

TRAINING AND EMPLOYMENT NOTICE	NO. 13-19
	DATE January 13, 2020

TO: STATE WORKFORCE AGENCIES
STATE WORKFORCE ADMINISTRATORS
STATE WORKFORCE LIAISONS
STATE AND LOCAL WORKFORCE BOARDS
LABOR COMMISSIONERS
AMERICAN JOB CENTERS
STATE MONITOR ADVOCATES
ALL ETA GRANTEES

FROM: JOHN PALLASCH 
Assistant Secretary

SUBJECT: Announcing the Release of the *Wagner-Peyser Act Staffing Flexibility* Final Rule and Amended Information Collections Associated with this Rulemaking

1. **Purpose.** The purpose of this Training and Employment Notice (TEN) is to announce changes to the Workforce Innovation and Opportunity Act (WIOA) regulations as part of the implementation of the *Wagner-Peyser Act Staffing Flexibility* final rule. Additionally, this TEN provides information to states seeking to adopt the flexibilities provided in this rulemaking as part of their WIOA Unified or Combined State Plan submissions for 2020.
2. **Action Requested.** Please share this information with interested stakeholders and review the regulations and information collections.
3. **Summary and Background.**
 - a. Summary – On January 6, 2020 the Employment and Training Administration (ETA) released the *Wagner-Peyser Act Staffing Flexibility* final rule to give states increased flexibility in their administration of Employment Service (ES) activities funded under the Wagner-Peyser Act. The final rule removes the requirement that states hire state merit staff for ES activities provided under the Wagner-Peyser Act. This flexibility applies to the grants allocated to the states for the traditional labor exchange and related services, and for the employment services in support of 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.

The final rule amends *Department of Labor-only WIOA final rule* provisions governing the Wagner-Peyser Act at 20 CFR 651, 652, 653, and 658, and is available at 85 FR 592. The final rule is effective February 5, 2020.

This TEN also announces the approved amendatory information collections associated with this final rule:

- 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*, and
- OMB Control Number 1205-0039, *Migrant and Seasonal Farmworker Monitoring Report and Complaint/Apparent Violation Form*.

Lastly, this TEN provides information to states on the changes to the state planning requirements for the Wagner-Peyser Act beginning with the Program Year (PY) 2020-2023 WIOA Unified or Combined State Plan planning cycle.

- b. Background – The Wagner-Peyser Act established the ES program, which is a nationwide system of public employment offices that provide labor exchange services. The ES program is designed to improve the functioning of the nation’s labor markets by bringing together individuals seeking employment with employers seeking workers. On June 24, 2019, ETA issued a Notice of Proposed Rulemaking (NPRM) to amend regulations in 20 CFR parts 651, 652, 653, and 658 to allow states flexibility in how they engage in ES activities. 84 Fed. Reg. 29433 (June 24, 2019). ETA took into consideration the public comments from the NPRM, and made some changes based on those comments, which are addressed in the final rule.

4. **Final Rule and State Planning.** The final rule includes several changes to the Information Collection Request (ICR) for 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*. These changes were also announced in the NPRM. 84 Fed. Reg. at 29448–49. Specifically, the Department of Labor updated requirements for the Wagner-Peyser Act portion of the State Plan to reflect the flexibility provided by the final rule; these ICR changes can be found in Attachment I: Wagner-Peyser Act Program (Employment Service) Requirements for State Plans.

The primary change to the ICR for ES activities asks a state how it plans to staff the provision of labor exchange services under the Wagner-Peyser Act. The ICR requires states seeking to use the flexibility provided by the final rule to describe how these services will be provided, such as through a subrecipient arrangement, or a combination of state merit-staff and subrecipients.

The Department also made changes to the Agricultural Outreach Plan (AOP) section of the State Plan ICR. Addressing the AOP requirements discussed in Attachment I is a necessary part of State Plan submissions. Note that, pursuant to the continued requirements at 20 CFR 653.107(d)(3), no change has been made to the requirement that SWAs solicit information and suggestions for the AOP from WIOA sec. 167 National Farmworker Jobs Program (NFJP) grantees, other appropriate MSFW groups, public agencies, agricultural employer organizations, and other interested organizations. In addition, at least 45 calendar days before

submitting its final AOP to the Department—as has been required in the past—the SWA must provide the proposed AOP to NFJP grantees, public agencies, agricultural employer organizations, and other organizations expressing an interest and allow at least 30 calendar days for review and comment.

Lastly, the Department made a change to the Assurances section of the Wagner-Peyser Act part of the State Plan ICR to remove the assurance that Wagner-Peyser Act-funded staff be state merit-staff employees. This was replaced with an assurance addressing services to migrant and seasonal farmworkers discussed in Attachment I.

a. Early Implementation

States seeking to implement the final rule’s flexibility for the beginning of PY 2020 need to describe their planned implementation activities in the PY 2020-2023 State Plan submission, as is required by the changes to the State Plan ICR, which are described in Attachment I. States interested in early implementation must ensure all aspects of the State Plan have met public comment requirements. States seeking early implementation can contact the appropriate ETA Regional Office for additional technical assistance.

b. Implementation after July 1, 2020 - Modification to 2020 State Plan

States wishing to implement the flexibility later than the beginning of PY 2020 or subsequent to the approval of their PY 2020-2023 WIOA Unified or Combined State Plan may submit a State Plan modification any time after they receive such notification of approval, as with any modification to a State Plan. Similarly to early implementer states, states submitting a modification to their State Plan will need to describe their implementation strategy, as is required by the changes made to the State Plan ICR, which are described in Attachment I.

c. States Opting Not to Use Flexibility in the Rule

Under the final rule, states may continue to use state merit staff as they have previously done. States not seeking to change their staffing will still need to address the changes made to the State Plan ICR described in Attachment 1, but can simply notify ETA that the state will continue to use state merit-staffing in question (a)(1) under the Wagner Peyser Act section in the state plan, as is stated in the State Plan ICR.

5. Inquiries. Please direct inquiries to the appropriate Regional Office.

6. References.

- Wagner-Peyser Act, as amended (29 U.S.C. 49 et seq.);
- The Workforce Innovation and Opportunity Act (WIOA) of 2014 (Pub. L. 113-128) Title I and III, enacted July 22, 2014;
- WIOA Regulations at 20 CFR parts 651, 652, 653, and 658;

- Wagner-Peyser Act Staffing Flexibility final rule (85 FR 592, available at <https://www.govinfo.gov/content/pkg/FR-2020-01-06/pdf/2019-27260.pdf>)

7. **Attachments.**

- Attachment I: Wagner-Peyser Act Program (Employment Service) Requirements for State Plans

Attachment I: Wagner-Peyser Act Program (Employment Service) Requirements for State Plans

The language below is found on pages 21-24 of Information Collection Request (ICR) (OMB Control Number 1205-0522) describes the requirements that states must address in their State Plan submissions in accordance with the Wagner-Peyser Act. Substantive changes made to the language in this section of the ICR are indicated by bold text below.

WAGNER-PEYSER ACT PROGRAM (Employment Service)

(a) Employment Service (ES) Staff.

- (1) Describe how the state will staff the provision of labor exchange services under the Wagner-Peyser Act, such as through state employees, including but not limited to state merit staff employees, staff of a subrecipient, or some combination thereof. *(Note – States not seeking to utilize the staffing flexibility in the final rule as part of their 2020 State Plan submission can answer this question by entering that the state will continue to utilize state merit staff employees)***
 - (2) Describe how the state will utilize professional development activities for Employment Service staff to ensure staff is able to provide high quality services to both jobseekers and employers.
 - (3) Describe strategies developed to support training and awareness across core programs and the Unemployment Insurance (UI) program and the training provided for Employment Service and WIOA staff on identification of UI eligibility issues and referral to UI staff for adjudication.
- (b) Explain how the state will provide information and meaningful assistance to individuals requesting assistance in filing a claim for unemployment compensation through one-stop centers, as required by WIOA as a career service.
- (c) Describe the state's strategy for providing reemployment assistance to UI claimants and other unemployed individuals.
- (d) Describe how the state will use Wagner-Peyser Act funds to support UI claimants, and the communication between the Employment Service and UI, as appropriate including the following:
- (1) Coordination of and provision of labor exchange services for UI claimants as required by the Wagner-Peyser Act;
 - (2) Registration of UI claimants with the state's employment service if required by State law;
 - (3) Administration of the work test for the state unemployment compensation system, including making eligibility assessments (for referral to UI adjudication, if needed), and providing job finding and placement services for UI claimants; and
 - (4) Provision of referrals to and application assistance for training and education programs and resources.
- (e) Agricultural Outreach Plan (AOP). Each state agency must develop an AOP every four years as part of the Unified or Combined State Plan required under sections 102 or 103 of WIOA.

The AOP must include an assessment of need. An assessment need describes the unique needs of farmworkers in the area based on past and projected agricultural and farmworker activity in the state. Such needs may include but are not limited to: employment, training, and housing. **The assessment of need must include:**

- (1) An assessment of the agricultural activity in the state: 1) Identify the top five labor-intensive crops, the months of heavy activity, and the geographic area of prime activity; 2) Summarize the agricultural employers' needs in the state (i.e. are they predominantly hiring local or foreign workers, are they expressing that there is a scarcity in the agricultural workforce); and 3) Identify any economic, natural, or other factors that are affecting agriculture in the state or any projected factors that will affect agriculture in the state.
- (2) An assessment of the unique needs of farmworkers means summarizing Migrant and Seasonal Farm Worker (MSFW) characteristics (including if they are predominantly from certain countries, what language(s) they speak, the approximate number of MSFWs in the state during peak season and during low season, and whether they tend to be migrant, seasonal, or year-round farmworkers). This information must take into account data supplied by WIOA Section 167 National Farmworker Jobs Program (NFJP) grantees, other MSFW organizations, employer organizations, and state and/or Federal agency data sources such as the U.S. Department of Agriculture and the U.S. Department of Labor, Employment and Training Administration.

(f) Outreach Activities. The local offices outreach activities must be designed to meet the needs of MSFWs in the state and to locate and contact MSFWs who are not being reached through normal intake activities. Describe the state agency's proposed strategies for:

- (1) Contacting farmworkers who are not being reached by the normal intake activities conducted by the employment service offices.
- (2) **Providing technical assistance to outreach staff. Technical assistance must include trainings, conferences, additional resources, and increased collaboration with other organizations on topics such as one-stop center services (i.e., availability of referrals to training, supportive services, and career services, as well as specific employment opportunities), the Employment Service and Employment-Related Law Complaint System ("Complaint System" described at 20 CFR 658 Subpart E), information on the other organizations serving MSFWs in the area, and a basic summary of farmworker rights, including their rights with respect to the terms and conditions of employment.**
- (3) Increasing outreach staff training and awareness across core programs including the UI program and the training on identification of UI eligibility issues.
- (4) Providing outreach staff professional development activities to ensure they are able to provide high quality services to both jobseekers and employers.
- (5) Coordinating outreach efforts with NFJP grantees as well as with public and private community service agencies and MSFW groups. **If an NFJP grantee is the State Workforce Agency's (SWA) subrecipient conducting outreach, provide:**
 - i. **A description of that relationship;**
 - ii. **A description of any other MSFW service providers the NFJP is coordinating with; and**
 - iii. **The NFJP grantee's outreach plan to be included in the State Plan.**

(g) Services provided to farmworkers and agricultural employers through the one-stop delivery system. Describe the state agency's proposed strategies for:

- (1) Providing the full range of employment and training services to the agricultural community, both farmworkers and agricultural employers, through the one-stop delivery system. This includes:
 - i. How career and training services required under WIOA Title I will be provided to MSFWs through the one-stop centers;
 - ii. How the state serves agricultural employers and how it intends to improve such services.
- (2) Marketing the Complaint System to farmworkers and other farmworker advocacy groups
- (3) Marketing the Agricultural Recruitment System for **U.S. Workers (ARS)** to agricultural employers and how it intends to improve such publicity.

(h) Other Requirements.

- (1) *Collaboration.* Describe any collaborative agreements the SWA has with other MSFW service providers including NFJP grantees and other service providers. Describe how the SWA intends to build upon/increase collaboration with existing partners and establish new partners over the next four years (including any approximate timelines for establishing agreements or building upon existing agreements).
- (2) *Review and Public Comment.* In developing the AOP, the SWA must solicit information and suggestions from NFJP grantees,¹ other appropriate MSFW groups, public agencies, agricultural employer organizations, and other interested organizations. In addition, at least 45 calendar days before submitting its final AOP, the SWA must provide a proposed plan to NFJP grantees, public agencies, agricultural employer organizations, and other organizations expressing an interest and allow at least 30 days for review and comment. The SWA must: 1) Consider any comments received in formulating its final proposed AOP; 2) Inform all commenting parties in writing whether their comments have been incorporated and, if not, the reasons therefore; and 3) Transmit the comments and recommendations received and its responses with the submission of the AOP.
 - i. The AOP must include a statement confirming NFJP grantees, other appropriate MSFW groups, public agencies, agricultural employer organizations and other interested employer organizations have been given an opportunity to comment on the AOP. Include the list of organizations from which information and suggestions were solicited, any comments received, and responses to those comments.
- (3) *Data Assessment.* Review the previous four years Wagner-Peyser Act data reports on performance. Note whether the state has been meeting its goals to provide MSFWs quantitatively proportionate services as compared to non-MSFWs. If it has not met these goals, explain why the state believes such goals were not met and how the state intends to improve its provision of services in order to meet such goals.
- (4) *Assessment of progress.* The plan must include an explanation of what was achieved based on the previous AOP, what was not achieved and an explanation as to why the state

¹ Where the NFJP grantee is the subrecipient, the NFJP grantee would not need to submit comments. Instead, the SWA must solicit information from other appropriate MSFW groups, public agencies, agricultural employer organizations, and other interested organizations.

believes the goals were not achieved, and how the state intends to remedy the gaps of achievement in the coming year.

- (5) *State Monitor Advocate*. The plan must contain a statement confirming the State Monitor Advocate has reviewed and approved the AOP.

Wagner-Peyser Assurances

The State Plan must include assurances that:	
1.	The Wagner-Peyser Act Employment Service is co-located with one-stop centers or a plan and timeline has been developed to comply with this requirement within a reasonable amount of time. (sec 121(e)(3));
2.	If the state has significant MSFW one-stop centers , the state agency is complying with the requirements under 20 CFR 653.111, State Workforce Agency staffing requirements;
3.	If a state Workforce Development Board, department, or agency administers state laws for vocational rehabilitation of persons with disabilities, that board, department, or agency cooperates with the agency that administers Wagner-Peyser Act services, Adult and Dislocated Worker programs and Youth Programs under Title I; and
4.	If a state chooses to provide certain ES activities without merit staff, it remains incumbent upon SWA officials to carry out the following activities if they arise: <ol style="list-style-type: none"> 1) Initiate the discontinuation of services; 2) Make the determination that services need to be discontinued; 3) Make the determination to reinstate services after the services have been discontinued; 4) Approve corrective action plans; 5) Approve the removal of an employer's clearance orders from interstate or intrastate clearance if the employer was granted conditional access to ARS and did not come into compliance within 5 calendar days; 6) Enter into agreements with state and Federal enforcement agencies for enforcement-agency staff to conduct field checks on the SWAs' behalf (if the SWA so chooses); and 7) Decide whether to consent to the withdrawal of complaints if a party who requested a hearing wishes to withdraw its request for hearing in writing before the hearing.