commenters who asserted that close monitoring is required to ensure U.S. workers who are

referred to jobs with H-2A employers are not subject to discriminatory practices, the Department agrees and notes that the SMA position continues to include monitoring as a key component of the position. Moreover, SWAs must continue to ensure the services provided to MSFWs are qualitatively equivalent and quantitatively proportionate to the services provided to non-MSFWs. The Department notes it will continue to monitor SWA compliance with the ES regulations.

Likewise, the Department acknowledges that the SMA has an important role in ensuring States and employers are complying with the requirements of the H-2A program. The SMA will continue to have the same responsibilities as the SMA had prior to this final rule. For example, the SMA will continue to be responsible for talking to workers in the field, which includes H-2A workers and U.S. workers. This ensures that the SMA will be detecting and taking action when wage and housing compliance issues emerge. Therefore, the Department does not anticipate that there will be a negative impact on States' and employers' compliance with the H-2A program requirements. The Department notes that States are still required to conduct field checks on all clearance job orders, including those job orders attached to H-2A applications, pursuant to 20 CFR 653.503.

One commenter noted that the SMA is still required to be a State employee, but that the requirement to have "status and compensation as approved by the civil service classification system and be comparable to other State positions assigned similar levels of tasks, complexity, and responsibility" was removed. The commenter explained that individuals employed in the commenter's SWA are covered by all applicable State personnel laws and regulations. Meaning, if the SMA is a State employee, by default the SMA is a State merit-staffed individual. The commenter opposed the removal of this provision and recommended it be retained, noting that the Department does not have the authority to allow States to arbitrarily determine status and compensation outside of the civil service classification system.

The Department understands the commenter's concern and clarifies that the Department is not requiring States to change how they structure their pay scales or systems. The regulation only gives States the flexibility to create the staffing arrangement that best suits each State's needs. States are free to structure the status and compensation for the

SMA position consistent with their own States' laws, regulations, and policies, as long as the SMA remains a State employee. Therefore, if keeping the SMA as a State employee means that the SMA will be in the State's civil service system, the State is free to do so. The Department has concluded no change is needed to the text of the regulation in response to this comment.

One commenter questioned whether the last sentence in 20 CFR 653.108(d)—which as proposed stated that any State that proposes less than full-time dedication must demonstrate to its Regional Administrator (RA) that the SMA function can be effectively performed with part-time ES staffing—should include “ES.” The commenter stated the reference to “ES” does not appear necessary, as this sentence is speaking specifically to the SMA function, which is a SWA official and not ES staff. The commenter recommended the sentence revert to the original text that does not include the “ES” reference. The Department appreciates the commenter raising this incongruence and agrees the addition of “ES” is not appropriate given that the requirement is referring to the SMA. Therefore, it is not correct to use the term “ES staffing” here. The final rule removes “ES” from this provision.

One commenter stated that the Department proposed to remove the 20 CFR 653.108(g)(1) requirement that SMAs “without delay, must advise the SWA and local offices of problems, deficiencies, or improper practices in the delivery of services and protections” to MSFWs. The commenter stated that this provision was part of the original regulations issued in 1980 to resolve the *NAACP, W. Region* litigation and that those regulations were intended to allow the SWAs and local offices to quickly correct deficiencies. The commenter stated that the Department did not indicate that this section has proven overly burdensome or ineffective, and it offers no reason for removing it. The commenter stated that the deletion is arbitrary and capricious and recommends that the language be retained as a tool to assist in effective agency self-monitoring.

The Department did not propose to remove the requirement at 20 CFR 653.108(g)(1), which requires the SMA to advise the SWA and local offices of problems, deficiencies, or improper practices in the delivery of services and protections afforded by regulations and permits the SMA to request a corrective action plan to address these deficiencies. This provision also requires the SMA to advise the SWA on means to improve the delivery of

services. In the NPRM, the Department addressed its proposed changes to paragraph (g)(1), and did not propose to change the aforementioned text. Therefore, the Department clarifies that the final regulatory text retains the second and third sentences of paragraph (g)(1) as is and, as proposed in the NPRM, revises the first sentence to read: “Conduct an ongoing review of the delivery of services and protections afforded by the ES regulations to MSFWs by the SWA and ES offices (including efforts to provide ES staff in accordance with § 653.111, and the appropriateness of informal complaint and apparent violation resolutions as documented in the complaint logs).”

One commenter noted that the Department proposed 20 CFR 653.108(g)(3) to ensure all significant MSFW one-stop centers not reviewed onsite by Federal staff are reviewed at least once per year by ES staff. The commenter noted that, instead of changing the former reference from “State staff” to “ES staff,” it should be changed from “State staff” to “SWA officials.” Otherwise, this function is given to the local level and bypasses State-level oversight. The Department agrees with the commenter that it would be more appropriate for a State employee to carry out the kind of monitoring envisioned here. The responsibilities laid out in paragraph (g) of 20 CFR 653.108 are the responsibilities of the SMA, and thus, a State employee (SWA official) should do this monitoring. Therefore, the Department will finalize 20 CFR 653.108(g)(3) to provide that all significant MSFW one-stop centers not reviewed onsite by Federal staff are reviewed at least once per year “by a SWA official.”

Also in 20 CFR 653.108(g), the Department is making two additional changes to clarify the roles in onsite reviews. The first change is to 20 CFR 653.108(g)(2)(v). The proposed language for § 653.108(g)(2)(v) stated that the corrective action plan must be approved or revised by appropriate superior officials and the SMA. However, the NPRM's preamble for this provision explained that the Department was proposing to replace “superior officials” with “SWA officials” to make it clear that a State employee must approve the corrective action plan. See 84 FR 29433, 29441 (June 24, 2019). The proposed regulatory language for this provision in the NPRM inadvertently did not include this revision. The final rule's regulatory text adopts the text as described in the NPRM preamble. It states, “The plan must be approved or revised by SWA officials and the SMA.”

The second change is to 20 CFR 653.108(g)(2)(vii). The Department proposed to revise this provision to state that the SMA may recommend the onsite review “be delegated to an ES staff person.” As proposed, this would permit the staff of a service provider to carry out these onsite reviews, permitting the service provider to monitor itself. The Department intends for the State to carry out monitoring of the local one-stop centers, as the State is the entity ultimately responsible for ensuring its compliance with the requirements for providing services to MSFWs. Therefore, to ensure the State is providing these services as required, the Department will require a State official to conduct these reviews. The Department is finalizing this rule with a minor change to the proposed rule text to provide that the SMA may delegate the onsite review to a SWA official (not ES staff) to clarify that the SMA may only delegate the responsibility for onsite reviews to a State employee. The final rule provides that the SMA may recommend that the review described in paragraph (g)(2) of this section be delegated to a SWA official. The Department notes that the current version of the regulatory text allows for this delegation to a responsible, professional member of the administrative staff of the SWA. As explained above, the rule as finalized will change this language to permit the delegation to a SWA official. The Department anticipates that the SMA would choose to delegate these reviews to a SWA official that is responsible and professional.

One commenter stated that at 20 CFR 653.108(o), the proposed rule referenced “significant MSFW ES offices,” where other sections of the regulations refer to “significant MSFW one-stop centers.” For consistency, the commenter suggested using “significant MSFW one-stop centers.” The Department agrees with the commenter that “significant MSFW ES offices” should be written “significant MSFW one-stop centers,” particularly because “significant MSFW one-stop centers” is a defined term in the ES regulations at 20 CFR 651.10.

#### § 653.111 State Workforce Agency Staffing Requirements

20 CFR 653.111 governs the requirements for SWA staffing. The Department is finalizing this section as proposed, except for the changes described below.

The Department stated in the NPRM that it had “serious concerns about the constitutionality of the additional, race-based and ethnicity-based hiring criteria in the current regulation.” 84 FR at

29441. The NPRM noted that the regulations were adopted in response to a 1974 court order—now 45 years ago—and that more recent Supreme Court precedent had emphasized that a racial-classification scheme cannot last “longer than the discriminatory effects it is designed to eliminate,” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995), and that a university, by comparison, cannot impose “a fixed quota” or “some specified percentage” of a racial or ethnic group. *Fisher v. Texas*, 136 S. Ct. 2198, 2208 (2016). The Department’s legal concerns remain, especially when commenters did not present evidence of systemic discrimination in the ES program today.

The NPRM also stated that the Department believed it could meet the needs of MSFWs without resorting to race-based or ethnicity-based criteria, and instead use the criteria employed for selecting State Monitor Advocates. The Department believes the criteria it establishes in this final rule for staffing significant MSFW ES offices, in addition to all the other safeguards and requirements in the MSFW program, will ensure that MSFWs are appropriately served.

One commenter opposed the Department’s proposal to remove requirements from 653.111 that obligate States to engage in affirmative action hiring practices. The commenter stated that simply citing U.S. Supreme Court decisions that have limited the use of race-based affirmative action programs is not a legally sufficient basis to remove the affirmative action requirements. Specifically, the commenter stated that the Department had not offered evidence that the discrimination the affirmative action provisions were intended to rectify was remedied. The commenter stated they opposed the elimination of these provisions, because there continues to be systemic racism in the United States as evidenced by a wage and wealth gap between white and African American workers. The Department has the authority to remove the affirmative action race-based hiring criteria and believes it is required to remove or revise these criteria as presently constituted to comply with current law. The federal government may impose race-based classifications only if the requirement meets the strict scrutiny standard. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). In order to meet strict scrutiny, the federal agency must demonstrate that the racial classification serves a compelling governmental interest and is narrowly tailored to further that interest. For the reasons provided in the NPRM and discussed

here, the Department has serious constitutional concerns about the regulations as they have been written, and has additionally determined as a policy matter that it can meet farmworkers’ needs without resorting to race-based hiring criteria. Other criteria can be just as probative, or perhaps even more so, of candidates’ ability to serve MSFWs.

The ES regulations have a number of provisions intended to ensure that MSFWs’ needs are met. For example, as explained above, the Department is finalizing 20 CFR 653.111 with slight changes for the recruitment criteria for outreach staff and ES staff in significant MSFW offices. The Department will require that States ensure the recruitment of ES staff who speak a language that a significant proportion of the State’s MSFW population speak and who are from MSFW backgrounds or who have substantial work experience in farmworker activities. Bringing prominence to the requirement that States ensure that outreach workers and ES staff speak a language that a significant proportion of MSFWs speak will help ensure that the ES Staff directly engaging with MSFWs are best able to meet MSFWs’ needs.

One commenter opposed the removal of the affirmative action hiring requirements because, the commenter stated, the proposed changes to the affirmative action hiring requirements would mean that ES staff people would no longer be subject to key, longstanding protections against racial discrimination. The Department disagrees that ES staff will no longer be subject to longstanding protections from racial discrimination. ES staff are subject to all anti-discrimination provisions applicable to the ES program. This includes the nondiscrimination and equal opportunity provisions of WIOA sec. 188 and its implementing regulations at 29 CFR part 38, which prohibit employment discrimination in the administration of or in connection with the Wagner-Peyser Act program based on race, color, religion, sex, national origin, age, disability, or political affiliation or belief. See, e.g., 29 CFR 38.18. Additionally, under § 653.111(c), which is being finalized as proposed, SWAs remain subject to all applicable Federal laws prohibiting discrimination and protecting equal employment opportunity.

One commenter opposed the changes to the affirmative action hiring requirements because, the commenter stated, discrimination against MSFWs in the ES still exists. Specifically, the commenter explained that the affirmative action hiring goals are the

result of a 1974 court order, and that while subsequent Supreme Court decisions have limited the use of certain types of race-based affirmative action programs, the Department had acknowledged that such targets still may be used until the discriminatory effects of past discrimination are eliminated. According to the commenter, for ES activities provided to MSFWs, lingering discriminatory practices warrant retention of the affirmative action plans. Although a number of commenters opposed the removal of the affirmative action provisions, neither this commenter nor any other commenters offered any evidence that lingering discriminatory practices against MSFWs still exist in the ES program. As explained above, the Department has concluded that it can effectively meet the needs of MSFWs without using hiring criteria that favor or disfavor applicants based on their race. Moreover, the nondiscrimination and equal opportunity provisions of WIOA sec. 188 and its implementing regulations prohibit discrimination in the Wagner-Peyser Act program based on race, color, religion, sex, national origin, age, disability, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, on the basis of citizenship status or participation. See, e.g., 29 CFR 38.5 and 38.18. Further, as noted above, SWAs remain subject to all applicable Federal laws prohibiting discrimination and protecting equal employment opportunity under 20 CFR 653.111(c), which is being finalized as proposed. States should continue to hire the individuals they determine will help best meet MSFWs’ needs and will effectively carry out the requirements of the final rule.

One commenter opposed the Department’s proposal to remove the affirmative action hiring requirements because, the commenter asserted, the Department did not suggest or offer any evidence that the inequities in service delivery highlighted in the *NAACP, W. Region* litigation were eradicated. The commenter stated that the ES is little more diverse than it was in 1980, and given that there are now a large number of indigenous workers from Mexico and Central America, as well as Afro-Caribbean immigrants, there is no basis for removing the affirmative action references in the regulations. Regardless, current law does not permit the Department to maintain 20 CFR 653.111’s affirmative action race-based hiring requirement as presently written. The Federal government may impose race-based classifications only if they

meet the strict scrutiny standard. *Adarand*, 515 U.S. at 227. As explained in the NPRM, the Department believes the current scheme is not narrowly tailored, and it has determined as a policy matter that it can meet farmworkers' needs without resorting to race-based hiring criteria.

The Department agrees with the commenter that special provision must be made to provide effective services to MSFWs. In order to ensure that the ES staff who are working with MSFWs are able to provide the best services possible and most effectively engage with MSFWs, the Department is slightly modifying the recruitment criteria for ES staff at significant MSFW one-stop centers at 20 CFR 653.111 and outreach staff at 20 CFR 653.107. For the reasons explained in the preamble discussion of 20 CFR 653.107 and 653.108 in this final rule, in recruiting for these positions, States will be required to ensure that individuals are sought who speak a language spoken by a significant proportion of the State's MSFW population and who are from MSFW backgrounds or who have substantial work experience in farmworker activities. Increasing the recruitment focus on language ability will help ensure that MSFWs are best able to engage with the ES program.

One commenter opposed the removal of the affirmative action staffing requirements because it would, the commenter stated, reduce diversity at the SWA and adversely affect MSFWs. The commenter noted that eliminating the affirmative action hiring practices within the SWA will inevitably decrease the diversity of the SWA's workforce—and that when there is a diminished presence of minority public servants in SWAs, MSFWs inevitably suffer, because the potential for bringing together and building connections is most successful when individuals are able to connect at a very basic human level. Those connections are more likely to occur, the commenter stated, when the persons providing services are of similar ethnic, racial, linguistic, and historical backgrounds as the individuals being served. Similarly, another commenter stated that eliminating affirmative action hiring goals is misguided, because MSFWs have particular needs, beyond linguistic needs. The commenter explained that actively hiring outreach staff from farmworker communities, which are disproportionately communities of color, is one of the few ways to guarantee that outreach staff have the cultural competency, sensitivity, and humility necessary to assist MSFWs with meeting their employment needs.

The Department appreciates the commenters' concerns about providing effective services to MSFWs and notes that States should continue to hire the individuals they determine will help best meet MSFWs' needs within the requirements of the final rule, including those that come from farmworker backgrounds.

Additionally, to ensure that MSFWs still have access to effective ES activities, the Department still requires that States ensure that recruitment for these positions be for individuals who are from MSFW backgrounds or who have substantial work experience in farmworker activities. Individuals with these characteristics are familiar with the array of issues MSFWs experience in their employment and have the cultural competency and sensitivity necessary to meet MSFWs' employment needs.

One commenter stated it opposed the elimination of affirmative action provisions for any aspect of the workforce, citing evidence of systemic racism that persists in the United States. It also asserted that eliminating affirmative action hiring practices within SWAs will decrease the diversity of its workforce. It stated that there are studies of States that have eliminated affirmative action over the past several years, which show that minorities working in State and local government decreased when affirmative action was dismantled. One commenter stated that, when there is a diminished presence of minority public servants in SWAs, MSFWs suffer. This commenter went on to say that building connections between job seekers and employers "are more likely to occur when the persons providing services are of similar ethnic, racial, linguistic, and historical backgrounds as the individuals being served."

Commenters asserted that eliminating the presence of individuals at SWAs of similar backgrounds will make it more difficult for farmworkers to benefit from the services provided by these SWAs. They referenced the particular needs of MSFWs, which go beyond linguistic needs, and may include, as one commenter noted, cultural isolation. One commenter stated that language skills, cultural awareness, and sensitivity should be top priorities for any staff working with MSFWs. Another commenter stated that actively hiring outreach staff that come from farmworker communities, which are disproportionately communities of color, is particularly needed and can guarantee that outreach staff have the cultural competency to assist farmworkers with their employment

needs, and to serve both MSFWs and H-2A workers.

As stated in the NPRM, the Department is fully committed to serving all MSFWs, and to requiring that States provide useful help to MSFWs from staff who can speak their languages and understand their work environments. As described in the NPRM and above, affirmative action requirements that mandate States to hire people of certain races or ethnicities are unconstitutional. The Department continues to harbor serious concerns about the constitutionality of the hiring scheme that has been in place. And the Department has decided as a policy matter that it can meet the needs of MSFWs without using race-based and ethnicity-based hiring criteria. Instead, the Department is mandating recruitment of ES staff with the skills and background necessary to provide quality services to farmworkers, specifically language skills paired with farmworker background or experience. Accordingly, the Department is maintaining in the final rule an emphasis on hiring ES staff who speak languages spoken by MSFWs and who have an MSFW background or experience. Additionally, the Department will continue to monitor SWA's compliance with the ES regulations, which includes ensuring MSFWs have access to employment and training services in a way that meets their unique needs, and it will take appropriate action if it determines that the SWA is not meeting its obligations under these regulations.

At 20 CFR 653.111(a), the NPRM proposed that the SWA must implement and maintain a program for staffing significant MSFW one-stop centers by providing ES staff in a manner facilitating the delivery of employment services tailored to the special needs of MSFWs, including by seeking ES staff that meet the criteria in § 653.108(b)(1) through (3). Those criteria are as follows: (1) Who are from MSFW backgrounds; or (2) who speak Spanish or other languages of a significant proportion of the State MSFW population; or (3) who have substantial work experience in farmworker activities.

In response to commenters' concerns about providing effective services to MSFWs, the Department is strengthening recruitment criteria for ES staff in significant MSFW one-stop centers. The Department is aligning the recruitment criteria with those used for outreach staff at § 653.107(a)(3)(i) and (ii), which requires SWAs to seek persons who speak the language of a significant proportion of the State

MSFW population; and (1) who are from MSFW backgrounds; or (2) who have substantial work experience in farmworker activities. Therefore, as finalized, § 653.111(a) provides, “The SWA must implement and maintain a program for staffing significant MSFW one-stop centers by providing ES staff in a manner facilitating the delivery of employment services tailored to the special needs of MSFWs, including by seeking ES staff that meet the criteria in § 653.107(a)(3).”

This change will ensure that recruitment for ES staff in significant MSFW one-stop centers and outreach staff will seek individuals that speak the language spoken by a significant proportion of the State MSFW population, and who are from an MSFW background—meaning that they or a family member have worked in farmwork as defined at 20 CFR 651.10—or have work experience in farmworker activities—meaning that they have worked with farmworkers, either as a service provider or through other means. These changes will enable ES staff at significant MSFW one-stop centers to better connect with and provide services to MSFWs. The Department notes that it removed the requirement for SWAs to seek persons who speak Spanish from the recruitment criteria for SMAs, staff at significant MSFW one-stop centers, and outreach staff, because some MSFWs do not speak Spanish. The Department wants to ensure recruitment for these positions focuses on seeking to hire individuals who can speak the language common to MSFWs in the State to facilitate communication and the provision of services. Additionally, the criteria to seek persons who speak the language of a significant proportion of the State MSFW population achieves the goal of ensuring that staff speak a language common to MSFWs in the State, which may be Spanish or another language.

One commenter asserted that “privatizing these functions” would likely result in MSFWs receiving inferior services. The Department notes that SWAs will continue to be held accountable to the same standards, regardless of how the SWAs choose to staff the provision of services. Moreover, SWAs must continue to ensure the services provided to MSFWs are qualitatively equivalent and quantitatively proportionate to the services provided to non-MSFWs. The Department will continue to monitor SWA compliance with the ES regulations.

One commenter stated that MSFW staff are well-trained to ensure that

workers are treated appropriately and that housing meets basic standards. The commenter also stated that non-governmental staff will likely lack the necessary authority to enforce the kinds of legal protections that these longstanding regulations were designed to ensure. The Department responds that, under Federal regulations, ES staff are not authorized to enforce legal protections. Rather, outreach staff must be trained to identify potential violations of the ES regulations or employment-related laws. It is then incumbent upon them to refer the potential violations to ES Office Managers or the Complaint System Representatives to attempt to resolve the issue informally. In some cases, violations may need to be logged and immediately referred to the appropriate enforcement agency.

#### *D. Part 658—Administrative Provisions Governing the Wagner-Peyser Act Employment Service*

Part 658 sets forth systems and procedures for complaints, monitoring for compliance assessment, enforcement, and sanctions for violations of the ES regulations and employment-related laws, including discontinuation of services to employers and decertification of SWAs. In part 658, the Department, among other changes, is finalizing the following proposed changes: (1) The State Administrator has overall responsibility for the Employment Service and Employment-Related Law Complaint System (Complaint System), which includes informal resolution of complaints; (2) a SWA official (as defined at § 651.10) must make determinations regarding initiation of the discontinuation of services to an employer; and (3) the RMA does not have to be a full-time position.

#### **§ 658.501 Basis for Discontinuation of Services**

Section 658.501 governs when States may or must discontinue providing services to employers. One State agency asked whether the intent of the change at 20 CFR 658.501(b) from “The SWA may” to “SWA officials may” is only to give the authority of discontinuing services to the SWA and not local ES offices. The Department clarifies that the intent of the change is to permit only SWA officials to discontinue services and it is finalizing this section as proposed.

#### **§ 658.601 State Workforce Agency Responsibility**

Section 658.601 governs the States’ establishment and maintenance of a

self-appraisal system. The Department is finalizing this provision with the change described below.

One commenter stated that the proposed change at 20 CFR 658.601 is incorrect. The commenter asserted that the required self-appraisal system was not reported as part of the 9002A. The commenter clarified that it has been replaced under WIOA as a narrative with aggregate State customized data in the annual narrative. The Department clarifies that § 658.601(a)(1)(ii) instructs SWAs to use a particular ETA report to compare planned numerical performance goals to actual accomplishments. Because the 9002A report is obsolete, the Department updated the language to reflect the new report that States are required to use, the WIOA Common Performance Reporting System, ETA Form 9172 (Participant Individual Record Layout).

#### **§ 658.603 Employment and Training Administration Regional Office Responsibility**

Section 658.603 governs ETA responsibilities in overseeing the States’ provision of ES activities to MSFWs. The Department received comments on this section and is responding to them below. The Department is finalizing this section as proposed.

Several commenters opposed the proposed changes to § 658.603 and raised three main issues in their comments: (1) The Department did not offer an explanation for the changes; (2) the changes will erode the effectiveness of the RMA in protecting MSFWs; and (3) contracting ES staff will create the need for States and RMAs to enhance the monitoring of SWAs, because outsourced staff may have little or no experience serving farmworkers and complying with the exacting dictates of the regulations and those governing the H-2A program.

In the NPRM, the Department explained that it was proposing to remove the requirement that the RMA be full-time, because different States have different MSFW needs, and the Department has determined it is most appropriate for the ETA RA to determine whether those needs merit a full-time employee dedicated to serving one population. This gives the RA greater flexibility in how they staff their offices based on the needs of their region.

The Department does not predict there will be an erosion in the effectiveness of the RMA in protecting farmworkers. First, the RMA must continue to carry out all of the RMA duties set forth at 20 CFR 658.603(f). Second, the RA continues to have the

responsibility to regularly review and assess SWA performance and compliance with ES regulations pursuant to 20 CFR 658.603(a).<sup>11</sup> Through these reviews and assessments, the Department will work to guarantee that the Monitor Advocate System ensures services to farmworkers are provided on a qualitatively equivalent and quantitatively proportionate basis to the services provided to non-MSFWs, regardless of the staffing model the State selects. This will ensure that the RMA's effectiveness in protecting MSFWs is not eroded.

The Department reaffirms that the responsibilities of the State to comply with the ES regulations do not change with this final rule. Pursuant to 20 CFR 658.601(a) each SWA must establish and maintain a self-appraisal system for ES operations to determine success in reaching goals and to correct deficiencies in performance. Whether the State continues to hire merit staff in its local offices or uses a services provider, the State Administrators must ensure their SWA monitors their own compliance with ES regulations in serving MSFWs on an ongoing basis.<sup>12</sup> Additionally the SMAs must conduct an ongoing review of the delivery of services and protections afforded by the ES regulations to MSFWs by the SWA and ES offices.<sup>13</sup> This includes ensuring MSFWs have access to ES activities in a way that meets their unique needs. MSFWs must receive services on a basis that is qualitatively equivalent and quantitatively proportionate to services provided to non-MSFWs; nothing in this final rule changes that requirement. The Department notes it has extensive experience overseeing programs with different staffing models and that the SMAs, RMAs, and NMA will continue to monitor to ensure the State is providing equitable services to MSFWs, regardless of the staffing structure the SWA chooses. The Department will provide monitoring guidance for States that choose to outsource the provision of employment services.

#### Removing Full-Time Staffing Requirement

Commenters opposed the Department's proposal to remove the full-time staffing requirement for the RMA position at 20 CFR 658.603(f), because commenters stated the RMA position was expressly deemed to be full-time, with a wide range of specified

duties. According to one commenter, the Department does not suggest that the challenges faced by the ES have so lessened since 1980 that RMA support is only needed on a part-time basis. The Department appreciates the commenter's historical context. However, the Department clarifies that it is not suggesting the RMA is only needed on a part-time basis; rather, it is at the discretion of RAs to determine how best to staff the responsibilities of their region. In the NPRM, the Department explained it was removing the requirement that the RMA position be a full-time position, recognizing different States' MSFW populations in the relevant labor markets. The Department recognizes that not all States have the same number of significant MSFW one-stop centers and that not all DOL regions have the same number of significant MSFW States, significant MSFW one-stop centers, or regional staff. Therefore, the Department is giving RAs the flexibility to analyze the MSFW needs in the relevant labor market and the available staffing to determine if a full time RMA is needed. Allowing local management to determine whether RMAs can perform their duties part-time enhances the effectiveness and cost-efficiency of ES programs. Of course, RMAs may remain full-time if the demands of their region necessitate a full-time position. Furthermore, the Department does not suggest that the challenges faced by the ES have lessened since 1980. Rather, the Department notes, as it explained in the NPRM preamble, that different States have different MSFW populations in the relevant labor market. The Department reiterates, however, that regardless of the time spent by the RMA, whether full-time or part-time, the activities and requirements of the RMA remain.

#### Revising Onsite Review Requirements

A couple of commenters stated that removing the mandate for the RMA to visit each State in its region at least once per year will hinder the RMA's ability to monitor the region. One commenter stated that the Department's reasoning that it is "very challenging" for RMAs to make harvest time visits to the States in their region is insufficient and that the challenge could only be exacerbated by a shift to part-time staffing. The commenter stated the Department offered no reason for relieving the RMA of the obligation for harvest time trips and attendance at MSFW-related meetings. Furthermore, the commenter stated, given the rapidly changing landscape of agricultural ES activities in every region in the wake of rapidly increasing numbers of H-2A

applications and the accompanying challenges for the SWAs, there is no justifiable basis for diminishing regional oversight activities.

The Department understands the RMA's importance in monitoring the States for compliance with the MSFW regulations. The Department notes that even though RMAs are no longer required to visit each State once a year, the RMAs will continue to monitor all States in their region pursuant to 20 CFR 658.603(f)(1) and (2) and that nothing would prevent the RMA from visiting a State once a year (or more often) if necessary. These provisions require RMAs to review the effective functioning of the SMAs in their regions and review the performance of SWAs in providing the full range of employment services to MSFWs. As explained in the preamble to the NPRM, the Department is eliminating this requirement, because it may not be necessary for the RMA to travel to a State once a year where there is not a significant MSFW population or where the NMA has already traveled. The Department also noted in the NPRM preamble that travel to each State once a year is challenging with the limited funding available to the Department. In an effort to ensure limited funding is used most efficiently, the Department determined that RAs are in the best position to make travel decisions for their staff depending on the needs of the Region. Moreover, if it is not a significant MSFW State and the RMA has a good sense of what is happening in the State, it may not be necessary to travel there.

One commenter opposed the proposed change to remove the requirement that RMAs make harvest time visits to the States, because the commenter stated that the Department's explanation that it was very challenging to make these trips was not sufficient. The commenter explained that given the rapidly changing landscape of agricultural ES activities in each region and the increasing numbers of H-2A applications and accompanying challenges for SWAs, there is no justifiable basis for diminishing regional oversight activities.

The Department is finalizing this change because, if an RMA conducted an on-site review in a particular State it may not be necessary to return to that same State to conduct a harvest time visit. If there is not a significant MSFW population in that particular State or if the NMA already visited the State that year, such a visit may not be necessary. However, the Department notes the importance of these visits and that, if warranted, the goals of these could be

<sup>11</sup> 20 CFR 658.603(a) states that the RA is responsible for regularly reviewing and assessing SWA performance and ensuring their compliance with ES regulations.

<sup>12</sup> 20 CFR 653.108(a).

<sup>13</sup> 20 CFR 653.108(g)(1).

accomplished by using technology such as videoconferencing or teleconferences.

#### IV. Rulemaking Analyses and Notices

##### A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Under E.O. 12866, the OMB's Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866 defines a "significant regulatory action," as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistencies or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. OMB has determined that while this final rule is not an economically significant regulatory action under sec. 3(f) of E.O. 12866, it raises novel legal or policy issues and is therefore otherwise significant. Accordingly, OMB has reviewed this final rule.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; it is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a 'major rule', as defined by 5 U.S.C. 804(2).

#### Public Comments

Commenters asserted that the economic analysis in the proposed rule left out any discussion of program effectiveness or accountability and that a determination of whether to make the proposed changes should be based on the cost-effectiveness of ES activities. One commenter stated that the proposal would impose greater costs on employers through Federal and State unemployment taxes. Commenters contended that the 2004 Jacobson study<sup>14</sup> demonstrates that the benefits of using merit-staffing outweigh its costs. Commenters also contended that a 2012 study of Nevada's REA program<sup>15</sup> found that requiring merit-based staff to conduct all program components improved outcomes. Some commenters pointed to examples of efforts in the United States to privatize (as the commenters termed it) the delivery of social service programs that resulted in cost overruns and other problems. The Department recognizes these studies and findings, but this final rule does not privatize Wagner-Peyser Act services; rather, it provides flexibility to States to offer Wagner-Peyser Act services using the best staffing models available to them to provide these services, while the Department maintains oversight and long-established criteria for proper and efficient delivery of those services. States are encouraged to consider cost-effectiveness when determining whether to use flexible staffing models for the delivery of ES activities. States are also encouraged to conduct evaluations of various service delivery models. The Department anticipates that States will choose the service delivery model that is the most cost effective in their State.

Some commenters stated that current ES programs are more cost-efficient than flexibly staffed WIOA title I programs. The Department anticipates that States will take cost information for their State into consideration when determining the most cost-effective approach to delivering ES activities. The Department did not compare the average cost per participant receiving Wagner-Peyser Act services to the average cost per participant receiving WIOA Dislocated

Worker services due to the differences between the two programs. When isolating similar services provided by the Wagner-Peyser Act and the WIOA Adult and Dislocated Worker programs, the outcomes were similar. However, the cost of the totality of services available in the Dislocated Worker program is not comparable to the cost of the services available through the Wagner-Peyser Act because the Dislocated Worker program provides more comprehensive services, such as individualized career services and training services.

Some commenters stated that the economic analysis relied on too few States. As explained in the proposed rule, to estimate the potential wage savings to States, the Department surveyed a sample of States that receive various levels of Wagner-Peyser Act funding. The Department began by sorting the 54 jurisdictions by funding level (from high to low), and then divided the list into three tiers. Next, the Department selected States from each of the three tiers and sent questions to those States regarding work hours and staff occupations. The Department has determined the eight States that were selected are a representative sample that allows for a robust analysis; therefore, the Department did not survey additional States for the final rule.

Two commenters questioned why the proposed rule assumed that 50 percent of merit staff would be replaced with non-merit staff. The Department provided the following explanation in the proposed rule: "The three pilot States have an average of 52 percent non-State-merit staff providing labor exchange services; therefore, the Department assumes a 50 percent substitution rate in its wage savings calculations."

Some commenters stated that the economic analysis used inaccurately high wages for public sector employees, and they stated that Occupational Employment Statistics (OES) data should not be relied on to compare the salaries of government and private sector workers. However, the commenters did not provide any alternative sources for wage data. The Department continues to believe that OES is the best source available for wage data by occupation, industry, and State. No data source is perfect, but OES data are the most robust and reliable data for the Department's analysis.

One commenter pointed out that the analysis does not use the most current and relevant information available from U.S. Bureau of Labor Statistics (BLS). The Department used 2017 OES data,

<sup>14</sup> Louis Jacobson, Ian Petta, Amy Shimshak, and Regina Yudd, "Evaluation of Labor Exchange Services in a One-Stop Delivery System Environment," prepared by Westat for the U.S. Department of Labor, Employment and Training Administration Occasional Paper 2004-09 (Feb. 2004).

<sup>15</sup> Marios Michaelides, Eileen Poe-Yamagata, Jacob Benus, and Dharmendra Tirumalasetti, "Impact of the Reemployment and Eligibility Assessment (REA) Initiative in Nevada," prepared by IMPAQ for the U.S. Department of Labor (Jan. 2012).

which were the most current data available when the analysis was conducted. The Department has updated the data to 2018 for the analysis in this final rule.

Commenters also stated that the analysis does not compare similar workers in both sectors and that the occupational codes are not representative of the actual work done by ES staff. The Department compared the wage rates for three Standard Occupational Classification (SOC) codes: (1) SOC 11–3011 Administrative Services Managers; (2) SOC 13–1141 Compensation, Benefits, and Job Analysis Specialists; and (3) SOC 43–9061 Office Clerks, General. The Department has determined these are the most applicable SOC codes because they represent three occupational levels of ES staff: Managers or supervisors; project managers or mid-level analysts; and administrative assistants or customer service representatives. The Department maintained these three occupations in the final rule because these three occupations most closely reflect the job duties of ES staff members. Moreover, commenters did not suggest specific alternatives.

Some commenters asserted that the Department unreasonably assumed that administrative costs for contracting out services would be small. Other commenters contended that the Department failed to sufficiently account for the administrative costs of providing services through contracts. Several commenters provided examples of costs that would be incurred by States that choose to use contract-based staffing methods for the delivery of ES activities, including expenses related to developing requests for proposal, managing the bidding process, reviewing proposals, drafting contracts, and monitoring contracts. The Department recognizes that there would be costs associated with obtaining a service provider to deliver ES activities. There would also be a reduction in costs due to the diminished need for management and oversight of State employees. The Department does not have a way to reliably estimate the difference between the new administrative costs and the administrative cost savings, but addressed commenters' concerns to the extent possible by lowering the overhead rate for government workers, as described below.

Some commenters questioned why the Department doubled the wage rates to account for fringe benefits and overhead without elaboration. To address comments about administrative and overhead costs, the Department

lowered the overhead rate for State government workers. In the proposed rule, the Department doubled the base wage rate for government workers and all sector workers to account for fringe benefits and overhead costs. For government workers, doubling the base wage rate reflected a fringe benefits rate of 60 percent<sup>16</sup> and an overhead rate of 40 percent.<sup>17</sup> For all sector workers, doubling the base wage rate reflected a fringe benefits rate of 44 percent<sup>18</sup> and an overhead rate of 56 percent.<sup>19</sup> In the final rule, the Department used updated ECEC data to calculate the fringe benefits rates and the results were the same: 60 percent for the government sector<sup>20</sup> and 44 percent for private sector workers.<sup>21</sup> In response to public comments, the Department reevaluated the most appropriate overhead rates to use in the final rule. The Department decided to keep the 56 percent overhead rate for new hires (represented by all sector workers) in light of the costs

<sup>16</sup> BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. For State and local government workers, wages and salaries averaged \$30.45 per hour worked in 2017, while benefit costs averaged \$18.12, which is a benefits rate of 60 percent.

<sup>17</sup> U.S. Department of Health and Human Services, "Guidelines for Regulatory Impact Analysis" (2016), [https://aspe.hhs.gov/system/files/pdf/242926/HHS\\_RIAGuidance.pdf](https://aspe.hhs.gov/system/files/pdf/242926/HHS_RIAGuidance.pdf). In its guidelines, HHS states, "as an interim default, while HHS conducts more research, analysts should assume overhead costs (including benefits) are equal to 100 percent of pre-tax wages." HHS explains that 100 percent is roughly the midpoint between 46 and 150 percent, with 46 percent based on Employer Costs for Employee Compensation (ECEC) data that suggest benefits average 46 percent of wages and salaries, and 150 percent based on the private sector "rule of thumb" that fringe benefits plus overhead equal 150 percent of wages. To isolate the overhead costs from HHS's 100 percent assumption, the Department subtracted the 60 percent benefits rate calculated from ECEC data, resulting in an overhead rate of approximately 40 percent.

<sup>18</sup> BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. For private industry workers, wages and salaries averaged \$23.26 per hour worked in 2017, while benefit costs averaged \$10.16, which is a benefits rate of 44 percent.

<sup>19</sup> U.S. Department of Health and Human Services, "Guidelines for Regulatory Impact Analysis" (2016), [https://aspe.hhs.gov/system/files/pdf/242926/HHS\\_RIAGuidance.pdf](https://aspe.hhs.gov/system/files/pdf/242926/HHS_RIAGuidance.pdf). To isolate the overhead costs from HHS's 100 percent assumption, the Department subtracted the 44 percent benefits rate calculated from ECEC data, resulting in an overhead rate of approximately 56 percent.

<sup>20</sup> BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. For State and local government workers, wages and salaries averaged \$31.12 per hour worked in 2018, while benefit costs averaged \$18.69, which is a benefits rate of 60 percent.

<sup>21</sup> BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. For private industry workers, wages and salaries averaged \$23.86 per hour worked in 2018, while benefit costs averaged \$10.38, which is a benefits rate of 44 percent.

related to awarding funds and monitoring subrecipients, and to reduce the overhead rate for government workers from 40 percent to 17 percent<sup>22</sup> to reflect the lower marginal increase in overhead costs for retaining incumbent workers than hiring new workers.

Some commenters stated that the proposal would lead to increased staff turnover. The Department acknowledges that, on average, employee turnover is higher in the private sector than in the public sector. According to data from the Job Openings and Labor Turnover Survey (JOLTS) program, the separations rate for the private sector was 4.1 percent on average over the past year, while the separations rate for State and local government was 1.6 percent,<sup>23</sup> substantiating commenters' statements insofar as they stand for the general proposition that turnover is higher among private sector workers than government workers. While private sector workers on average may have a higher turnover rate than State employees on average, the Department is unable to quantify the potential impact on ES activities particularly, aside from reducing the overhead rate for State employees, as described above. Importantly, the Department is not requiring delivery of ES activities by private sector workers and anticipates that States will take employee turnover into consideration when assessing the cost effectiveness of various service delivery options.

Several commenters stated that the Department is unsure of the proposed rule's costs, and that this degree of uncertainty cautions against implementing the proposal. Even though the Department has determined that its cost estimates are based on the best available data, the Department acknowledges that projections of future costs and estimates based on surveys are subject to some degree of uncertainty. As such, the Department discussed in detail the areas of uncertainty in the analysis.

#### Wage Savings for States

As stated elsewhere in this preamble, the Department is exercising its discretion under the Wagner-Peyser Act to give States more staffing options for how they provide labor exchange services and carry out certain other ES

<sup>22</sup> Cody Rice, U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005>.

<sup>23</sup> BLS, JOLTS program, <https://www.bls.gov/jlt>. "Separations" includes quits, layoffs and discharges, and other separations. Total separations is referred to as "turnover."

activities authorized by that Act. This flexibility will permit States to continue using State merit-staffing models to perform these functions, or to use other innovative models that best suit each State's individual needs. All 50 States, plus the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands, receive funding under the Wagner-Peyser Act (54 jurisdictions total).

To estimate the wage savings to States, the Department surveyed a sample of States that receive various levels of Wagner-Peyser Act funding to obtain an approximation of staffing levels and patterns. In Program Year (PY) 2019, 17 jurisdictions received annual Wagner-Peyser Act funding between \$12.4 and \$77.5 million (labeled Tier 1 States in this analysis), 17 jurisdictions received funding between \$6.0 million and \$12.2 million (labeled Tier 2 States in this analysis), and 20 jurisdictions received funding of less than \$6.0 million (labeled Tier 3 States in this analysis).<sup>24</sup> Eight States were surveyed by the Department and asked to provide the total number of Full-Time Equivalent (FTE) hours worked by State merit staff dedicated to delivering Wagner-Peyser Act-funded services, as well as the occupational/position title for all employees included in the FTE calculations.<sup>25</sup> The results ranged from 561 FTEs in California, the State that received the highest level of Wagner-Peyser Act funding in PY 2019, to 19 FTEs in Delaware, the State that received the lowest level of Wagner-Peyser Act funding in PY 2019.<sup>26</sup> On average among the States surveyed, 15 percent of staff funded under the Wagner-Peyser Act are managers or supervisors, 19 percent provide project management or mid-level analysis, and 66 percent provide administrative support and/or customer service.<sup>27</sup>

<sup>24</sup> State allotments are primarily based on a State's relative share of the civilian labor force and relative share of total unemployment.

<sup>25</sup> The eight States surveyed were California, Delaware, Idaho, Maryland, North Dakota, Ohio, Tennessee, and Utah. California, Ohio, and Maryland are in Tier 1. Tennessee and Idaho are in Tier 2. Utah, North Dakota, and Delaware are in Tier 3. In the proposed rule, Tennessee was in Tier 1 and Maryland was in Tier 2 based on PY 2018 funding levels; in the final rule, Maryland is in Tier 1 and Tennessee is in Tier 2 based on PY 2019 funding levels.

<sup>26</sup> The U.S. Virgin Islands and Guam received lower levels of Wagner-Peyser Act funding than Delaware. The PY 2019 allotments are available at <https://www.federalregister.gov/documents/2019/04/19/2019-07729/program-year-py-2019-workforce-innovation-and-opportunity-act-wioa-allotments-py-2019-wagner-peyser>.

<sup>27</sup> Three States (California, North Dakota, and Ohio) provided a breakdown of FTEs by occupation. The Department calculated an average distribution based on those three States, and then applied the distribution to the other five States.

To estimate the percent of current ES positions that States would choose to re-staff under this final rule, the Department surveyed three States that participate in a Wagner-Peyser Act pilot program and already have non-State-merit staff providing labor exchange services: Colorado, Massachusetts, and Michigan. These three States were asked how many of their Wagner-Peyser Act-funded FTE hours are provided by non-State-merit staff.<sup>28</sup> The three pilot States have an average of 52 percent non-State-merit staff providing labor exchange services; therefore, the Department assumes a 50 percent substitution rate in its wage savings calculations. For example, the Department estimated that California would employ 280.5 FTEs (= 561 FTEs × 50%) who are neither merit-staffed nor State employees after the final rule takes effect, while Delaware would employ 9.5 such FTEs (= 19 FTEs × 50%). The FTEs are assumed to be distributed in accordance with the average staffing patterns of the surveyed States: 15 percent are managers or supervisors, 19 percent provide project management or mid-level analysis, and 66 percent provide administrative support and/or customer service.

To calculate the potential savings, median wage rates for government workers in each of the eight States were obtained from the BLS OES program.<sup>29</sup> The median wage rates for private sector workers are not available by State and occupation; therefore, the Department used the median wage rates for all sectors<sup>30</sup> as a proxy because private sector jobs constitute 85 percent of total employment.<sup>31</sup> The median wage rates were obtained for three SOC codes: (1) SOC 11–3011 Administrative Services Managers; (2) SOC 13–1141 Compensation, Benefits, and Job Analysis Specialists; and (3) SOC 43–

Table X reflects the data provided by California, North Dakota, and Ohio and the calculated distributions for Maryland, Tennessee, Idaho, Utah, and Delaware.

<sup>28</sup> SMAs will continue to be State staff, so they are not included in the calculations of this final rule.

<sup>29</sup> BLS OES data for government workers by State (May 2018): [https://www.bls.gov/oes/special.requests/oes\\_research\\_2018\\_sec\\_99.xlsx](https://www.bls.gov/oes/special.requests/oes_research_2018_sec_99.xlsx). These data do not distinguish between government staff employed under a merit system and staff who are not, thus the Department could not accurately estimate of the impact of transitioning to State employees not under a merit system.

<sup>30</sup> BLS OES data for all sectors by State (May 2018): <https://www.bls.gov/oes/special.requests/oesm18st.zip>.

<sup>31</sup> In May 2018, total employment was 144,733,270 ([https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm)), with 122,999,150 jobs (85%) in the private sector (<https://www.bls.gov/oes/current/000001.htm>) and 21,734,120 jobs (15%) in the government sector (<https://www.bls.gov/oes/current/999001.htm>).

9061 Office Clerks, General. To account for fringe benefits, the Department used a 60 percent benefits rate for the government sector<sup>32</sup> and a 44 percent rate for private sector workers.<sup>33</sup> To account for overhead costs, the Department used a 17 percent overhead rate<sup>34</sup> for the government sector and a 56 percent overhead rate<sup>35</sup> for new hires (represented by all sector workers). In response to public comments, the Department reduced the overhead rate for government workers from 40 percent to 17 percent in the final rule to reflect the lower marginal increase in overhead costs for retaining incumbent workers than hiring new workers.

Then the difference between the fully loaded wage rates of government workers and workers in all sectors was calculated. For example, in Ohio, the median hourly wage rate for managers/supervisors is \$35.91 in the government sector and \$40.84 in all sectors. Accounting for fringe benefits and overhead costs, the fully loaded median hourly rate is \$63.56 in the government sector [= \$35.91 + (\$35.91 × 60%) + (\$35.91 × 17%)] and \$81.68 in all sectors [= \$40.84 + (\$40.84 × 44%) + (\$40.84 × 56%)], a difference of \$18.12 per hour. Since the fully loaded wage rate is \$18.12 per hour higher in all sectors than in the government sector, Ohio would not realize a savings at the manager/supervisor level under this final rule. Likewise, Ohio would not realize a savings at the project management level because the fully loaded wage rate is \$6.89 per hour higher in all sectors than in the government sector (= \$49.31 for government workers—\$56.20 for workers in all sectors). However, Ohio would realize a \$1.23 per hour savings at the administrative support level (=

<sup>32</sup> BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. For State and local government workers, wages and salaries averaged \$31.12 per hour worked in 2018, while benefit costs averaged \$18.69, which is a benefits rate of 60 percent.

<sup>33</sup> BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. For private industry workers, wages and salaries averaged \$23.86 per hour worked in 2018, while benefit costs averaged \$10.38, which is a benefits rate of 44 percent.

<sup>34</sup> Cody Rice, U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005>.

<sup>35</sup> U.S. Department of Health and Human Services, "Guidelines for Regulatory Impact Analysis" (2016), [https://aspe.hhs.gov/system/files/pdf/242926/HHS\\_RIAGuidance.pdf](https://aspe.hhs.gov/system/files/pdf/242926/HHS_RIAGuidance.pdf). To isolate the overhead costs from HHS's 100 percent assumption, the Department subtracted the 44 percent benefits rate calculated from ECEC data, resulting in an overhead rate of approximately 56 percent.

\$32.71 for government workers—\$31.48 for workers in all sectors).

Multiplying this fully loaded wage rate difference by the estimated number of FTEs in this occupation (34.0 FTEs) and by 2,080 hours (= 40 hours per week × 52 weeks per year) results in a potential savings for Ohio of \$86,986 per year at the administrative support level (= \$1.23 per hour savings × 34.0 FTEs × 2,080 hours per year). The same process was followed for the other seven States surveyed by the Department.

Next, the estimated wage savings for the States within each tier were summed. The estimated savings for the Tier 1 States of California (\$950,456), Ohio (\$86,986), and Maryland (\$0) equals \$1,037,442. The estimated

savings for the Tier 2 States of Tennessee (\$0) and Idaho (\$9,058) equals \$9,058. The estimated savings for the Tier 3 States of Utah (\$106,579), North Dakota (\$0), and Delaware (\$13,250) equals \$119,829.

The results for each tier were then multiplied by the appropriate ratio to estimate the wage savings for the entire tier. There are 17 States in Tier 1, so the estimated savings for the Tier 1 States of California, Ohio, and Maryland (\$1,037,442) was multiplied by 17/3, bringing the total estimated savings to \$5,878,836 per year for Tier 1. There are 17 States in Tier 2, so the estimated savings for the Tier 2 States of Tennessee and Idaho (\$9,058) was multiplied by 17/2, bringing the total

estimated savings to \$76,996 per year for Tier 2. There are 20 States in Tier 3, so the estimated savings for the Tier 3 States of Utah, Nevada, and Delaware (\$119,829) was multiplied by 20/3, bringing the total estimated savings to \$798,859 per year for Tier 3.

Finally, the estimated wage savings for each tier were added together. Therefore, the total estimated savings of this final rule is \$6,754,691 per year (= \$5,878,836 for Tier 1 States + \$76,996 for Tier 2 States + \$798,859 for Tier 3 States), as shown in Table X.<sup>36</sup>

For purposes of E.O.s 12866 and 13771, the base wage and fringe benefit portions of these estimated savings are categorized as transfers from employees to States.

TABLE X—ESTIMATED WAGE SAVINGS PER YEAR

SOC code	Number of FTEs (rounded)	Number of FTEs with 50% substitution rate	Median wage rate for government sector	Loaded median wage rate for government sector	Median wage rate for all sectors	Loaded median wage rate for all sectors	Difference between loaded wage rates for government and all sectors	Cost savings = estimated FTE × wage rate difference × 2080 hours per year
<b>CA:</b>								
11-3011 .....	117	58.5	\$54.25	\$96.02	\$51.07	\$102.14	\$6.12	\$0
13-1141 .....	74	37.0	34.45	60.98	34.20	68.40	7.42	0
43-9061 .....	370	185.0	20.58	36.43	16.98	33.96	-2.47	(950,456)
	561	280.5						
<b>OH:</b>								
11-3011 .....	8	4.0	35.91	63.56	40.84	81.68	18.12	0
13-1141 .....	7	3.5	27.86	49.31	28.10	56.20	6.89	0
43-9061 .....	68	34.0	18.48	32.71	15.74	31.48	-1.23	(86,986)
	84	42.0						
<b>MD:</b>								
11-3011 .....	12	6.0	45.04	79.2	52.08	104.16	24.44	0
13-1141 .....	16	8.0	29.42	52.07	34.45	68.90	16.83	0
43-9061 .....	53	26.5	17.24	30.51	15.67	31.34	0.83	0
	81	40.5						
Estimated cost savings for CA, OH, and MD .....								(1,037,442)
Estimated cost savings for 17 Tier 1 States .....								(5,878,836)
<b>TN:</b>								
11-3011 .....	22	11.0	35.47	62.78	38.81	77.62	14.84	0
13-1141 .....	28	14.0	24.63	43.60	25.74	51.48	7.88	0
43-9061 .....	97	48.5	15.46	27.36	14.96	29.92	2.56	0
	148	74.0						
<b>ID:</b>								
11-3011 .....	10	5.0	29.72	52.60	33.87	67.74	15.14	0
13-1141 .....	13	6.5	28.11	49.75	24.54	49.08	-0.67	(9,058)
43-9061 .....	46	23.0	15.62	27.65	14.62	29.24	1.59	0
	70	35.0						
Estimated cost savings for TN and ID .....								(9,048)
Estimated cost savings for 17 Tier 2 States .....								(76,996)
<b>UT:</b>								
11-3011 .....	11	5.5	32.60	57.70	36.44	72.88	15.18	0
13-1141 .....	14	7.0	30.42	53.84	23.26	46.52	-7.32	(106,579)
43-9061 .....	48	24.0	14.94	26.44	14.96	29.92	3.48	0
	73	36.5						
<b>ND:</b>								
11-3011 .....	6	3.0	35.43	62.71	37.75	75.50	12.79	0
13-1141 .....	15	7.5	30.42	53.84	27.10	54.20	0.36	0
43-9061 .....	21	10.5	18.76	33.21	18.09	36.18	2.97	0
	41	20.5						
<b>DE:</b>								
11-3011 .....	3	1.5	41.33	73.15	53.61	107.22	34.07	0

<sup>36</sup>This rule may have other effects, which are described qualitatively here. The changes to § 653.111, regarding the staffing of significant MSFW one-stop centers, could affect States'

administrative costs. The changes would revise the staffing criteria for these centers, eliminating some requirements and adding new requirements. It is unknown whether this change will reduce or

increase costs, but the Department believes that the effect in either case will be small.

TABLE X—ESTIMATED WAGE SAVINGS PER YEAR—Continued

SOC code	Number of FTEs (rounded)	Number of FTEs with 50% substitution rate	Median wage rate for government sector	Loaded median wage rate for government sector	Median wage rate for all sectors	Loaded median wage rate for all sectors	Difference between loaded wage rates for government and all sectors	Cost savings = estimated FTE × wage rate difference × 2080 hours per year
13-1141 .....	4	2.0	26.95	47.70	31.81	63.62	15.92	0
43-9061 .....	13	6.5	16.43	29.08	14.05	28.10	-0.98	(13,250)
	19	9.5	.....	.....	.....	.....	.....	.....
Estimated cost savings for UT, ND, and DE .....								(119,829)
Estimated cost savings for 20 Tier 3 States .....								(798,859)
Total estimated cost savings .....								(6,754,691)

### Rule Familiarization Costs

Regulatory familiarization costs represent direct costs to States associated with reviewing the new regulation. The Department calculated this cost by multiplying the estimated time to review the rule by the hourly compensation of a Human Resources Manager and by the number of jurisdictions (including the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands).

The Department estimates that rule familiarization will take on average one hour by a State government Human Resources Manager who is paid a median hourly wage of \$48.66.<sup>37</sup> The Department used a 60 percent benefits rate<sup>38</sup> and a 17 percent overhead rate,<sup>39</sup> so the fully loaded hourly wage is \$86.13 [= \$48.66 + (\$48.66 × 60%) + (\$48.66 × 17%)]. Therefore, the one-time rule familiarization cost for all 54 jurisdictions (the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands) is estimated to be \$4,651 (= \$86.13 × 1 hour × 54 jurisdictions).

### Summary of Estimated Impacts and Discussion of Uncertainty

For all States, the expected first-year budget savings will be approximately \$6,750,040 (= \$6,754,691 wage savings – \$4,651 regulatory familiarization costs).

This analysis assumes a 50 percent substitution rate, meaning that States will choose to re-staff certain positions

with personnel other than State merit staff because these models may be more efficient and less expensive. Wage savings will vary among States based on each State's substitution rate. For some States, substitution at the managerial level may be cheaper; for other States, cost savings may be realized for administrative staff. Some States may find that private sector wage rates, for example, are more expensive than State merit staff wage rates and so choose to keep their current Wagner-Peyser Act merit staff. Under this final rule, States are not required to re-staff employment services and certain other activities under the Wagner-Peyser Act; they are given the option to do so. The purpose of this final rule is to grant States maximum flexibility in administering the Wagner-Peyser Act ES program and thereby free up resources for more and better service to employers and job seekers. Each State's wage savings will depend on the choices it makes for staffing.<sup>40</sup>

### Non-Quantifiable Benefits

In addition to cost savings, this final rule will likely provide benefits to States and to society. The added staffing flexibility this final rule gives to States will allow them to identify and achieve administrative efficiencies. Given the estimated cost savings that will result, States will be able to dedicate more resources under the Wagner-Peyser Act to providing services to job seekers and

employers. These services, which help individuals find jobs and help employers find workers, will provide economic benefits through greater employment. These resources can also provide the States with added capacity to deliver more career services, including individualized career services, which studies have shown improve employment outcomes.

### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. Chapter 6, requires the Department to evaluate the economic impact of this final rule on small entities. The RFA defines small entities to include small businesses, small organizations, including not-for-profit organizations, and small governmental jurisdictions. The Department must determine whether the final rule imposes a significant economic impact on a substantial number of such small entities. The Department concludes that this final rule does not directly regulate any small entities, so any regulatory effect on small entities will be indirect. Accordingly, the Department has determined this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

### C. Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing for public comment a summary of the collection of information and a brief description of the need for and proposed use of the information.

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the public and Federal agencies

<sup>37</sup> BLS OES National Industry-Specific Occupational Employment and Wage Estimates, Sector 99 (May 2018): [https://www.bls.gov/oes/current/naics2\\_99.htm](https://www.bls.gov/oes/current/naics2_99.htm).

<sup>38</sup> BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. For State and local government workers, wages and salaries averaged \$31.12 per hour worked in 2018, while benefit costs averaged \$18.69, which is a benefits rate of 60 percent.

<sup>39</sup> Cody Rice, U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005>.

<sup>40</sup> This rule is expected to reduce deadweight loss (DWL). DWL occurs when a market operates at less than optimal equilibrium output, which happens any time the conditions for a perfectly competitive market are not met. Causes of DWL include taxes, subsidies, externalities, labor market interventions, price ceilings, and price floors. This rule removes a wage premium. The lower cost of labor may lead to an increase in the total number of labor hours purchased on the market. DWL reduction is a function of the difference between the compensation employers would be willing to pay for the hours gained and the compensation employees would be willing to accept for those hours. The size of the DWL reduction will largely depend on the elasticities of labor demand and labor supply.

with an opportunity to comment on proposed and continuing collections of information in accordance with the PRA. See 44 U.S.C. 3506(c)(2)(A). This activity helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

A Federal agency may not conduct or sponsor a collection of information unless approved by OMB under the PRA and displays a currently valid OMB control number. The public is also not required to respond to a collection of information unless it displays a currently valid OMB control number. In addition, notwithstanding any other provisions of law, no person will be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512).

In accordance with the PRA, the Department submitted two information collection requests (ICRs) to OMB in concert with the publishing of the NPRM. This provided the public the opportunity to submit comments on the ICRs, either directly to the Department or to OMB. The 60-day period for the public to submit comments began with the submission of the ICRs to OMB. The Department did not receive comments on either of the two ICRs. The Department notes that the changes in the State Plan ICR are limited to the Wagner-Peyser Act program portion of that ICR and are consistent with the narrow focus of the changes in this final rule. The Department is clarifying that this joint State Plan ICR as a whole was approved by OMB in September 2019 with an expiration date of September 30, 2022. The other five (5) core programs affected by this joint State Plan ICR will not be impacted by the changes in this ICR package.

Therefore, the ICRs are being finalized consistent with this final rule.

The information collections in this final rule are summarized as follows.

Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications Under the Workforce Innovation and Opportunity Act

*Agency:* DOL-ETA.

*Title of Collection:* Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act.

*Type of Review:* Revision.

*OMB Control Number:* 1205-0522.

*Description:* Under the provisions of WIOA, the Governor of each State or Territory must submit a Unified or Combined State Plan to the U.S. Department of Labor—approved jointly with the U.S. Department of Education—that fosters strategic alignment of the six core programs, which include: The Adult, Dislocated Worker, Youth, Wagner-Peyser Act ES, Adult Education and Family Literacy Act, and VR programs.

*Affected Public:* States, Local, and Tribal Governments.

*Obligation to Respond:* Required to Obtain or Retain Benefits.

*Estimated Total Annual Respondents:* 38.

*Estimated Total Annual Responses:* 38.

*Estimated Total Annual Burden Hours:* 8,136.

*Estimated Total Annual Other Burden Costs:* \$0.

*Regulations Sections:* DOL programs—20 CFR 652.211, 653.107(d), 653.109(d), 676.105, 676.110, 676.115, 676.120, 676.135, 676.140, 676.145, 677.230, 678.310, 678.405, 678.750(a), 681.400(a), 681.410(b)(2), 682.100, 683.115. ED programs—34 CFR parts 361, 462, and 463.

Migrant and Seasonal Farmworker Monitoring Report and Complaint/Apparent Violation Form

This information collection is not new. The MSFW information collected supports regulations that set forth requirements to ensure such workers receive services that are qualitatively equivalent and quantitatively proportionate to other workers. ETA is revising Form ETA-5148 to conform to the changes in this final rule. In the proposed rule, the Department listed §§ 653.107(a)(3), 653.108(g)(1) and (s)(11), and 653.111 as including proposed changes that affected the information collection. Only the final rule's changes in § 653.108(s)(2) affect the information collection. This update is reflected below.

Unrelated to this rulemaking, this information collection is currently being revised for other purposes. Those changes were the subject of a separate **Federal Register** Notice published in a **Federal Register** notice on March 7, 2019 (84 FR 8343). While this package is unrelated, the Department is incorporating the modifications to the burden estimate. Since the unrelated package contains the most current calculations for estimating the burden, the Department is aligning the

calculations in this final rule to ensure future consistency.

*Agency:* DOL-ETA.

*Title of Collection:* Migrant and Seasonal Farmworker Monitoring Report and Complaint/Apparent Violation Form.

*Type of Review:* Revision.

*OMB Control Number:* 1205-0039.

*Description:* This information collection package includes the ETA Form 5148 (Services to Migrant and Seasonal Farmworkers Report) and the ETA Form 8429 (Complaint/Apparent Violation Form). SWAs must submit (pursuant to § 653.109) ETA Form 5148 quarterly to report the level of services provided to MSFWs through the one-stop centers and through outreach staff to demonstrate the degree to which MSFWs are serviced and to ensure that such services are provided on a basis that is qualitatively equivalent and quantitatively proportionate to the services provided to non-MSFWs. The Department requires SWAs to use ETA Form 8429 when logging and referring complaints and/or apparent violations pursuant to part 658, subpart E.

*Affected Public:* State and Local Governments; Individuals or Households.

*Obligation to Respond:* Required to Obtain or Retain Benefits.

*Estimated Total Annual Respondents:* 51.

*Estimated Total Annual Responses:* 6,572.

*Estimated Total Annual Burden Hours:* 8,813.

*Estimated Total Annual Other Burden Costs:* \$361,949.

*Regulations Sections:* § 653.108(s)(2).

Interested parties may obtain a copy free of charge of one or more of the ICRs submitted to the OMB on the [reginfo.gov](http://www.reginfo.gov/public/do/PRAMain) website at <http://www.reginfo.gov/public/do/PRAMain>. From the Information Collection Review tab, select Information Collection Review. Then select Department of Labor from the Currently Under Review dropdown menu and look up the Control Number. You may also request a free copy of an ICR by contacting the person named in the **ADDRESSES** section of this preamble.

*D. Executive Order 13132 (Federalism)*

E.O. 13132 requires Federal agencies to ensure that the principles of Federalism animating our Constitution guide the executive departments and agencies in the formulation and implementation of policies and to further the policies of the Unfunded Mandates Reform Act. Further, agencies must strictly adhere to constitutional principles. Agencies must closely examine the constitutional and statutory

authority supporting any action that would limit the policy-making discretion of the States and they must carefully assess the necessity for any such action. To the extent practicable, State and local officials must be consulted before any such action is implemented. The Department has reviewed the final rule in light of these requirements and has concluded that it is properly premised on the statutory authority given to the Secretary to set standards of efficiency for programs under the Wagner-Peyser Act, and it meets the requirements of E.O. 13132 by enhancing, rather than limiting, States' discretion in the administration of these programs.

Accordingly, the Department has reviewed this final rule and has concluded that the rulemaking has no substantial direct effects on States, or on the distribution of power and responsibilities among the various levels of government as described by E.O. 13132. Therefore, the Department has concluded that this final rule does not have a sufficient Federalism implication to warrant consultation with State and local officials or the preparation of a summary impact statement.

#### *E. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. A Federal mandate is defined in 2 U.S.C. 658, in part, as any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or the private sector.

Following consideration of these factors, the Department has concluded that the final rule contains no unfunded Federal mandates, including either a "Federal intergovernmental mandate" or a "Federal private sector mandate." Rather, this final rule increases State flexibility in staffing the Wagner-Peyser Act program.

#### *F. Executive Order 13175 (Indian Tribal Governments)*

The Department has reviewed the NPRM under the terms of E.O. 13175 and DOL's Tribal Consultation Policy, and have concluded that the changes to regulatory text that are the focus of the final rule would not have tribal

implications, as these changes do not have substantial direct effects on one or more Indian tribes, the relationship between the Federal government and Indian tribes, nor the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, no consultations with tribal governments, officials, or other tribal institutions were necessary.

#### List of Subjects

##### *20 CFR Part 651*

Employment, Grant programs—labor.

##### *20 CFR Part 652*

Employment, Grant programs—labor, Reporting and recordkeeping requirements.

##### *20 CFR Part 653*

Agriculture, Employment, Equal employment opportunity, Grant programs—labor, Migrant labor, Reporting and recordkeeping requirements.

##### *20 CFR Part 658*

Administrative practice and procedure, Employment, Grant programs—labor, Reporting and recordkeeping requirements.

Accordingly, the Employment and Training Administration amends 20 CFR chapter V, parts 651, 652, 653 and 658, as follows:

#### **PART 651—GENERAL PROVISIONS GOVERNING THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE**

- 1. The authority citation for part 651 continues to read as follows:

**Authority:** 29 U.S.C. 49a; 38 U.S.C. part III, 4101, 4211; Secs. 503, 3, 189, Pub. L. 113-128, 128 Stat. 1425 (July 22, 2014).

- 2. Amend § 651.10 by:
  - a. Removing the definition of "Affirmative action";
  - b. Adding a definition for "Complaint System Representative";
  - c. Revising the definition of "Employment Service (ES) office";
  - d. Adding definitions in alphabetical order for "Employment Service (ES) Office Manager" and "Employment Service (ES) staff";
  - e. Revising the definitions of "Field checks" and "Field visits";
  - f. Removing the definition of "Local Office Manager";
  - g. Revising the definition for "Outreach contact";
  - h. Adding a definition in alphabetical order for "Outreach staff";
  - i. Revising the definition of "Respondent"; and

- j. Adding in alphabetical order a definition for "State Workforce Agency (SWA) official".

The additions and revisions read as follows:

#### **§ 651.10 Definitions of terms used in this part and parts 652, 653, 654, and 658 of this chapter.**

\* \* \* \* \*

*Complaint System Representative* means the ES staff individual at the local or State level who is responsible for handling complaints.

\* \* \* \* \*

*Employment Service (ES) office* means a site that provides Wagner-Peyser Act services as a one-stop partner program. A site must be collocated in a one-stop center consistent with the requirements of §§ 678.305 through 678.315 of this chapter.

*Employment Service (ES) Office Manager* means the individual in charge of all ES activities in a one-stop center.

\* \* \* \* \*

*Employment Service (ES) staff* means individuals, including but not limited to State employees and staff of a subrecipient, who are funded, in whole or in part, by Wagner-Peyser Act funds to carry out activities authorized under the Wagner-Peyser Act.

\* \* \* \* \*

*Field checks* means random, unannounced appearances by ES staff and/or Federal staff at agricultural worksites to which ES placements have been made through the intrastate or interstate clearance system to ensure that conditions are as stated on the job order and that the employer is not violating an employment-related law.

*Field visits* means appearances by Monitor Advocates or outreach staff to the working and living areas of migrant and seasonal farmworkers (MSFWs), to discuss employment services and other employment-related programs with MSFWs, crew leaders, and employers. Monitor Advocates or outreach staff must keep records of each such visit.

\* \* \* \* \*

*Outreach contact* means each MSFW that receives the presentation of information, offering of assistance, or follow-up activity from outreach staff.

*Outreach staff* means ES staff with the responsibilities described in § 653.107(b) of this chapter.

\* \* \* \* \*

*Respondent* means the individual or entity alleged to have committed the violation described in the complaint, such as the employer, service provider, or State agency (including a State agency official).

\* \* \* \* \*

State Workforce Agency (SWA) official means an individual employed by the State Workforce Agency or any of its subdivisions.

PART 652—ESTABLISHMENT AND FUNCTIONING OF STATE EMPLOYMENT SERVICE

3. The authority citation for part 652 continues to read as follows:

Authority: 29 U.S.C. 491-2; Secs. 189 and 503, Public Law 113-128, 128 Stat. 1425 (July 22, 2014).

4. Amend § 652.204 by revising the first sentence to read as follows:

§ 652.204 Must funds authorized under the Wagner-Peyser Act (the Governor's Reserve) flow through the one-stop delivery system?

No, sec. 7(b) of the Wagner-Peyser Act provides that 10 percent of the State's allotment under the Wagner-Peyser Act is reserved for use by the Governor for performance incentives, supporting exemplary models of service delivery, professional development and career advancement of SWA officials as applicable, and services for groups with special needs.

5. Amend § 652.207 by revising paragraph (b)(3) to read as follows:

§ 652.207 How does a State meet the requirement for universal access to services provided under the Wagner-Peyser Act?

(b) In each local area, in at least one comprehensive physical center, ES staff must provide labor exchange services (including staff-assisted labor exchange services) and career services as described in § 652.206; and

6. Amend § 652.210 by revising paragraph (b) introductory text to read as follows:

§ 652.210 What are the Wagner-Peyser Act's requirements for administration of the work test, including eligibility assessments, as appropriate, and assistance to unemployment insurance claimants?

(b) ES staff must assure that:

7. Revise § 652.215 to read as follows:

§ 652.215 Can Wagner-Peyser Act-funded activities be provided through a variety of staffing models?

Yes, Wagner-Peyser Act-funded activities can be provided through a variety of staffing models. They are not required to be provided by State merit-

staff employees; however, States may still choose to do so.

8. Revise § 652.216 to read as follows:

§ 652.216 May the one-stop operator provide guidance to Employment Service staff in accordance with the Wagner-Peyser Act?

(a) Yes, the one-stop delivery system envisions a partnership in which Wagner-Peyser Act labor exchange services are coordinated with other activities provided by other partners in a one-stop setting. As part of the local MOU described in § 678.500 of this chapter, the SWA, as a one-stop partner, may agree to have ES staff receive guidance from the one-stop operator regarding the provision of labor exchange services.

(b) The guidance given to ES staff must be consistent with the provisions of the Wagner-Peyser Act, the local MOU, and applicable collective bargaining agreements.

PART 653—SERVICES OF THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE SYSTEM

9. The authority citation for part 653 continues to read as follows:

Authority: Secs. 167, 189, 503, Public Law 113-128, 128 Stat. 1425 (July 22, 2014); 29 U.S.C. chapter 4B; 38 U.S.C. part III, chapters 41 and 42.

10. Amend § 653.102 by revising the third sentence to read as follows:

§ 653.102 Job information.

One-stop centers must provide adequate assistance to MSFWs to access job order information easily and efficiently.

11. Amend § 653.103 by revising paragraphs (c) and (d) to read as follows:

§ 653.103 Process for migrant and seasonal farmworkers to participate in workforce development activities.

(c) One-stop centers must provide MSFWs a list of available career and supportive services in their native language.

(d) One-stop centers must refer and/or register MSFWs for services, as appropriate, if the MSFW is interested in obtaining such services.

12. Amend § 653.107 by:

a. Revising paragraphs (a)(1), (a)(2) introductory text, and (a)(3) and (4);

b. Adding paragraph (a)(6); and

c. Revising paragraphs (b) introductory text, (b)(2), (b)(4)(iv), (b)(5) through (11), and (c).

The revisions and addition read as follows:

§ 653.107 Outreach and Agricultural Outreach Plan.

(a) Each SWA must provide an adequate number of outreach staff to conduct MSFW outreach in their service areas. SWA Administrators must ensure State Monitor Advocates (SMAs) and outreach staff coordinate their outreach efforts with WIOA title I sec. 167 grantees as well as with public and private community service agencies and MSFW groups.

(2) As part of their outreach, SWAs must ensure outreach staff:

(3) For purposes of providing and assigning outreach staff to conduct outreach duties, and to facilitate the delivery of employment services tailored to the special needs of MSFWs, SWAs must seek qualified candidates who speak the language of a significant proportion of the State MSFW population; and

(i) Who are from MSFW backgrounds; or (ii) Who have substantial work experience in farmworker activities.

(4) In the 20 States with the highest estimated year-round MSFW activity, as identified in guidance issued by the Secretary, there must be full-time, year-round outreach staff to conduct outreach duties. For the remainder of the States, there must be year-round part-time outreach staff, and during periods of the highest MSFW activity, there must be full-time outreach staff. All outreach staff must be multilingual, if warranted by the characteristics of the MSFW population in the State, and must spend a majority of their time in the field.

(6) SWAs must ensure each outreach staff member is provided with an identification card or other materials identifying them as representatives of the State.

(b) Outreach staff responsibilities. Outreach staff must locate and contact MSFWs who are not being reached by the normal intake activities conducted by the ES offices. Outreach staff responsibilities include:

(2) Outreach staff must not enter work areas to perform outreach duties described in this section on an employer's property without permission of the employer unless otherwise authorized to enter by law; must not enter workers' living areas without the permission of the workers; and must comply with appropriate State laws regarding access.

(4) \* \* \*

(iv) Referral of complaints to the ES office Complaint System Representative or ES Office Manager;

\* \* \* \* \*

(5) Outreach staff must make follow-up contacts as necessary and appropriate to provide the assistance specified in paragraphs (b)(1) through (4) of this section.

(6) Outreach staff must be alert to observe the working and living conditions of MSFWs and, upon observation or upon receipt of information regarding a suspected violation of Federal or State employment-related law, document and refer information to the ES Office Manager for processing in accordance with § 658.411 of this chapter. Additionally, if an outreach staff member observes or receives information about apparent violations (as described in § 658.419 of this chapter), the outreach staff member must document and refer the information to the appropriate ES Office Manager.

(7) Outreach staff must be trained in local office procedures and in the services, benefits, and protections afforded MSFWs by the ES, including training on protecting farmworkers against sexual harassment. While sexual harassment is the primary requirement, training also may include similar issues, such as sexual coercion, assault, and human trafficking. Such trainings are intended to help outreach staff identify when such issues may be occurring in the fields and how to document and refer the cases to the appropriate enforcement agencies. They also must be trained in the procedure for informal resolution of complaints. The program for such training must be formulated by the State Administrator, pursuant to uniform guidelines developed by ETA. The SMA must be given an opportunity to review and comment on the State's program.

(8) Outreach staff must maintain complete records of their contacts with MSFWs and the services they perform. These records must include a daily log, a copy of which must be sent monthly to the ES Office Manager and maintained on file for at least 2 years. These records must include the number of contacts, the names of contacts (if available), and the services provided (e.g., whether a complaint was received and if the complaint or apparent violation was resolved informally or referred to the appropriate enforcement agency, and whether a request for career services was received). Outreach staff also must maintain records of each

possible violation or complaint of which they have knowledge, and their actions in ascertaining the facts and referring the matters as provided herein. These records must include a description of the circumstances and names of any employers who have refused outreach staff access to MSFWs pursuant to paragraph (b)(2) of this section.

(9) Outreach staff must not engage in political, unionization, or anti-unionization activities during the performance of their duties.

(10) Outreach staff must be provided with, carry, and display, upon request, identification cards or other material identifying them as representatives of the State.

(11) Outreach staff in significant MSFW local offices must conduct especially vigorous outreach in their service areas.

(c) *ES office outreach responsibilities.* Each ES Office Manager must file with the SMA a monthly summary report of outreach efforts. These reports must summarize information collected, pursuant to paragraph (b)(8) of this section. The ES Office Manager and/or other appropriate staff must assess the performance of outreach staff by examining the overall quality and productivity of their work, including the services provided and the methods and tools used to offer services. Performance must not be judged solely by the number of contacts made by the outreach staff. The monthly reports and daily outreach logs must be made available to the SMA and Federal onsite review teams.

\* \* \* \* \*

- 13. Amend § 653.108 by revising:
  - a. Paragraphs (b) introductory text, (b)(2), (c), and (d);
  - b. The first sentence of paragraph (g)(1);
  - c. Paragraph (g)(2)(i)(D);
  - d. The second sentence of paragraph (g)(2)(v);
  - e. Paragraphs (g)(2)(vii) and (g)(3);
  - f. The first sentence of paragraph (i);
  - g. The first and second sentences of paragraph (o); and
  - h. Paragraphs (s)(2) and (3) and (9) and (11).

The revisions read as follows:

**§ 653.108 State Workforce Agency and State Monitor Advocate responsibilities.**

\* \* \* \* \*

(b) The State Administrator must appoint an SMA who must be a SWA official. The State Administrator must inform farmworker organizations and other organizations with expertise concerning MSFWs of the opening and encourage them to refer qualified applicants to apply. Among qualified

candidates, the SWAs must seek persons:

\* \* \* \* \*

(2) Who speak the language of a significant proportion of the State MSFW population; or

\* \* \* \* \*

(c) The SMA must have direct, personal access, when necessary, to the State Administrator.

(d) The SMA must have ES staff necessary to fulfill effectively all of the duties set forth in this subpart. The number of ES staff positions must be determined by reference to the number of MSFWs in the State, as measured at the time of the peak MSFW population, and the need for monitoring activity in the State. The SMA must devote full time to Monitor Advocate functions. Any State that proposes less than full-time dedication must demonstrate to its Regional Administrator that the SMA function can be effectively performed with part-time staffing.

\* \* \* \* \*

(g) \* \* \*

(1) Conduct an ongoing review of the delivery of services and protections afforded by the ES regulations to MSFWs by the SWA and ES offices (including efforts to provide ES staff in accordance with § 653.111, and the appropriateness of informal complaint and apparent violation resolutions as documented in the complaint logs). \* \*

\*

(2) \* \* \*

(i) \* \* \*

(D) Complaint logs including logs documenting the informal resolution of complaints and apparent violations; and

\* \* \* \* \*

(v) \* \* \* The plan must be approved or revised by SWA officials and the SMA. \* \* \*

\* \* \* \* \*

(vii) The SMA may recommend that the review described in paragraph (g)(2) of this section be delegated to a SWA official, if and when the State Administrator finds such delegation necessary. In such event, the SMA is responsible for and must approve the written report of the review.

(3) Ensure all significant MSFW one-stop centers not reviewed onsite by Federal staff are reviewed at least once per year by a SWA official, and that, if necessary, those ES offices in which significant problems are revealed by required reports, management information, the Complaint System, or other means are reviewed as soon as possible.

\* \* \* \* \*

(i) At the discretion of the State Administrator, the SMA may be

assigned the responsibility as the Complaint System Representative. \* \* \*

(o) The SMA must ensure that outreach efforts in all significant MSFW one-stop centers are reviewed at least yearly. This review will include accompanying at least one outreach staff from each significant MSFW one-stop center on field visits to MSFWs' working, living, and/or gathering areas.

(s) \* \* \*

(2) An assurance that the SMA has direct, personal access, whenever he/she finds it necessary, to the State Administrator.

(3) An assurance the SMA devotes all of his/her time to Monitor Advocate functions. Or, if the SMA conducts his/her functions on a part-time basis, an explanation of how the SMA functions are effectively performed with part-time staffing.

(9) A summary of the training conducted for ES staff on techniques for accurately reporting data.

(11) For significant MSFW ES offices, a summary of the State's efforts to provide ES staff in accordance with § 653.111.

■ 14. Amend § 653.109 by revising paragraph (c) to read as follows:

§ 653.109 Data collection and performance accountability measures.

(c) Provide necessary training to ES staff on techniques for accurately reporting data.

■ 15. Revise § 653.111 to read as follows:

§ 653.111 State Workforce Agency staffing requirements.

(a) The SWA must implement and maintain a program for staffing significant MSFW one-stop centers by providing ES staff in a manner facilitating the delivery of employment services tailored to the special needs of MSFWs, including by seeking ES staff that meet the criteria in § 653.107(a)(3).

(b) The SMA, Regional Monitor Advocate, or the National Monitor Advocate, as part of his/her regular reviews of SWA compliance with these regulations, must monitor the extent to which the SWA has complied with its obligations under paragraph (a) of this section.

(c) SWAs remain subject to all applicable Federal laws prohibiting

discrimination and protecting equal employment opportunity.

■ 16. Amend § 653.501 by revising paragraphs (a) introductory text, (c)(3)(vii), and (d)(6) and (9) to read as follows:

§ 653.501 Requirements for processing clearance orders.

(a) Assessment of need. No ES office or SWA official may place a job order seeking workers to perform farmwork into intrastate or interstate clearance unless:

(c) \* \* \*

(3) \* \* \*

(vii) Outreach staff must have reasonable access to the workers in the conduct of outreach activities pursuant to § 653.107.

(d) \* \* \*

(6) ES staff must assist all farmworkers, upon request in their native language, to understand the terms and conditions of employment set forth in intrastate and interstate clearance orders and must provide such workers with checklists in their native language showing wage payment schedules, working conditions, and other material specifications of the clearance order.

(9) If weather conditions, over-recruitment, or other conditions have eliminated the scheduled job opportunities, the SWAs involved must make every effort to place the workers in alternate job opportunities as soon as possible, especially if the worker(s) is/are already en route or at the job site. ES staff must keep records of actions under this section.

■ 17. Amend § 653.502 by revising paragraph (e)(2) to read as follows:

§ 653.502 Conditional access to the Agricultural Recruitment System.

(2) With the approval of an appropriate SWA official, remove the employer's clearance orders from intrastate and interstate clearance; and

■ 18. Amend § 653.503 by revising paragraphs (d) and (e) to read as follows:

§ 653.503 Field checks.

(d) If the individual conducting the field check observes or receives information, or otherwise has reason to believe that conditions are not as stated in the clearance order or that an employer is violating an employment-related law, the individual must

document the finding and attempt informal resolution where appropriate (for example, informal resolution must not be attempted in certain cases, such as E.O.-related issues and others identified by the Department through guidance). If the matter has not been resolved within 5 business days, the SWA must initiate the Discontinuation of Services as set forth at part 658, subpart F of this chapter and must refer apparent violations of employment-related laws to appropriate enforcement agencies in writing.

(e) SWA officials may enter into formal or informal arrangements with appropriate State and Federal enforcement agencies where the enforcement agency staff may conduct field checks instead of and on behalf of the SWA. The agreement may include the sharing of information and any actions taken regarding violations of the terms and conditions of the employment as stated in the clearance order and any other violations of employment-related laws. An enforcement agency field check must satisfy the requirement for SWA field checks where all aspects of wages, hours, and working and housing conditions have been reviewed by the enforcement agency. The SWA must supplement enforcement agency efforts with field checks focusing on areas not addressed by enforcement agencies.

PART 658—ADMINISTRATIVE PROVISIONS GOVERNING THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE

■ 19. The authority citation for part 658 continues to read as follows:

Authority: Secs. 189, 503, Pub. L. 113–128, 128 Stat. 1425 (July 22, 2014); 29 U.S.C. chapter 4B.

■ 20. Amend § 658.410 by revising paragraphs (b), (c) introductory text, (c)(6), (f), (g), (h), (i), (k), and (m) to read as follows:

§ 658.410 Establishment of local and State complaint systems.

(b) The State Administrator must have overall responsibility for the operation of the Complaint System; this includes responsibility for the informal resolution of complaints. In the ES office, the ES Office Manager is responsible for the operation of the Complaint System.

(c) SWAs must ensure centralized control procedures are established for the processing of complaints. The ES Office Manager and the SWA Administrator must ensure a central complaint log is maintained, listing all

complaints taken by the ES office or the SWA, and specifying for each complaint:

\* \* \* \* \*

(6) The action taken, and whether the complaint has been resolved, including informally. The complaint log also must include action taken on apparent violations.

\* \* \* \* \*

(f) Complaints may be accepted in any one-stop center, or by a SWA, or elsewhere by outreach staff.

(g) All complaints filed through the local ES office must be handled by a trained Complaint System Representative.

(h) All complaints received by a SWA must be assigned to a trained Complaint System Representative designated by the State Administrator, provided that the Complaint System Representative designated to handle MSFW complaints must be the State Monitor Advocate (SMA).

(i) State agencies must ensure any action taken by the Complaint System Representative, including referral on a complaint from an MSFW, is fully documented and contains all relevant information, including a notation of the type of each complaint pursuant to Department guidance, a copy of the original complaint form, a copy of any ES-related reports, any relevant correspondence, a list of actions taken, a record of pertinent telephone calls, and all correspondence relating thereto.

\* \* \* \* \*

(k) The appropriate ES staff handling a complaint must offer to assist the complainant through the provision of appropriate services.

\* \* \* \* \*

(m) Follow-up on unresolved complaints. When an MSFW submits a complaint, the SMA must follow-up monthly on the handling of the complaint, and must inform the complainant of the status of the complaint. No follow-up with the complainant is required for non-MSFW complaints.

\* \* \* \* \*

■ 21. Amend § 658.411 by:

■ a. Revising paragraph (a)(1);

■ b. Removing in paragraphs (a)(2)(iii), (a)(3) and (4), (b)(1)(ii) introductory text, (b)(1)(ii)(B) through (D), (c)(1), (d)(2)(i) and (ii), and (d)(3)(i) the words “Complaint System representative” wherever they appear and adding in their place “Complaint System Representative”; and

■ c. Revising paragraphs (d)(3)(ii), (d)(5)(ii), and (d)(5)(iii)(G).

The revisions read as follows:

#### § 658.411 Action on complaints.

(a) \* \* \*

(1) Whenever an individual indicates an interest in filing a complaint under this subpart with an ES office, the SWA, or outreach staff, the individual receiving the complaint must offer to explain the operation of the Complaint System and must offer to take the complaint in writing.

\* \* \* \* \*

(d) \* \* \*

(3) \* \* \*

(ii) If resolution at the SWA level has not been accomplished within 30 working days after the complaint was received by the SWA (or after all necessary information has been submitted to the SWA pursuant to paragraph (a)(4) of this section), whether the complaint was received directly or from an ES office pursuant to paragraph (d)(2)(ii) of this section, the SWA official must make a written determination regarding the complaint and must send electronic copies to the complainant and the respondent. The determination must follow the procedures set forth in paragraph (d)(5) of this section.

\* \* \* \* \*

(5) \* \* \*

(ii) If SWA officials determine that the employer has not violated the ES regulations, the SWA must offer to the complainant the opportunity to request a hearing within 20 working days after the certified date of receipt of the notification.

(iii) \* \* \*

(G) With the consent of the SWA official and of the State hearing official, the party who requested the hearing may withdraw the request for the hearing in writing before the hearing.

\* \* \* \* \*

■ 22. Amend § 658.419 by revising paragraph (a) to read as follows:

#### § 658.419 Apparent violations.

(a) If a SWA, an ES office employee, or outreach staff observes, has reason to believe, or is in receipt of information regarding a suspected violation of employment-related laws or ES regulations by an employer, except as provided at § 653.503 of this chapter (field checks) or § 658.411 (complaints), the employee must document the suspected violation and refer this information to the ES Office Manager.

\* \* \* \* \*

■ 23. Amend § 658.501 by revising paragraphs (a) introductory text, (b), and (c) to read as follows:

#### § 658.501 Basis for discontinuation of services.

(a) SWA officials must initiate procedures for discontinuation of services to employers who:

\* \* \* \* \*

(b) SWA officials may discontinue services immediately if, in the judgment of the State Administrator, exhaustion of the administrative procedures set forth in this subpart in paragraphs (a)(1) through (7) of this section would cause substantial harm to a significant number of workers. In such instances, procedures at §§ 658.503 and 658.504 must be followed.

(c) If it comes to the attention of an ES office or a SWA that an employer participating in the ES may not have complied with the terms of its temporary labor certification, under, for example the H-2A and H-2B visa programs, SWA officials must engage in the procedures for discontinuation of services to employers pursuant to paragraphs (a)(1) through (8) of this section and simultaneously notify the Chicago National Processing Center (CNPC) of the alleged non-compliance for investigation and consideration of ineligibility pursuant to § 655.184 or § 655.73 of this chapter respectively for subsequent temporary labor certification.

■ 24. Amend § 658.601 by revising paragraphs (a)(1)(ii) and (a)(2)(ii) to read as follows:

#### § 658.601 State Workforce Agency responsibility.

(a) \* \* \*

(1) \* \* \*

(ii) To appraise numerical activities/indicators, actual results as shown on the Department’s ETA Form 9172, or any successor report required by the Department must be compared to planned levels. Differences between achievement and plan levels must be identified.

\* \* \* \* \*

(2) \* \* \*

(ii) To appraise these key numerical activities/indicators, actual results as shown on ETA Form 9172, or any successor report required by the Department must be compared to planned levels. Differences between achievement and plan levels must be identified.

\* \* \* \* \*

■ 25. Amend § 658.602 by revising paragraphs (l), (o)(1), and (s)(2) to read as follows:

#### § 658.602 Employment and Training Administration National Office responsibility.

\* \* \* \* \*

(l) If the NMA finds the effectiveness of any RMA has been substantially impeded by the Regional Administrator or other regional office official, he/she must, if unable to resolve such problems informally, report and recommend appropriate actions directly to the OWI Administrator. If the NMA receives information that the effectiveness of any SMA has been substantially impeded by the State Administrator, a State or Federal ES official, or other ES staff, he/she must, in the absence of a satisfactory informal resolution at the regional level, report and recommend appropriate actions directly to the OWI Administrator.

\* \* \* \* \*

(o) \* \* \*

(1) Meet with the SMA and other ES staff to discuss MSFW service delivery; and

\* \* \* \* \*

(s) \* \* \*

(2) Provide technical assistance to ETA regional office and ES staff for administering the Complaint System, and any other employment services as appropriate.

\* \* \* \* \*

■ 26. Amend § 658.603 by:

■ a. Revising the section heading and paragraphs (f) introductory text and (h);

■ b. Republishing paragraph (n) introductory text; and

■ e. Revising paragraphs (n)(3), (o), (r) introductory text, (r)(1), and (t).

The revisions read as follows:

**§ 658.603 Employment and Training Administration regional office responsibility.**

\* \* \* \* \*

(f) The Regional Administrator must appoint a RMA who must carry out the

duties set forth in this subpart. The RMA must:

\* \* \* \* \*

(h) The Regional Administrator must ensure that staff necessary to fulfill effectively all the regional office responsibilities set forth in this section are assigned.

\* \* \* \* \*

(n) The RMA must review the activities and performance of the SMAs and the State monitoring system in the region, and must recommend any appropriate changes in the operation of the system to the Regional Administrator. The RMA's review must include a determination whether the SMA:

\* \* \* \* \*

(3) Is making recommendations that are being consistently ignored by SWA officials. If the RMA believes that the effectiveness of any SMA has been substantially impeded by the State Administrator, other State agency officials, any Federal officials, or other ES staff, he/she must report and recommend appropriate actions to the Regional Administrator. Copies of the recommendations must be provided to the NMA electronically or in hard copy.

\* \* \* \* \*

(o)(1) The RMA must be informed of all proposed changes in policy and practice within the ES, including ES regulations, which may affect the delivery of services to MSFWs. He/she must advise the Regional Administrator on all such proposed changes which, in his/her opinion, may adversely affect MSFWs or which may substantially improve the delivery of services to MSFWs.

(2) The RMA also may recommend changes in ES policy or regulations, as well as changes in the funding of State

Workforce Agencies and/or adjustments of reallocation of the discretionary portions of funding formulae as they pertain to MSFWs.

\* \* \* \* \*

(r) As appropriate, each year during the peak harvest season, the RMA must visit each State in the region not scheduled for an onsite review during that fiscal year and must:

(1) Meet with the SMA and other ES staff to discuss MSFW service delivery; and

\* \* \* \* \*

(t) The RMA must attend MSFW-related public meeting(s) conducted in the region, as appropriate. Following such meetings or hearings, the RMA must take such steps or make such recommendations to the Regional Administrator, as he/she deems necessary to remedy problem(s) or condition(s) identified or described therein.

\* \* \* \* \*

■ 27. Amend § 658.704 by republishing paragraph (a) introductory text and revising paragraph (a)(4) to read as follows:

**§ 658.704 Remedial actions.**

(a) If a SWA fails to correct violations as determined pursuant to § 658.702, the Regional Administrator must apply one or more of the following remedial actions to the SWA:

\* \* \* \* \*

(4) Requirement of special training for ES staff;

\* \* \* \* \*

**John P. Pallasch,**

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