



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: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Labor (Department) is issuing a Notice of Proposed Rulemaking (NPRM) that, if finalized, would give States increased flexibility in their administration of Employment Service (ES) activities funded under the Wagner-Peyser Act. The proposed changes would modernize the regulations to align them with the flexibility allowed under the Workforce Innovation and Opportunity Act (WIOA). The changes would also give States the 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 in the way that makes the most sense for them. This in turn could leave more resources to help employers find employees, and to help employees find the work they need. The proposed changes are also consistent with Executive Order (EO) 13777, which requires the Department to identify outdated, inefficient, unnecessary, or overly burdensome regulations that should be repealed, replaced, or modified.

DATES: To be ensured consideration, comments must be received on or before **July 24, 2019**.

ADDRESSES: You may submit comments, identified by docket number ETA-2019-0004, for Regulatory Information Number (RIN) 1205-AB87, by one of the following methods:

Federal e-Rulemaking portal: <http://www.regulations.gov>. Follow the website instructions for submitting comments (under “Help” > “How to use Regulations.gov”).

Mail and hand delivery/courier: Written comments, disk, and CD-ROM submissions may be mailed to Adele Gagliardi, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-5641, Washington, DC 20210.

Instructions: Label all submissions with “RIN 1205-AB87.”

Please submit your comments by only one method. Please be advised that the Department will post all comments received that relate to this NPRM on <http://www.regulations.gov> without making any change to the comments or redacting any information. The <http://www.regulations.gov> website is the Federal e-rulemaking portal, and all comments posted there are available and accessible to the public. Therefore, the Department recommends that commenters remove personal information such as Social Security Numbers (SSNs), personal addresses, telephone numbers, and email addresses included in their comments, as such, information may become easily available to the public via the <http://www.regulations.gov> website. It is the responsibility of the commenter to safeguard personal information.

Also, please note that, due to security concerns, postal mail delivery in Washington, DC, may be delayed. Therefore, the Department encourages the public to submit comments on <http://www.regulations.gov>.

Docket: All comments on this proposed rule will be available on the <http://www.regulations.gov> website and can be found using RIN 1205-AB87. The Department also will make all the comments it receives available for public inspection by appointment during

normal business hours at the above address. If you need assistance to review the comments, the Department will provide appropriate aids such as readers or print magnifiers. The Department will make copies of this proposed rule available, upon request, in large print and electronic file on computer disk. To schedule an appointment to review the comments and/or obtain the proposed rule in an alternative format, contact the Office of Policy Development and Research (OPDR) at (202) 693-3700 (this is not a toll-free number). You may also contact this office at the address listed below.

Comments under the Paperwork Reduction Act (PRA): In addition to filing comments with the Employment and Training Administration (ETA), persons wishing to comment on the information collection (IC) aspects of this proposed rule may send comments to: Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-ETA, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503, Fax: (202) 395-6881 (this is not a toll-free number), email: *OIRA_submissions@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT:

Adele Gagliardi, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-5641, Washington, DC 20210, Telephone: (202) 693-3700 (voice) (this is not a toll-free number) or 1-800-326-2577 (TDD).

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I. Summary

A. Delivery of Wagner-Peyser Act-Funded Activities

The Wagner-Peyser Act established the ES program, which is a nationwide system of public employment offices that provide public 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. Section 3(a) of the Wagner-Peyser Act directs the Secretary of Labor to assist States by "developing and prescribing minimum standards of efficiency" for the States' public ES offices. This NPRM would amend regulations in 20 CFR parts 651, 652, 653, and 658 by allowing States flexibility in how they engage in ES activities. States would have the freedom to use State employees, local employees, contractors, other personnel, or a combination of them to best meet their States' unique circumstances in engaging in ES activities. These changes may free up resources for the ES program and put its focus where it counts: on helping employers find the employees they need, and helping workers find the jobs they are looking for. The Department is also proposing technical corrections to these parts for consistency among the parts and to make them easier to understand.

The proposed regulation is consistent with recent EOs. On January 30, 2017, President Trump signed EO 13771, "Reducing Regulation and Controlling Regulatory Costs." EO 13771 announced "the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources." EO 13771 requires that for every

new regulation, at least two be identified for elimination, and that the total incremental cost of new regulations be no greater than zero. On February 25, 2017, President Trump signed EO 13777, “Enforcing the Regulatory Reform Agenda.” EO 13777 directs agencies to identify regulations that eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; or impose costs that exceed benefits. As required by the EOs, ETA is in the process of identifying such overly burdensome regulations for repeal, replacement, or modification. This rule is an EO 13771 deregulatory action, as it would remove unnecessary restrictions on States, giving them the flexibility to serve workers better and more efficiently. Details on the estimated cost savings of this proposed rule can be found in the proposed rule’s economic analysis.

The proposed modifications, if finalized, would require conforming amendments to the specific Wagner-Peyser Act reference 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 55,792 (Aug. 19, 2016)) in a separate rulemaking. This change would not affect other programs’ staffing requirements, such as the Vocational Rehabilitation program.

i. Flexible Staffing for Wagner-Peyser Act-Funded Activities

Although the Wagner-Peyser Act does not impose particular staffing requirements for State ES offices, current Wagner-Peyser Act regulations (*see* 20 CFR parts 651 through 653, 658) require that labor exchange services provided through the ES program, Monitor Advocate System activities for migrant and seasonal farmworkers (MSFWs), and ES Complaint System

intake be provided under the Federal standards for merit personnel systems.² See 5 CFR part 900, subpart F.

The Department has reconsidered these one-size-fits-all federally mandated regulatory requirements and is now proposing to allow States more flexibility. Specifically, the Department proposes to allow States to use the staffing model that best fits their needs and the needs of workers and job creators, whether that model be State staff that comply with Federal criteria for merit personnel systems, local-area staff, contracted services, other alternatives, or all of the above. The Department would remove, with limited exceptions, the requirement for one-size-fits-all State staffing based on Federal criteria for the Wagner-Peyser Act ES program. The Department is proposing the change for several reasons.

First, this proposal aligns the provision of Wagner-Peyser Act services and activities with WIOA's service-delivery model, so the programs work better together. WIOA envisions an integrated workforce development system that provides streamlined service delivery of the WIOA core programs,³ including ES services. Neither statute nor regulation requires that personnel providing services under WIOA's Adult, Dislocated Worker, and Youth programs meet Federal merit personnel system criteria. Instead, States and local areas have discretion in how to staff WIOA title I programs, and they have adopted a variety of staffing approaches—local-area staff, contractors, and State employees. The specific staffing requirements in the current ES regulations may inhibit full integration of the ES program with WIOA's other

² Throughout this NPRM, the term merit staff is used in several different contexts, but, is always meant to refer to the requirement to employ individuals consistent with the Federal standards for merit personnel systems.

³ The WIOA core programs are the WIOA title I Adult, Dislocated Worker, and Youth programs; the WIOA title II Adult Education and Family Literacy Act (AEFLA) program; the Wagner-Peyser Act Employment Service (ES) program, authorized under the Wagner-Peyser Act, as amended by title III of WIOA; and the Vocational Rehabilitation (VR) program, authorized under title I of the Rehabilitation Act of 1973, as amended by title IV of WIOA.

services, such as those provided through the WIOA title I programs. This proposal, if finalized, would allow States to use the same service-delivery model for both the ES program and other Department-administered WIOA title I programs.

Second, allowing maximum flexibility to States would encourage innovative and creative approaches to delivering employment services with limited resources. This flexibility would allow States to create the staffing solutions that best meet their unique needs.

Third, and as a direct consequence, allowing States more staffing flexibility for ES activities would free up resources to assist job creators and workers more effectively. Section 3 of the Wagner-Peyser Act charges the Department with helping States in coordinating “State public employment services throughout the country and increasing their usefulness.” These proposed changes would free States focusing on issues of internal administration to focus on issues that are most central—and most useful—to the purpose of the ES program: helping workers find jobs, and helping employers find workers. The changes may also free up additional resources for States to better help workers and job creators.

Fourth, the Department 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 merit staffing. States have had experience administering similar services through flexible staffing models since 1982, under the Job Training Partnership Act, the Workforce Investment Act of 1998 (WIA), and WIOA. These programs historically have placed an emphasis on serving disadvantaged populations with barriers to employment, as opposed to the ES program’s emphasis on providing universal access to all job seekers. But the WIOA title I formula programs for adults and dislocated workers provide similar services to the ES program using a combination of State employees, other employees, and contractors. These similar

services include job-search assistance, job-referral and placement assistance for job seekers, reemployment services for unemployment-insurance claimants, and recruitment services for employers with job openings. The Department acknowledges that ES services are less staff- and time-intensive than some services offered under WIOA’s Adult and Dislocated Worker programs (e.g., individualized case management, training services, etc.). Yet, when comparing the WIOA title I core programs and ES services that are similar, the performance outcomes are comparable (earnings, employment status, etc.).⁴ ETA seeks comments addressing how differing staffing models for the various DOL-administered workforce programs affect—or do not affect—services delivered, worker and employer outcomes, and administrative costs and efficiency.

The Department notes that, unlike the Wagner-Peyser Act, section 303(a)(1) of the Social Security Act requires States to administer the Unemployment Insurance (UI) program with personnel who meet the Federal criteria for a merit-staff personnel system. The ES is required to provide certain services to UI claimants. For example, the ES is required to administer the work-test requirements of the State unemployment-compensation system. *See* 20 CFR 652.3(e). Any eligibility issues for UI claimants that arise out of these services must still be handled by staff that meet the requirements of the Social Security Act.

ii. Flexible Staffing for Wagner-Peyser Act-Funded Activities Conducted under the Monitor Advocate System

The Monitor Advocate System was created to comply with a court order issued by the U.S. District Court for the District of Columbia. *See* Order issued on August 13, 1974 in *NAACP*,

⁴ Full employment-outcome data under WIOA are not yet available, so the Department has analyzed outcomes for the programs under WIA, which authorized similar services. Under WIA, those services were identified as “core” services, while under WIOA, they are classified as “basic career services.” To find data related to ES program outcomes, please visit http://doleta.gov/performance/results/wagner-peyser_act.fm. To find data on WIA outcomes, please visit http://doleta.gov/performance/results/WIA_Performance_Results.cfm.

Western Region et al. v. Brennan, No. 2010-72 (D.D.C.); *see also* 45 FR 39,454 (June 10, 1980).

The Order set forth requirements to establish a system to ensure that MSFWs receive ES services that are qualitatively equivalent and quantitatively proportionate to the services provided other job seekers. Key components of the Monitor Advocate System include outreach, monitoring, the Complaint System, and the Agricultural Recruitment System for U.S. Workers. The Department still expects States to ensure that MSFWs receive ES services that are qualitatively equivalent and quantitatively proportionate to the services provided other job seekers. But the Department has determined that nothing in the Order requires staff providing ES services to MSFWs to meet the Federal criteria of a merit-personnel system. The Department welcomes comment and information regarding this issue.

As explained more fully below, the Department now proposes changes to the Monitor Advocate System regulations found at 20 CFR parts 651, 653, and 658 to parallel the proposed changes in part 652, which would permit States flexibility in their staffing of certain activities funded by the Wagner-Peyser Act. The Department also proposes other changes necessitated by the new flexibilities for States. The Department's proposed changes to part 651 involve revisions to definitions used throughout the Monitor Advocate System regulations, including *ES office*, *field checks*, *field visits*, *outreach contact*, and *Respondent*. The most notable proposed change is adding new, clarifying definitions for *Complaint System Representative* and *outreach staff*.

In part 653, the Department proposes to change the language throughout to reflect States' new flexibility in staffing. In addition, the Department proposes two other notable changes in part 653: 1) clarifying that complaint logs must include actions regarding the informal resolution of complaints (*see* proposed § 653.107(b)(8)) and that State Monitor Advocates (SMAs) must monitor the informal resolution of complaints (*see* proposed § 653.108(g)(1)); and 2) requiring

that the SMA be a State employee, though he or she need not be merit-staffed (*see* proposed § 653.108(b)). While the Department is generally proposing to allow States to determine the best staffing model for the needs of their program, the Department has concluded it would be more appropriate for the SMA to be a State employee, as explained in further detail below.

In part 658, the Department proposes several changes: 1) stating that the State Administrator has overall responsibility for the Complaint System, which includes informal resolution of complaints; 2) requiring a State Workforce Agency (SWA) official (as proposed to be defined at § 651.10) to make determinations regarding initiation of the discontinuation of services to an employer; and 3) no longer requiring that the Regional Monitor Advocate (RMA) be a full-time position.

B. Legal Basis

The Wagner-Peyser Act does not dictate particular staffing requirements. Section 3(a) of the Wagner-Peyser Act requires the Secretary of Labor to assist in coordinating the ES Offices by “developing and prescribing minimum standards of efficiency.” Historically, the Department has interpreted Section 3(a) as permitting the Department to require, through regulations, States to provide Wagner-Peyser Act labor exchange services with State merit staff. The Department has determined, however, that is not the only reasonable interpretation of this open-ended statutory provision. Under this proposed rule, the Department would adopt an interpretation that would allow States the flexibility to use staffing arrangements that best suit their needs and thereby to create additional efficiencies in their provision and administration of Wagner-Peyser Act-funded activities. Under these proposed regulations, if finalized, States could use a personnel system that meets Federal merit-staffing criteria if they deem that their best solution.

The broad scope of Section 3(a) has been recognized in court. In 1998, the State of Michigan challenged the Department's authority to require the use of State merit staff. *See Michigan v. Herman*, 81 F. Supp. 2d 840 (W.D. Mich. 1998). The district court held that "the language in § 3[a] authorizing the Secretary to develop and prescribe 'minimum standards of efficiency' is broad enough to permit the Secretary . . . to require merit-staffing" and that "the Department of Labor's construction of the Wagner-Peyser Act to require merit-staffing is a reasonable and permissible interpretation of the Act." *Id.* at 848. The court also recognized that "there is ample basis for a conflicting interpretation of the Wagner-Peyser Act's requirements." *Id.*

The WIA and WIOA rulemakings continued the Department's requirement of federal merit-system staffing procedures for the Wagner-Peyser Act-funded employment services. *See* 64 FR 18,662, 18,691 (April 15, 1999) (WIA Interim Final Rule); 65 FR 49,294, 49,385 (Aug. 11, 2000) (WIA Final Rule); 80 FR 20,690, 20,805 (April 16, 2015) (WIOA NPRM); 81 FR 56,072, 56,267 (Aug. 19, 2016) (WIOA Final Rule). Those rulemakings acknowledged the Department's history of requiring these procedures, but they did not interpret the Wagner-Peyser Act itself to require them. Rather, the Department in those rulemakings continued to impose federal merit-system staffing requirements on States as a policy choice.

The Department has in the past cited section 5(b) of the Wagner-Peyser Act as support for imposing the federal merit-system staffing requirement, both during the *Michigan* litigation and in rulemaking, see 65 FR 49,294, 49,385; *Michigan*, 81 F. Supp. 2d at 845, but section 5(b) also does not require the imposition of such a requirement. Instead, section 5(b) requires the Secretary of Labor to certify that each State seeking Wagner-Peyser Act funds "has an unemployment compensation law. . . in compliance with section 303 of the Social Security Act," "coordinate[s] the public employment services with the provision of unemployment insurance claimant

services,” and “compli[es] with this [Wagner-Peyser] Act.” Section 303 of the Social Security Act expressly requires “the establishment and maintenance of personnel standards on a merit basis,” see 42 U.S.C. § 503(a)(1), but the Wagner-Peyser Act does not. Section 5(b) thus conditions States’ Wagner-Peyser Act funds on such staffing in the administration of UI programs. Section 5(b) does not condition funds on such staffing in the administration of Wagner-Peyser Act-funded services and activities.

As authorized by the Wagner-Peyser Act and acknowledged by the district court, the Department has discretion in how “to develop and prescribe minimum standards of efficiency” in the provision of ES services. Exercising this discretion, the Department proposes to change its policy to allow States additional flexibility in their staffing approaches for the provision of Wagner-Peyser Act-funded services.

The Department has authority to change its interpretation of an ambiguous statutory provision like Section 3(a) so long as the Department offers a reasoned explanation for the change. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984). Here, the Department believes that its proposal will ensure and indeed enhance the efficiency of States as they seek to carry out Wagner-Peyser-funded activities. The reasons for this belief are discussed throughout this 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.

This proposal, if finalized, should not affect the reliance interests of States accustomed to the current rules. This proposed rule would not impose any new requirements on States. States could

choose to make no changes to their staffing arrangements as a result of this proposed rule. This proposed rule only provides States flexibility to determine the system that best meets their workers' and employers' needs.

Accordingly, the Department proposes to amend regulations at parts 651, 652, 653, and 658.

II. Section-By-Section Discussion of Proposal

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

20 CFR 651.10 sets forth definitions for 20 CFR parts 652, 653, 654, and 658. The Department proposes to revise the definitions to better align them across the regulatory text, and to conform them to the proposed changes permitting States flexibility in the staffing of certain Wagner-Peyser Act-funded activities.

The Department proposes to delete the definition of *affirmative action* as, for the reasons stated in the preamble explaining changes to §653.111, the term will no longer be used in these regulations.

The Department proposes to add a definition for *Complaint System Representative* to this section. Currently, this term is used in part 658, but is not defined. The proposed definition makes clear that a Complaint System Representative is an ES staff person working at the local or State level who is responsible for handling complaints. The Complaint System Representative position is funded, in whole or in part, by the funds the Department provides to the States to administer the Wagner-Peyser Act ES program. As such, the individual is an ES staff person. Except when the SMA acts as the Complaint System Representative as required by §653.108, the proposed rule provides States the flexibility to determine how to staff the Complaint System Representative position.

The Department proposes to amend the definition of *Employment Service (ES) office* in two ways. First, the Department intends to define the term more accurately. Currently the ES office definition refers to a local workforce development board (WDB) as the site where the ES office is located. However, the previous usage of “local WDB” in this situation did not fully capture the intended meaning because local WDBs are not physical locations. Therefore, the Department is proposing to remove the reference to the local WDB and instead define an ES office as a “site that provides Wagner-Peyser Act services as a one-stop partner program.”⁵ This would better align the use of the terms in the other WIOA regulations and guidance. Second, the Department proposes to remove the language referring to staff of the SWA and the requirements found in 20 CFR 652.215. This change is proposed for consistency with the proposed changes to 20 CFR 652.215 in how to staff the provision of Wagner-Peyser Act-funded services.

The Department proposes to change the definition of *Local Office Manager* to *Employment Service (ES) Office Manager*. This proposed change includes replacing “official” with “individual.” The term “official” may suggest a person employed by the State, but the Department is not requiring the ES Office Manager to be a State employee. Second, the Department proposes to change the term *Local Office Manager* to *ES Office Manager*, because the current regulations do not use the term *Local Office Manager* and instead use the undefined

⁵ There are two categories of partner programs under WIOA, those which are statutorily required to participate in one-stop centers for regions in which those programs are active, and optional partner programs, which can be any Federal, State, or local government entity or organization, as long as it is approved by the local Workforce Development Board. The required partner programs are, as listed in 20 CFR 678.400: the WIOA Title I programs for adults, dislocated workers, youth, job corps, YouthBuild, Native American Programs, and Migrant Seasonal Farmworker (MSFW) programs; the Wagner-Peyser Act Employment Service; the Adult Education and Family Literacy Act program; the Vocational Rehabilitation program; the Senior Community Service Employment Program; career and technical education programs at the postsecondary level authorized by the Carl D. Perkins Career and Technical Education Act of 2006, as amended by the Strengthening Career and Technical Education for the 21st Century Act; programs carrying out Trade Adjustment Assistance activities; Jobs for Veterans State Grant programs; programs carrying out Community Services Block Grant activities; programs authorized under State unemployment laws; and Temporary Assistance for Needy Families (TANF), unless exempted by the Governor under 20 CFR 678.405(b).

term of *ES Office Manager*. Within §651.10, the Department will move the definition to align with alphabetical order, placing it between *Employment Service (ES) office* and *Employment Service (ES) regulations*.

The Department proposes to align the definition of *field checks* with section 653.503(a). The proposed language would also provide that Federal staff may, at times, be involved in or make *field checks*. The Department notes that the terms *field checks* and *field visits* are distinct.

The Department proposes to change the definition of *field visits* to replace the language referring to “State Workforce Agency outreach personnel” with “outreach staff.” This change would align the definition with the proposal to afford States greater flexibility in staffing.

The Department proposes to change the definition of *outreach contact* to remove “worker” from the definition and replace it with the term “staff.” This would align terminology throughout the regulations for consistent use of the term “worker” to mean someone who receives services through the system and “staff” to mean someone who provides services funded by the Wagner-Peyser Act.

The Department proposes to add a new definition for the term *outreach staff* to mean ES staff with the responsibilities described in 653.107(b) of this chapter.

The Department proposes to amend the definition of *Respondent* to include the term “service provider” as an entity that may be alleged to have committed a violation of the ES regulation, or other violations of employment-related laws. Because States now have the flexibility to provide certain Wagner-Peyser Act services through contracts, the Department proposes to add the term “service provider” to make it clear that service providers can also be Respondents. The Department notes that the list of Respondents in this proposed regulation is not exhaustive.

The Department proposes to add the term *State Workforce Agency (SWA) official*, because proposed changes elsewhere in the ES regulations have added this term or amended language to include this term. The definition clarifies that SWA officials are individuals employed directly by the SWA or its subparts, rather than through other staffing mechanisms such as those provided for in the proposed definition for ES staff.

The Department proposes to add the term *Wagner-Peyser Act Employment Service staff (ES staff)* which it defines as individuals, including, but not limited to, State employees and contractors, who are funded, in whole or in part, by Wagner-Peyser Act funds to carry out activities authorized under the Wagner-Peyser Act. As discussed below, the Department is proposing to revise §652.215 to allow States more flexibility in providing Wagner-Peyser Act services and activities. To implement this change, the Department proposes to replace “Staff funded under the Wagner-Peyser Act,” “SWA or ES office representative,” and “State Workforce Agency personnel” with the umbrella term “ES staff” throughout the regulations. Accordingly, the Department proposes to add this definition to §651.10.

The Department is not proposing changes to the definitions of *State, State Administrator, State agency, or State Workforce Agency*, but notes that these terms have been used throughout the proposed rule text to confer ultimate responsibility for Wagner-Peyser Act functions on the State as the grant recipient. Although a State may contract for the provision of most Wagner-Peyser Act functions, the State must ensure that contractors are fulfilling their responsibilities consistent with the requirements of the Wagner-Peyser Act, its implementing regulations, and all relevant guidance. This requires States to monitor how contractors are fulfilling their obligations. If a contractor is not following all applicable requirements, States must take steps to bring the contractor into compliance, or, ultimately, to replace the contractor if necessary. Additionally,

the Department will continue to monitor States' provision of Wagner-Peyser Act services and activities. States will continue to be held responsible for meeting all applicable requirements, whether or not they use contractors.

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

Subpart C—Wagner-Peyser Act Services in a One-Stop Delivery System Environment

This subpart 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 NPRM's proposed changes to regulations under subpart C are tailored to provide flexibility to States by allowing them to use alternative staffing models to deliver Wagner-Peyser Act-funded services and activities.

The Department notes that, while the proposed changes under subpart C give States more flexibility in staffing programs funded under the Wagner-Peyser Act, the changes do not affect existing merit-staffing requirements applicable to the UI program. These are required by statute. *See* 42 U.S.C. § 503(a)(1). Under 20 CFR 652.209(b)(2) and Sec. 3(c)(3) of the Wagner-Peyser Act, States are required to provide reemployment services to certain UI claimants; however, these services are not required to be delivered by merit-staff employees. For example, 20 CFR 652.209(b)(2) requires that the State administer the work-test, conduct eligibility assessments, register UI claimants for employment services, and provide job-finding and placement services, but these activities, under these proposed regulations, could be performed under any staffing model the State determines most appropriate. In accordance with the applicable UI system requirements, which would remain unaffected by these proposed regulations, all UI eligibility determinations would still need to be issued by staff who meet the UI staffing requirements.

§ 652.204 Must funds authorized under the Wagner-Peyser Act (the Governor's Reserve)

flow through the one-stop delivery system?

This section clarifies that the Governor's reserve funds may or may not flow through the one-stop delivery system and provides a list of allowable uses for those funds. The proposed text would change "SWA staff" to "SWA official." Under the current regulations, "SWA staff" are employees of the State. Under the proposed revisions to the regulations, SWA staff would no longer be required to be State employees; "SWA officials," however, would be required to be State employees. This change was made to align the proposed regulations with the Wagner-Peyser Act, which allows funds under Sec. 7(b)(3) of the Act, as amended by WIOA, to be used for professional development and career advancement of "State agency staff." The Department interprets "State agency staff" in this provision of the Wagner-Peyser Act to be employees of the State. Therefore, the Department is proposing to use the term "SWA officials" instead of "SWA staff" here.

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

This section currently provides that only State merit staff may provide Wagner-Peyser Act labor exchange services. For the reasons explained at length earlier in this NPRM, the Department proposes to exercise its discretion under Sec. 3(a) of the Wagner-Peyser Act to permit States to deliver Wagner-Peyser Act-funded employment services using a variety of staffing models, rather than with the current one-size-fits-all merit personnel system. The Department notes that Section 3(a) of the Act also requires the Department to assist States in "promoting uniformity in their [States] administrative and statistical procedure..." Although States would now have the discretion to determine what staffing structure best suits their unique

needs, the Department would still require the uniform provision of services as governed by the Act and the other regulations that implement the Act.

The proposed expansion of options would give States greater flexibility to determine how best to provide these services, whether through State staff, local government staff, a contractor, a combination of these personnel, or otherwise. Since the early 1990s, pursuant to Sec. 3(a)'s open-ended terms, the Department has permitted the use of different staffing systems in three States—Colorado, Massachusetts, and Michigan. This allowed these States the flexibility to set their own staffing models. The Department seeks comments on the use of the different staffing systems and their impact on service delivery under Wagner-Peyser Act-funded programs in these States.

The Department proposes revising both the question asked by 20 CFR 652.215 as well as the response. The Department proposes revising the current question to: “Can Wagner-Peyser Act-funded activities be provided through a variety of staffing models?” The Department also proposes revising the response to: “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.” These revisions are proposed to make the amended 20 CFR 652.215 clear and concise. In the proposed amended §652.215, the Department is referring to “Wagner-Peyser Act-funded activities” instead of “services” to clarify that the flexibility afforded by this section pertains not only to labor exchange services, but also to certain activities covered by the Monitor Advocate System and some administrative functions of the Wagner-Peyser Act.

These proposed changes would allow States to continue using State and State merit-staffing models, but provide additional flexibility to use other innovative staffing and service delivery

models, such as contract-based staffing, which may free up resources to better serve employers and workers. The Department requests comments on different service-delivery methods States could use to provide these services with the flexibility proposed in this section. This proposal would allow Colorado, Massachusetts, and Michigan, as well as all other States, to provide labor exchange services using staff that are not State merit staff. Under the proposed regulations, all States would have the flexibility to determine what staffing arrangement best suits their needs.

In the preamble to the Department's final rule for WIOA, the Department addressed this same section and stated that the benefits of merit staffing included promoting greater consistency, efficiency, accountability, and transparency. *See* 81 FR 56,072, 56,267. The Department values these benefits and believes they can be achieved by approaches other than a requirement mandating one-size-fits-all State merit staffing, when such requirement is not mandated by statute. As discussed above, services similar to those provided through the ES program are delivered effectively through systems without the specific Federal regulatory requirements regarding merit staffing. Allowing States flexibility in their Wagner-Peyser Act-funded activities gives them the opportunity to innovate, better integrates WIOA title I services, and may improve efficiency by focusing States on serving employers and workers rather than complying with one-size-fits-all staffing requirements—which, in turn, may preserve resources for those services to employers and workers. As noted above, under the proposed rule, the Department would continue to hold States accountable for providing high-quality Wagner-Peyser Act-funded services, consistent with the Act and its implementing regulations.

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

This section explains that ES staff may receive guidance from a one-stop operator about the provision of labor exchange services. The Department proposes to change the language in 20 CFR 652.216 to clarify that staff funded under the Wagner-Peyser Act could be employed through a variety of staffing models. The Department proposes removing references to State merit-staff employees found in 20 CFR 652.216 and replacing them with the newly defined “ES staff,” as appropriate. One-stop operators would be able to continue to provide guidance to staff funded under the Wagner-Peyser Act, if that guidance is consistent with the provisions of the Wagner-Peyser Act, the Memorandum of Understanding as described in 20 CFR 678.500, and any applicable collective-bargaining agreements. This change is proposed to align this section with the proposed change under 20 CFR 652.215 that would give States more flexibility in providing Wagner-Peyser Act-funded employment services. In light of this proposal, the Department would no longer require that personnel matters for ES staff remain under the authority of the SWA.

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

Subpart B—Services for Migrant and Seasonal Farmworkers (MSFWs)

This subpart sets forth the principal regulations of the 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. Throughout subpart B, the Department proposes revised language to conform to the proposed changes above that would allow States more staffing flexibility, except at section 653.108(b), where the Department clarifies that the SMA must be a SWA official. This proposed change is further explained below.

§ 653.102 Job information

The regulations at §653.102 provide for equitable access to job information for MSFWs. This section requires one-stop centers to take affirmative steps to assist MSFWs in accessing job information to enable them to take advantage of employment services in a manner comparable to non-MSFWs. The current text states, “One-stop centers must provide adequate staff assistance to MSFWs to access job order information easily and efficiently.” Consistent with the changes proposed in part 652, the Department proposes to remove the word “staff.” This change would give States maximum flexibility to determine who, on behalf of the one-stop centers—including contractors—provides assistance to MSFWs to access job order information. This proposed change is consistent with the Department’s broader goal to give States flexibility in how they staff the provision of services.

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

The regulation at §653.103 describes the process for MSFWs to participate in workforce development activities. This section provides for meaningful access to career services in particular for MSFWs who are English-language learners. Specifically, section 653.103(c) requires that one-stop centers provide MSFWs a list of available career and supportive services in their native language, and paragraph (d) of this section requires that one-stop centers refer and/or register MSFWs for services, as appropriate, if the MSFW is interested in obtaining such services. Consistent with the proposed changes to part 652, the Department proposes to change sections 653.103(c) and (d) by removing the word “staff.” This change would give States maximum flexibility to determine who on behalf of the one-stop centers, including contractors, provides services to MSFWs participating in workforce development activities, allowing the States to adopt staffing models that best meet the unique needs of MSFWs in their areas.

§ 653.107 Outreach and Agricultural Outreach Plan

Section 653.107 requires States to conduct outreach to MSFWs and specifies the requirements for the Agricultural Outreach Plan. The Department is proposing to make several changes to this section of the regulation to provide States flexibility in how best to staff the provision of outreach services.

Proposed § 653.107 contains changes to conform to the addition of the term outreach staff proposed in part 651. This proposed addition is explained in the preamble to part 651.

Section 653.107(a)(1) currently requires States to “employ” an adequate number of outreach workers to conduct MSFW outreach in their service areas. In this paragraph, the Department proposes to replace “employ” with “provide.” The Department currently requires that these services be delivered by State employees under a merit-personnel system, but is proposing to give States flexibility to determine what staffing solution best fits the States’ unique needs. The use of the term “provide” instead of “employ” in the proposed regulation makes it clear that States would have the discretion and flexibility to choose to provide the services with State employees or to contract for these outreach services. Although this would give States significantly more flexibility in how they satisfy the requirement that there be an adequate number of outreach staff, States would still be required to meet that requirement consistent with the requirement for the equitable provision of services.

Section 653.107(a)(2) assigns responsibility to the SWA to communicate the full range of workforce development services available to MSFWs and to conduct thorough outreach and follow-up in Supply States. The Department proposes to replace the current language, which states that “SWAs must” perform these outreach functions, with the requirement that “SWAs must ensure outreach staff” perform these functions. This proposed change would align this

provision with the other flexibility-maximizing provisions. Under this proposed change, SWAs will have the flexibility to choose whether to provide these services directly, as they do now, or, if it is a better approach, to use another model described in the preamble to §652.215. This change does not affect the SWAs' ultimate responsibility for the outreach program, nor their responsibility to monitor their own compliance with program requirements, under the oversight of the State Administrator, as required by section 653.108(a). A State that contracts for MSFW outreach would still be required to ensure that contractors are fulfilling their responsibilities consistent with regulatory requirements. This would require States to monitor their contractors and, if a contractor is not following all applicable requirements, to take steps to bring the contractor into compliance or, ultimately, to replace the contractor if necessary.

Section 653.107(a)(3) sets out criteria the SWAs must look for in seeking and “hiring” outreach staff candidates. The Department proposes to change “hiring” to “providing,” and to no longer require that SWAs seek candidates “through merit system procedures,” consistent with the proposed change to paragraph (a)(1) of this section. However a State chooses to staff these positions, it would still be required to seek out candidates possessing the MSFW-related qualities specified in § 653.107. The Department also proposes to replace the phrase “affirmative action programs” with the requirement that States seek outreach staff candidates using the same criteria used for State Monitor Advocates. Those criteria are located in § 653.108(b)(1) through (3). The reasons for these proposed revisions are explained below in the discussion of proposed § 653.111, which would be revised similarly and remind States of their obligations to comply with all applicable antidiscrimination laws.

Paragraph (a)(4) of this section lays out the requirement to have full-time, year-round outreach staff in the 20 States with the highest estimated MSFW activity, and provides for

increasing the required part-time staff coverage in the remaining States to full-time coverage during periods of high activity. The current provision requires the States to “assign” staff “in accordance with State merit staff requirements” to conduct outreach duties. The Department proposes to no longer require State merit staffing and to remove the provision specifically for assignment of staff by the States. Similarly, the Department proposes to no longer require that the States outside the top 20 with the highest levels of activity “hire” outreach staff, instead requiring that these States “provide” sufficient staff, whether through direct hiring or outside contracting. The proposed language maintains the current staffing level requirements based on areas with high MSFW activity but would provide States flexibility in how they achieve those levels. Allowing States to use different models to achieve required staffing levels aligns with the other proposed changes to the ES regulations.

Section 653.107(b) includes provisions regarding outreach staff responsibilities. In particular, paragraph (b)(4) of this section specifies the responsibilities of outreach staff to provide various forms of on-site assistance in situations where the MSFW cannot or does not want to visit the one-stop center, where the MSFW would otherwise be able to obtain the full range of employment and training services. One of these responsibilities is to refer ES or employment law-related complaints to the ES Office Complaint Specialist or ES Office Manager. Here, the Department proposes to replace the term “ES Office Complaint Specialist” with “Complaint System Representative,” in order to clarify to whom the referral must be sent and to align the terminology with the proposed added definition of “Complaint System Representative” at § 651.10.

Paragraph (b)(8) of this section lays out the recordkeeping requirements for outreach staff in order to document their contacts with MSFWs. The paragraph requires in part that outreach staff

maintain records of the number of contacts, the names of contacts (if available), and the services provided by the staff. The regulations provide examples of events that would require documentation, including “whether a referral was made.” The Department proposes to change this example to clarify that outreach staff must document “if the complaint or apparent violation was resolved informally or referred to the appropriate enforcement agency.” The Department proposes this change to ensure that logs kept by outreach staff capture the complaints that were resolved informally without the need for referral, which provides the opportunity for higher-level review of informal complaint resolution among the services provided, and methods and tools used, by outreach staff.

Under the current version of § 653.107(c), the performance of outreach staff, including quality and productivity of their work, is assessed by the “ES Office Manager and/or other appropriate State office staff.” The Department proposes to delete the words “State office” and refer only to “staff.” The current regulation gives States the flexibility to determine who, in addition to or in place of the ES Office Manager, may appropriately assess outreach worker performance. The proposed change would maximize this flexibility by enabling States to determine the appropriate staff, whether employed by the State, contracted, or otherwise, to perform these assessments.

§ 653.108 State Workforce Agency and State Monitor Advocate Responsibilities

The regulations at § 653.108 contain the provisions for SWA and SMA responsibilities. The Department proposes several changes to this section to improve SWA and SMA review functions, increase hiring and staffing flexibility, and align the language with proposed new terminology.

Section 653.108(b) provides the process by which the SMA is appointed. Currently, paragraph (b) of this section requires the State Administrator to appoint the SMA. First, the Department proposes to add that the SMA must be a SWA official and cannot be a contracted position. The Department proposes to add this provision to distinguish the SMA from other ES staff. The SMA performs oversight functions on behalf of the State Administrator to ensure compliance with the ES regulations. This oversight function suggests that it is more appropriate for the SMA to be a SWA official. Likewise, the responsibilities of the SMA, which include entering into memoranda of understanding (MOUs) on behalf of the State with workforce system partners, such as the National Farmworker Jobs Program (NFJP) grantees, are more appropriately carried out by a State employee. Second, the Department proposes to delete the current requirement that the State Administrator encourage SMA applicants to apply through “the State merit system prior to appointing a State Monitor Advocate.” While the SMA would continue to be a State employee, the SWA may choose to hire the SMA through means other than the State merit system. Again, this would allow States more hiring flexibility.

Section 653.108(c) currently requires that the SMA “have direct, personal access, when necessary, to the State Administrator,” and that the SMA “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.” The Department proposes to remove the second requirement regarding the SMA’s status and compensation and comparability to other State positions. This gives the States the flexibility to determine what is appropriate for the SMA position and conforms with other changes proposed throughout the NPRM.

Section 653.108(d) provides staffing requirements for the SMA. The current text requires that the SMA “be assigned” the staff necessary to perform all regulatory responsibilities. The

Department proposes to change this provision to require simply that SMAs “must have” the necessary staff. This change is proposed to provide maximum flexibility in the manner in which SMAs are staffed, whether by the State directly or through a contractor. The Department further proposes to insert “ES” before “staff” and “staffing” consistent with the proposed definition of the term “ES staff,” to reflect that while the SMA must be a SWA official, SMA staff do not necessarily have to meet State- or merit-staffing requirements.

Section 653.108(g) lays out SMA duties in reviewing the provision of services to MSFWs. In paragraph (g)(1) of this section, the current text provides that the SMA must “[c]onduct an ongoing review of the delivery of services and protections afforded by the ES regulations to MSFWs by the SWA and ES offices (including progress made in achieving affirmative action staffing goals),” which the SMA performs in part by studying complaint logs prior to on-site reviews as described in paragraph (g)(2) of this section. The Department seeks to clarify in proposed paragraphs (g)(1) and (g)(2)(i)(D) of this section that reviewing the log includes reviewing the informal resolution of complaints and apparent violations. This would allow the SMA as a State official to assess the outcomes of complaints and apparent violations regarding MSFWs, in conjunction with the comprehensive recordkeeping requirements provided in § 653.107(b)(8), to determine whether such outcomes are in keeping with the States’ obligations to MSFWs and with applicable laws. The Department also proposes changing the phrase “achieving affirmative action staffing goals” to “efforts to provide ES staff in accordance with § 653.111,” to conform to revisions proposed to § 653.111.

Paragraph (g)(2)(v) of this section discusses procedures following SMA on-site reviews and analysis. Among other requirements, this paragraph states that “[i]f the review results in any findings of noncompliance with the regulations under this chapter, the ES Office Manager must

develop and propose a written corrective action plan. The plan must be approved or revised by appropriate superior officials and the SMA.” The Department proposes to replace “superior officials” with “SWA officials” to clarify that the corrective action plan must continue to be approved by State employees (i.e., not contractors). This will avoid any ambiguity that may be introduced by enabling other functions throughout this subpart to be performed by non-State employees.

Section 653.108(i), which discusses the SMA’s role in the Complaint System, states that the SMA may be assigned the responsibility as the Complaint Specialist. Similar to the proposed change to section 653.107(b), the Department proposes to replace “Complaint Specialist” with “Complaint System Representative” in accordance with the definition of Complaint System Representative that is proposed to be added to § 651.10, to ensure that these regulations refer in a consistent manner to the individual at the State or local level responsible for handling complaints.

Section 653.108(s) lays out the requirements for the Annual Summary that the SMA must prepare for the State Administrator, the RMA, and the National Monitor Advocate (NMA) on the State’s provision of services to MSFWs. Proposed section 653.108(s)(2) states that the summary must include an assurance that “the SMA has status and compensation approved by the civil service classification system, and is comparable to other State positions assigned similar levels of tasks, complexity, and responsibility.” The Department proposes to remove these requirements surrounding status and compensation and comparability to other State positions to maintain consistency with the proposed change to section 653.108(c).

Section 653.108(s)(3) further states that the summary must also include “[a]n assurance the SMA devotes all of his/her time to monitor advocate functions. Or, if the SWA proposed 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.” In this paragraph, the Department proposes to remove “the SWA proposed” for clarity. This results in a requirement that the summary contain an explanation of the effectiveness of part-time SMAs if those functions are in fact being performed on a part-time basis.

Finally, in section 653.108(s)(11), the Department proposes changing the phrase “the functioning of the State’s affirmative action staffing program” to “the State’s efforts to provide ES staff in accordance with § 653.111,” to conform to revisions proposed to § 653.111.

§ 653.111 State Workforce Agency Staffing Requirements

Section 653.111 contains provisions for SWA staffing requirements in “significant” MSFW ES offices, as defined in current § 651.10. The Department proposes two sets of changes to § 653.111.

The first set of changes would revise the section to reflect the new flexibilities proposed for States. Current section 653.111(a) requires SWAs to employ ES staff to facilitate the provision of services tailored to MSFWs. Consistent with similar changes proposed elsewhere in this NPRM, the Department proposes to change this provision to require the SWA to provide such staff, but not necessarily to hire or employ them directly.

The second set of changes regards the section’s staffing criteria. The Department is fully committed to serving all MSFWs, and to requiring that States provide useful help to them from staff who can speak their languages and understand their work environment. Accordingly, the Department proposes to maintain an emphasis on hiring ES staff who speak languages spoken by MSFWs and who have an MSFW background or experience, by cross-referencing those same criteria as used in the hiring of State Monitor Advocates. The Department, however, has serious

concerns about the constitutionality of the additional, race-based and ethnicity-based hiring criteria in the current regulation. The regulations were originally adopted to remedy discrimination in response to a court order in *NAACP, Western Region v. Brennan*, No. 2010-72, 1974 WL 229 (D.D.C. 1974). In the intervening years, the Supreme Court has held that government-imposed racial classifications must be narrowly tailored, including by lasting no “longer than the discriminatory effects it is designed to eliminate.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring; cf. *Fisher v. Texas*, 136 S. Ct. 2198, 2208 (2016) (“A university cannot impose a fixed quota or otherwise define diversity as some specified percentage of a particular group merely because of its race or ethnic origin.” (quoted sources omitted))). The Department believes it can meet the needs of MSFWs without resorting to employment criteria that favor or disfavor applicants on the basis of race or ethnicity. The Department thus proposes to remove the requirement for an “affirmative action program,” which requires quota-style “sufficient staffing” of employees in “under-represented categories,” 20 CFR 653.111(b)(2), and replace it with the express requirements that the SWA seek ES staff that meet the same criteria as those used for State Monitor Advocates. The proposed regulation also includes an explicit reminder that SWAs remain subject to all applicable federal laws prohibiting discrimination and protecting equal employment opportunity.⁶ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”). SWAs’ efforts to hire in accordance with this section would be monitored as part of their regular compliance reviews. Current § 653.111(a) would be modified accordingly, § 653.111(b) through (b)(2) would be removed, and current paragraph §

⁶ These laws include, as applicable, Titles VI and VII of the Civil Rights Act, Title IX of the Education Amendments Act of 1972, and WIOA § 188.

653.111(b)(3) would be renumbered as § 653.111(b), with the revised instruction that SWAs be regularly reviewed for their compliance with the requirements of this section.⁷ A new paragraph § 653.111(c) would be added to remind SWAs of their obligations to comply with all applicable federal antidiscrimination laws.

Subpart F—Agricultural Recruitment System for U.S. Workers (ARS)

This subpart includes the requirements for the acceptance of intrastate and interstate job clearance orders, which seek U.S. workers to perform farmwork on a temporary, less than year-round basis. Orders seeking workers to perform farmwork on a year-round basis are not subject to the requirements of this subpart. This subpart affects all job orders for workers who are recruited through the ES intrastate and interstate clearance systems for less than year-round farmwork, including both MSFWs and non-MSFW job seekers.

The Department proposes changes to this subpart, which include clarifying who must make certain decisions or take specific actions.

§ 653.502 Conditional access to the Agricultural Recruitment System

The regulations at §653.502 cover the provisions for conditional access to the ARS. Employers may be granted conditional access if they provide assurance that housing that does not meet applicable standards will be brought into compliance at least 20 calendar days before occupancy. Section 653.502(e) covers housing inspections for employers who were granted conditional access to ARS. If the housing inspection reveals that the housing is not in full compliance as assured by the employer, and the employer does not then come into compliance

⁷ As mentioned above, the Department is aware that the MSFW program was founded as a remedial measure in litigation against the Department in the 1970s and 1980s, prior to more recent precedent from the U.S. Supreme Court. The Department is continuing to evaluate whether the results of that litigation require additional or different changes to the regulations governing employment in significant MSFW ES offices than those proposed in this NPRM.

within 5 calendar days, the ES office must take immediate action, including removing the employer's clearance orders from interstate and intrastate clearance. The Department proposes to add the requirement that this removal take place only with the approval of an appropriate SWA official. This would ensure that parties' rights and responsibilities are determined by the State itself, which is a typical governmental duty. Further, State governments have experience and expertise in adjudicating parties' rights and responsibilities.

§ 653.503 Field checks

The regulation at §653.503 includes the provisions for field checks as defined at 20 CFR 651.10. This section discusses how and when field checks must be conducted, and the respective roles of the SWAs and ES staff generally. Section 653.503(d) provides procedures for instances in which fields checks reveal conditions not as stated in the clearance order or employment law violations. Currently, these conditions or violations are described as being documented by the SWA or Federal personnel. The Department proposes to revise the language to replace "SWA or Federal personnel observe" with "If the individual conducting the field check observes" and replace, "the SWA must" with "the individual must" to recognize that States may assign these duties to non-State employees, while ensuring that whoever is conducting the field check (be they ES staff, a State employee, or a Federal employee) documents the finding.

Section 653.503(e) provides authority for SWAs to enter into agreements with State and Federal enforcement agencies for enforcement-agency staff to conduct field checks on the SWAs' behalf. Currently, this paragraph enables the SWA to enter into either formal or informal agreements. The Department proposes to change "SWA" to "SWA officials" to clarify that only State employees, and not contractors, may enter into formal or informal arrangements with appropriate State and Federal enforcement agencies. The Department also proposes to delete the

reference to performing checks on behalf of SWA “personnel” and instead refer simply to “the SWA” for clarity.

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

Subpart E—Employment Service and Employment-Related Law Complaint System (Complaint System)

Subpart E sets forth the regulations governing the Complaint System for the ES at the State and Federal levels. The Complaint System handles complaints from applicants against an employer about a specific job to which the applicant was referred through the ES, and complaints involving failure to comply with the ES regulations under parts 651, 652, 653, and 654 of this chapter. The Complaint System also accepts, refers, and, under certain circumstances, tracks and resolves complaints involving employment-related laws as defined in §651.10.

Throughout subpart E, the Department proposes revisions consistent with the proposed new flexibility for States’ provision of and engagement in Wagner-Peyser Act-funded services and activities from §652.215. Additionally, the Department proposes clarifications to several provisions in subpart E to state explicitly that the State Administrator’s ultimate responsibility for the Complaint System, as currently provided in the regulation, includes the informal resolution of complaints and apparent violations.

Further, the Department proposes that the SMA, a State official, review complaint logs and monitor actions on the informal resolution of complaints. The Department notes that it is not proposing that informal resolution of complaints must be approved in each instance by a State official. More information can be found about this in proposed §653.108 and its accompanying preamble. The Department also proposes to change references to a Complaint Specialist to

“Complaint System Representative” for clarity, consistency, and alignment with the proposed definition for Complaint System Representative at §651.10.

The Department has made various changes to terms in proposed part 658 to conform to changes in proposed part 651. As discussed in detail above, throughout this proposed rule the Department proposes to use an umbrella term, ES staff, to refer to a variety of individuals providing Wagner-Peyser Act services. The term ES staff is defined in proposed §651.10 and includes State employees and contractors. Where the Department uses the term ES staff in this Part, the State has the flexibility to contract for the services governed or required by that provision of the regulation if the State so chooses.

Likewise, the Department proposes to change the term “outreach worker” to “outreach staff” which is a type of ES staff. As with other ES staff, outreach staff can be State employees or contractors, as States would no longer be required to hire individuals directly to perform this work.

While the Department is now giving States more flexibility for accomplishing many ES activities, the States still retain ultimate responsibility for ensuring the services and activities required to be provided under this Part are consistent with the requirements of the statute, regulation, and any relevant guidance.

§ 658.410 Establishment of local and State Complaint Systems

The regulations at §658.410 govern the establishment of local and State Complaint Systems. The Department is proposing to amend section 658.410(b) to clarify that the State Administrator has overall responsibility for the informal resolution of complaints. Currently, section 658.410(b) provides that the State Administrator has overall responsibility for the operation of the Complaint System. Informal resolution of complaints is already a part of the Complaint System,

and thus, the State Administrator already has responsibility for the resolution of these complaints. The Department proposes to clarify that the State Administrator's responsibilities extend to informal resolution of complaints, a duty that ES staff would be permitted to perform under the proposed regulation. Additional information about the informal resolution of complaints is found in proposed §653.108 and its accompanying preamble. The Department notes that "the State Administrator has overall responsibility" means the State Administrator must ensure all of the requirements set forth in the operation of the Complaint System at the local and State level are followed, regardless of the staffing model used to meet the requirements.

The Department also proposes to modify the second sentence of §658.410(b) to clarify that the ES Office Manager, as defined at §651.10, is responsible for the operation of the Complaint System. The current version of the regulation states, "At the ES office level the manager must be responsible for the operation of the Complaint System." The Department proposes to revise the sentence to, "In the ES office, the ES Office Manager is responsible for the operation of the Complaint System" to align it with the definition of ES Office Manager at §651.10.

Section 658.410(c) requires, among other things, that the SWA maintain a central complaint log. This log contains a variety of information to help determine if complaints are being appropriately handled. The Department proposes to modify section 658.410(c)(6) to include a clarification that the complaint log's description of what action was taken on a complaint must also include whether the complaint was resolved informally. This clarification is proposed to ensure these actions are captured in complaint logs and therefore will be reviewed by the SMA. In proposed section 653.108(g), the Department clarifies that the SMA, a SWA official, must review informal resolution of complaints. The language proposed in section 658.410(c)(6) will

ensure this information is available in the complaint log to facilitate the SMA's review of complaints. Additionally, to ensure that the SMA reviews action on apparent violations, the Department proposes to add a new sentence to section 658.410(c) that clarifies that the complaint log must include any action taken on apparent violations.

In the second sentence of section 653.410(c), the Department proposes to change "manager of the ES office," an undefined term, to "the ES Office Manager," a term proposed to be added to the part 651 definitions. The Department intends no change in meaning, but merely proposes the change here for clarity and consistency within the regulations.

Section 658.410(h) governs who must be designated to handle complaints. Currently, the provision requires the State Administrator to assign complaints to a State agency official, with the State agency official designated to handle MSFW complaints being the SMA. The term "State agency official" suggests the individual handling the complaints is a State employee. Because the Department is proposing to give States the flexibility to determine how to staff the provision of Wagner-Peyser Act-funded services, State employees would no longer be required to handle non-MSFW complaints. Therefore, the Department proposes to replace "State agency official" with "Complaint System Representative." As noted above, the Department proposes to define Complaint System Representative in § 651.10 as an ES staff individual who is responsible for handling complaints. As with other ES staff, Complaint System Representatives would be permitted to be State employees (merit staff or otherwise), local government employees, contractors, others, or a combination of such personnel.

Section 658.410(m) governs follow-up on unresolved complaints for MSFWs. When an MSFW submits a complaint at the State level to the SWA, the SMA is responsible for handling the complaint. This provision requires the SMA to follow-up monthly on the handling of the

complaint and inform the complainant of the complaint's status. The Department proposes to streamline the text of this provision to make the requirements clearer. The Department notes that the current regulations do not require follow-up on complaints made by individuals who are not MSFWs, and the Department is not proposing to change this.

§ 658.411 Action on complaints

The regulations at § 658.411 govern the actions States must take when individuals file complaints. There are two kinds of complaints, ES complaints and employment-law related complaints. There are also specific procedures States must follow when an MSFW makes a complaint.

Section 658.411(a) governs the procedures for filing complaints. Currently, §658.411(a)(1) provides that when an individual indicates interest in filing a complaint with an "ES Office, a SWA representative, or an outreach worker," the individual who receives the complaint must explain the operation of the Complaint System and offer to take the complaint in writing. Under the changes proposed to parts 651 and 652, States would be permitted to contract for the provision of these services, which could include some responsibilities in the Complaint System. In this section, the Department proposes to replace the term "a SWA representative" with a reference to "the SWA" to make it clear that the SWA, not its representatives, has the responsibility for ensuring that the individuals receiving complaints offer to explain the operation of the Complaint System and offer to take the complaint in writing. As in other areas of the program, the SWA has discretion to choose how best to carry out this requirement.

Section 658.411(d) governs how States are required to treat complaints regarding the ES regulations (ES complaints). Section 658.411(d)(3)(ii) requires States to issue a written determination about a complaint if 30 calendar days have elapsed since the complaint was

received or after all necessary information was submitted to the SWA pursuant to paragraph (a)(4) of this section. Currently, the regulation requires “the SWA” to make a written determination. While the Department is giving States the flexibility to permit non-State employees to be involved in many aspects of administering the Complaint System, the Department has determined that making determinations on complaints is more appropriately handled by a State employee. This ensures that parties’ rights and responsibilities are determined by the State itself, which is a typical governmental duty. Further, State governments have experience and expertise in adjudicating parties’ rights and responsibilities. Moreover, a State might contract with more than one contractor to provide the services throughout the State, or that contractor might change with time. Different contractors could make different and possibly inconsistent decisions. Requiring States to make these determinations means that only one entity will be doing so, promoting consistency in determinations. The regulation implements this approach by proposing to add the word “official” to this provision to make it clear that the SWA official, a State employee, must make written determinations.

Section 658.411(d)(5)(ii) requires SWAs to offer complainants a hearing if the SWA has determined that a Respondent has not violated the ES regulations. Currently, this paragraph provides that if the “SWA determines that an employer has not violated the ES regulations,” then the SWA must offer the complainant the opportunity to request a hearing. The Department proposes to revise this provision to require SWA officials to make the determination that ES regulations have not been violated instead of referencing only the SWA. The Department proposes to make this change for similar reasons to the proposed change in § 658.411(d)(3)(ii) as explained above.

Section 658.411(d)(5)(iii) governs how a SWA must handle a written request for a hearing. A party can submit a written withdrawal of their hearing request before the hearing. However, the SWA and the State hearing official must consent to the withdrawal. This NPRM proposes more flexibility for States, under which they could choose to contract for the processing of complaints. But, the Department has determined that a SWA official—a State employee—should decide whether to consent to the withdrawal of complaints. Such a decision is akin to a determination on the merits of a complaint, because a withdrawal almost always indicates the parties have accepted (or otherwise reached) a compromise on the underlying determination. The same policy considerations thus apply to both determinations on complaints and decisions on withdrawals. To implement this decision, the Department proposes to replace “SWA representative” with “SWA official” in section 658.411(d)(5)(iii)(G). The proposed regulation would then read, “With the consent of the SWA official and of the State hearing official, the party who requested the hearing may withdraw the request for hearing in writing before the hearing.”

**Subpart F—Discontinuation of Services to Employers by the Wagner-Peyser Act
Employment Service**

This subpart contains the regulations governing the discontinuation of services provided pursuant to 20 CFR part 653 to employers by ETA, including SWAs. In this subpart, the Department proposes to clarify various provisions to state that a SWA official must initiate procedures for and make decisions regarding the discontinuation of services to employers. These proposed clarifications would maintain consistency with the Department’s determination that it is most appropriate for a State employee to determine when an employer may no longer use the Wagner-Peyser Act services.

§ 658.501 Basis for discontinuation of services

The regulations at § 658.501 govern the basis for discontinuation of services. Section 658.501(a) states that a SWA must initiate procedures for discontinuation of services to employers who have committed one or more of the eight infractions listed under paragraph (a) of this section. The Department proposes to add the word “official” after “SWA” to clarify that a SWA official must initiate procedures for discontinuation of services. While the Department proposes more flexibility for States to choose to contract for services related to the discontinuation of services provisions, for the same reasons discussed above regarding decisions on complaints and withdrawals, the Department has determined that it would be most appropriate for a State employee to determine when an employer may no longer access the Wagner-Peyser Act-funded services. To make this requirement clear, the Department proposes to insert the term “officials” after SWA in paragraph (a) of this section to provide that only State employees may initiate procedures to discontinue services.

The Department is proposing similar changes to § 658.501(b) and (c) for the same reasons as the change to paragraph 658.501(a). Section 658.501(b) governs when a SWA may discontinue services immediately. The Department proposes to change the beginning of the sentence from “The SWA may” to “SWA officials may” to clarify that only SWA officials may discontinue services. The Department also proposes a similar change for § 658.501(c). Currently, this provision in the regulation provides that the “State agencies” must engage in the procedures for discontinuation of services if it comes to the attention of the ES office or SWA that an employer participating in the ES may not have complied with the terms of its temporary labor certification. The Department proposes to change “State agencies” to “SWA officials” to clarify that only State employees may engage in the procedures for discontinuation of services under paragraph (a)(1) of this section.

Subpart G—Review and Assessment of State Workforce Agency Compliance with Employment Service Regulations

This subpart sets forth the regulations governing review and assessment of SWA compliance with the ES regulations at this part and parts 651, 652, 653, and 654 of this chapter. In Subpart G, the Department proposes changes to update reporting-system references. It also proposes changes to the ETA Regional Office responsibilities by providing Regional Administrators (RAs) greater flexibility in staffing their ETA regional offices and obligating travel funds. The Department notes that these changes would directly affect only the U.S. Department of Labor's internal administration.

§ 658.601 State Workforce Agency responsibility

The regulations at § 658.601 govern SWA responsibilities for establishing and maintaining a self-appraisal system for ES operations to determine success in reaching its goals and to correct deficiencies in performance. The Department proposes to change how this information is submitted to the Department. Previously the information was submitted through the ETA 9002A report. However, the Department is proposing that it be submitted through the WIOA Common Performance Reporting System, ETA Form 9172 (Participant Individual Record Layout). The Department is proposing to change the reference to ETA 9002A report in section 658.601(a)(1)(ii) to ETA Form 9172. A similar change for the same reasons is also proposed at section 658.601(a)(2)(ii).

§ 658.602 Employment and Training Administration National Office responsibility

Section 658.602 governs the responsibilities of the ETA National Office. This provision requires the NMA to monitor and assess the SWAs' compliance with the ES regulations affecting MSFWs. Currently, section 658.602(l) requires the NMA to take certain steps if the

NMA receives information that the effectiveness of any SMA is being substantially impeded by the State Administrator or another State or Federal ES official. The Department proposes to add “ES staff” to this group of individuals who may be impeding the effectiveness of the SMA. This proposed addition would clarify that the NMA is also responsible for ensuring that the SMA is not substantially impeded by any of the individuals who may be providing Wagner-Peyser Act-funded services, whether that individual is an employee of the State or Federal government or a contractor. The revised provision would state, “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 ES staff...”

§ 658.603 Employment and Training Administration Regional Office responsibility

Section 658.603 governs ETA Regional Office responsibilities. Section 658.603(f) currently requires the RMA to be devoted fulltime to RMA duties. Recognizing different States’ MSFW populations in the relevant labor markets, the Department is proposing to remove that requirement to give RAs greater flexibility in how they staff and assign duties in the regional offices to meet MSFWs’ needs best. To make this change, in the first sentence of paragraph §658.603(f), the Department proposes to replace “devote full time” with “carry out” so that it is clear there is not a requirement for the RMA to work full time on RMA duties.

Section 658.603(h) requires the RA to ensure assignment of the staff necessary to fulfill effectively the regional-office responsibilities set forth in § 658.603. Currently, the second sentence of this provision requires the RMA to notify the RA of staffing deficiencies and for the RA to appropriately respond. The Department proposes to delete this sentence because the RA is in the best position to determine regional office staffing needs. This proposed deletion does not prevent the RMA from making staffing recommendations to the RA. The Department notes that

section 658.603(h) would continue to require the RA to ensure there are the necessary staff to fulfill effectively the regional office responsibilities.

Proposed section 658.603(n)(3) adds the term “ES staff” to the list of those who could “impede” the effectiveness of an SMA, and who must be reported to the Regional Administrator by the RSMA with recommended appropriate actions. This change is proposed to bring this provision in line with other proposed changes made throughout this NPRM, including the proposed addition of the term “ES staff” and corresponding change to section 653.602(l), Employment and Training Administration National Office responsibility, discussed earlier in this preamble.

Finally, section 658.603(r) currently requires the RMA to visit each State in the region not scheduled for an on-site review during peak harvest season of that fiscal year. It may not be necessary to visit each of these States every year, due, for example, to there not being a significant MSFW population in those States or to a visit by the NMA instead of the RMA that year. Further, with limited funds, this is very challenging to carry out. Therefore, the Department proposes to revise this provision to read, “As appropriate, each year during the peak harvest season, the RMA will visit each State in the region not scheduled for an on-site review...” The remainder of the provision would retain the current language. This will allow Regional Administrators the flexibility to determine where staff will travel depending on the specific needs of each State and the availability of Federal funds.

Proposed section 658.603(t) adds “as necessary” to the end of the first sentence, to clarify that the RMA will not be attending all MSFW-related public meetings. The Department is adding “as appropriate” here to allow flexibility to adapt to unforeseen circumstances, such as limited resources, or the urgency of issues.

III. Rulemaking Analyses and Notices

A. Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 13771 (Reducing Regulation and Controlling Regulatory Costs)

Under EO 12866, the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the EO and review by OMB. 58 *FR* 51735. Section 3(f) of EO 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 EO. OMB has determined that while this proposed rule is not an economically significant regulatory action under Sec. 3(f) of EO 12866, it raises novel legal or policy issues and is therefore otherwise significant. Accordingly, OMB has reviewed this proposed rule.

EO 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. EO 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.

EO 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017 and is discussed in the Summary section of this preamble. This proposed rule, if finalized as proposed, is expected not to be an EO 13771 regulatory action, because it imposes no more than *de minimis* costs.

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 activities authorized by that Act. This flexibility would permit States to continue using State merit-staffing models to perform these functions, or to use other innovative models such as contract-based staffing 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.

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. Seventeen jurisdictions⁸ receive annual Wagner-Peyser Act funding between \$12.3 and \$78.3 million (labeled *Tier 1 States* in this analysis), 17 jurisdictions receive funding between \$6.0 million and \$12.2 million (labeled *Tier 2 States* in this analysis), and 20

⁸ Fifty States receive Wagner-Peyser Act funding. Additionally, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands receive Wagner-Peyser Act funding.

jurisdictions receive funding of less than \$6.0 million (labeled *Tier 3 States* in this analysis).⁹ Eight States were surveyed by the Department and asked to provide the total number of Full-Time Equivalent (FTE) hours provided by State merit staff dedicated to providing Wagner-Peyser Act-funded services, as well as the occupational/position title for all employees included in the FTE calculations.¹⁰ The results ranged from 561 FTEs in California, the state that received the highest level of Wagner-Peyser Act funding in Program Year (PY) 2018, to 19 FTEs in Delaware, the state that received the lowest level of Wagner-Peyser Act funding in PY 2018.¹¹ 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.

To estimate the percent of current ES positions that States would choose to re-staff under this 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.¹² 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 ($= 561 \text{ FTEs} \times 50\%$) who

⁹ State allotments are primarily based on a State's relative share of the civilian labor force and relative share of total unemployment.

¹⁰ The eight States surveyed were California, Delaware, Idaho, Maryland, North Dakota, Ohio, Tennessee, and Utah. California, Ohio, and Tennessee are in Tier 1. Maryland and Idaho are in Tier 2. Utah, North Dakota, and Delaware are in Tier 3.

¹¹ The U.S. Virgin Islands and Guam received lower levels of Wagner-Peyser Act funding than Delaware. The PY 2018 allotments are available at <https://www.federalregister.gov/documents/2018/05/25/2018-11307/program-year-py-2018-workforce-innovation-and-opportunity-act-wioa-allotments-py-2018-wagner-peyser>.

¹² State Monitor Advocates will continue to be State staff, so they are not included in the calculations of this rule.

are neither merit-staffed nor State employees after the 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 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 Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) program.¹³ 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 sectors¹⁴ as a proxy, because private sector jobs constitute 85 percent of total employment.¹⁵ The median wage rates were obtained 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 wage rates were doubled to account for fringe benefits and overhead costs. 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 \$36.02 in the government sector and \$40.52 in all sectors. Accounting for fringe benefits and overhead costs, the fully loaded median hourly rate is \$72.04 in the government sector and \$81.04 in all sectors, a difference of \$9.00 per hour. Since the fully loaded wage rate is \$9.00 per

¹³ BLS OES data for government workers by State (May 2017): https://www.bls.gov/oes/special.requests/oes_research_2017_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.

¹⁴ BLS OES data for all sectors by State (May 2017): <https://www.bls.gov/oes/special.requests/oesm17st.zip>.

¹⁵ In May 2017, total employment was 142,549,250 (https://www.bls.gov/oes/current/oes_nat.htm), with 120,851,270 jobs (85%) in the private sector (<https://www.bls.gov/oes/current/000001.htm>) and 21,697,980 jobs (15%) in the government sector (<https://www.bls.gov/oes/current/999001.htm>).

hour higher in all sectors than in the government sector, Ohio would not realize a savings at the manager/supervisor level under this proposed rule. However, Ohio would realize a \$0.42 per hour savings at the project management level (= \$56.08 for government workers – \$55.66 for workers in all sectors) and a \$6.66 per hour savings at the administrative support level (= \$36.42 for government workers – \$29.76 for workers in all sectors).

Multiplying these fully loaded wage rate differences by the estimated number of FTEs in each occupation and by 2,080 hours (= 40 hours per week × 52 weeks per year) results in a potential savings for Ohio of \$3,058 per year at the project management level (= \$0.42 per hour savings × 3.5 FTEs × 2,080 hours per year) and \$470,995 per year at the administrative support level (= \$6.66 per hour savings × 34.0 FTEs × 2,080 hours per year). In total, the estimated savings for Ohio under this proposed rule is \$474,053 per year (= \$0 at the manager/supervisor level + \$3,058 at the project management level + \$470,995 at the administrative support level). 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 (\$4,066,254), Ohio (\$474,053), and Tennessee (\$100,880) equals \$4,641,187. The estimated savings for the Tier 2 States of Maryland (\$0) and Idaho (\$174,637) equals \$174,637. The estimated savings for the Tier 3 States of Utah (\$20,301), North Dakota (\$121,118), and Delaware (\$35,693) equals \$177,112.

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 Tennessee (\$4,641,187) was multiplied by 17/3, bringing the total estimated savings to \$26,300,061 per year for Tier 1. There are 17 States in Tier 2, so the estimated savings for the Tier 2 States of Maryland and Idaho (\$174,637) was multiplied by

17/2, bringing the total estimated savings to \$1,484,413 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 (\$177,112) was multiplied by 20/3, bringing the total estimated savings to \$1,180,747 per year for Tier 3.

Finally, the estimated wage savings for each tier were added together. Therefore, the total estimated savings of this proposed rule is \$28,965,220 per year (= \$26,300,061 for Tier 1 States + \$1,484,413 for Tier 2 States + \$1,180,747 for Tier 3 States), as shown in Table X.¹⁶

For purposes of Executive Orders 12866 and 13771, these estimated savings are categorized as transfers from employees to States.

¹⁶ This proposed rule may have other effects, which are described qualitatively here. The changes proposed 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 would reduce or increase costs, but the Department believes that the effect in either case would be small.

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 |
|---|--------------------------|---|--|---|----------------------------------|---|---|---|
| CA | | | | | | | | |
| 11-3011 | 117 | 58.5 | \$56.63 | \$113.26 | \$49.44 | \$98.88 | -\$14.38 | (\$1,749,758) |
| 13-1141 | 74 | 37.0 | \$33.50 | \$67.00 | \$33.67 | \$67.34 | \$0.34 | \$0 |
| 43-9061 | 370 | 185.0 | \$19.31 | \$38.62 | \$16.30 | \$32.60 | -\$6.02 | (\$2,316,496) |
| | 561 | 280.5 | | | | | | |
| OH | | | | | | | | |
| 11-3011 | 8 | 4.0 | \$36.02 | \$72.04 | \$40.52 | \$81.04 | \$9.00 | \$0 |
| 13-1141 | 7 | 3.5 | \$28.04 | \$56.08 | \$27.83 | \$55.66 | -\$0.42 | (\$3,058) |
| 43-9061 | 68 | 34.0 | \$18.21 | \$36.42 | \$14.88 | \$29.76 | -\$6.66 | (\$470,995) |
| | 84 | 42.0 | | | | | | |
| TN | | | | | | | | |
| 11-3011 | 22 | 11.0 | \$34.44 | \$68.88 | \$35.84 | \$71.68 | \$2.80 | \$0 |
| 13-1141 | 28 | 14.0 | \$24.84 | \$49.68 | \$27.99 | \$55.98 | \$6.30 | \$0 |
| 43-9061 | 97 | 48.5 | \$15.02 | \$30.04 | \$14.52 | \$29.04 | -\$1.00 | (\$100,880) |
| | 148 | 74.0 | | | | | | |
| Estimated cost savings for CA, OH, and TN | | | | | | | | (\$4,641,187) |
| Estimated cost savings for 17 Tier 1 States | | | | | | | | (\$26,300,061) |
| MD | | | | | | | | |
| 11-3011 | 12 | 6.0 | \$44.27 | \$88.54 | \$49.84 | \$99.68 | \$11.14 | \$0 |
| 13-1141 | 16 | 8.0 | \$27.67 | \$55.34 | \$34.39 | \$68.78 | \$13.44 | \$0 |
| 43-9061 | 53 | 26.5 | \$14.60 | \$29.20 | \$15.34 | \$30.68 | \$1.48 | \$0 |
| | 81 | 40.5 | | | | | | |
| ID | | | | | | | | |
| 11-3011 | 10 | 5.0 | \$30.25 | \$60.50 | \$32.24 | \$64.48 | \$3.98 | \$0 |
| 13-1141 | 13 | 6.5 | \$27.32 | \$54.64 | \$26.70 | \$53.40 | -\$1.24 | (\$16,765) |
| 43-9061 | 46 | 23.0 | \$15.67 | \$31.34 | \$14.02 | \$28.04 | -\$3.30 | (\$157,872) |
| | 70 | 35.0 | | | | | | |
| Estimated cost savings for MD and ID | | | | | | | | (\$174,637) |
| Estimated cost savings for 17 Tier 2 States | | | | | | | | (\$1,484,413) |
| UT | | | | | | | | |
| 11-3011 | 11 | 5.5 | \$33.05 | \$66.10 | \$36.42 | \$72.84 | \$6.74 | \$0 |
| 13-1141 | 14 | 7.0 | \$24.14 | \$48.28 | \$23.82 | \$47.64 | -\$0.64 | (\$9,318) |
| 43-9061 | 48 | 24.0 | \$14.18 | \$28.36 | \$14.07 | \$28.14 | -\$0.22 | (\$10,982) |
| | 73 | 36.5 | | | | | | |
| ND | | | | | | | | |
| 11-3011 | 6 | 3.0 | \$35.38 | \$70.76 | \$38.21 | \$76.42 | \$5.66 | \$0 |
| 13-1141 | 15 | 7.5 | \$29.92 | \$59.84 | \$26.50 | \$53.00 | -\$6.84 | (\$106,704) |
| 43-9061 | 21 | 10.5 | \$16.06 | \$32.12 | \$15.73 | \$31.46 | -\$0.66 | (\$14,414) |
| | 41 | 20.5 | | | | | | |
| DE | | | | | | | | |
| 11-3011 | 3 | 1.5 | \$40.52 | \$81.04 | \$51.56 | \$103.12 | \$22.08 | \$0 |
| 13-1141 | 4 | 2.0 | \$28.80 | \$57.60 | \$30.71 | \$61.42 | \$3.82 | \$0 |
| 43-9061 | 13 | 6.5 | \$14.95 | \$29.90 | \$13.63 | \$27.26 | -\$2.64 | (\$35,693) |
| | 19 | 9.5 | | | | | | |
| Estimated cost savings for UT, ND, and DE | | | | | | | | (\$177,112) |
| Estimated cost savings for 20 Tier 3 States | | | | | | | | (\$1,180,747) |
| Total estimated cost savings | | | | | | | | (\$28,965,220) |

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 States (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 \$47.25.¹⁷ To account for fringe benefits and overhead costs, the median hourly wage rate has been doubled, so the fully loaded hourly wage is \$94.50 ($= \47.25×2). Therefore, the one-time rule familiarization cost for all 54 jurisdictions (the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands) is estimated to be \$5,103 ($= \$94.50 \times 1 \text{ hour} \times 54$ jurisdictions).

Summary of Estimated Impacts and Discussion of Uncertainty

For all States, the expected first-year budget savings will be approximately \$28,960,117 ($= \$28,965,220$ wage savings $- \$5,103$ regulatory familiarization costs).

This analysis assumes a 50 percent substitution rate, meaning that States would 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 proposed rule, States

¹⁷ BLS OES National Industry-Specific Occupational Employment and Wage Estimates, Sector 99 (May 2017): https://www.bls.gov/oes/current/naics2_99.htm.

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 rule is to grant States maximum flexibility in administering the Wagner-Peyser Act Employment Service 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. The Department seeks comments on the savings expected from this proposed rule.¹⁸

Non-Quantifiable Benefits

In addition to cost savings, this proposed rule will likely provide benefits to States and to society. The added staffing flexibility this 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 helps employers find workers, will provide economic benefits through greater employment. These resources can also provide the States with added capacity to provide more intensive services, which studies have shown improve employment outcomes. The Department seeks comments on these anticipated benefits, including studies and data.

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 proposed rule on small entities. The RFA defines small entities to include small businesses, small organizations, including not-for-profit organizations,

¹⁸ This NPRM is expected to reduce deadweight loss (DWL). DWL occurs when a market operates at less than optimal equilibrium output, which happens anytime 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 NPRM 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.

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 rule does not directly regulate any small entities, so any regulatory effect on small entities would be indirect. Accordingly, the Department has determined this 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 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 it is 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 has submitted two ICRs to OMB in concert with the publishing of this NPRM. This provides the public the opportunity to submit comments on the information collections, either directly to the Department or to OMB. The 60-day period for the public to submit comments begins with the submission of the ICRs to OMB. Comments may be submitted electronically through www.Regulations.gov, or in hardcopy via the United States Postal Service.

The information collections in this NPRM are summarized as follows.

Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act, Wagner-Peyser WIOA Title I Programs and Vocational Rehabilitation Adult Education

Agency: DOL-ETA.

Title of Collection: Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act, Wagner-Peyser WIOA Title I Programs and Vocational Rehabilitation Adult Education.

Type of Review: Revision.

OMB Control Number: 1205-0522.

Description: Under the provisions of *Workforce Innovation and Opportunity Act* (WIOA), the Governor of each State or Territory must submit a Unified or Combined State Plan to the U.S. Department of Labor, which is approved jointly with the Department of Education,

that fosters strategic alignment of the six core programs, which include the adult, dislocated worker, youth, Wagner-Peyser Act Employment Service, AEFLA, 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)(1), 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 proposing to revise Form ETA-5148 to conform to this NPRM's proposed changes to § 653.107(a)(3), .108(g)(1) & (s)(11), and .111.

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 on March 7, 2019 (84 FR 8343).

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: 52.

Estimated Total Annual Responses: 7,416

Estimated Total Annual Burden Hours: 9,706

Estimated Total Annual Other Burden Costs: \$297,922.

Regulations sections: § 653.107, § 653.108(g)(6), § 653.108(s), § 653.108(i), § 653.108(m), § 653.109, § 658.601.

Interested parties may obtain a copy free of charge of one or more of the information collection requests submitted to the OMB on the [reginfo.gov](http://www.reginfo.gov/public/do/PRAMain) Web site 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 information collection by contacting the person named in the ADDRESSES section of this preamble.

As noted in the ADDRESSES section of this proposed rule, interested parties may send comments about the information collections to the Department throughout the 60-day comment period and/or to the OMB within 30 days of publication of this notice in the Federal Register. In order to help ensure appropriate consideration, comments should mention the applicable OMB Control Number(s).

The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

D. Executive Order 13132 (Federalism)

EO 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 NPRM in light of these requirements and has concluded that it is properly premised on the statutory authority given to the Secretary of Labor to set standards of efficiency for programs under the Wagner-Peyser Act, and it meets the requirements of EO 13132 by enhancing, rather than limiting, States' discretion in the administration of these programs.

Accordingly, the Department has reviewed this NPRM 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 EO 13132. Therefore, the Department has concluded that this NPRM 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 NPRM contains no unfunded Federal mandates, including either a “Federal intergovernmental mandate” or a “Federal private sector mandate.” Rather, this NPRM increases State flexibility in staffing the Wagner-Peyser program.

F. Executive Order 13175 (Indian Tribal Governments)

The Department has reviewed the NPRM under the terms of EO 13175 and DOL’s Tribal Consultation Policy, and have concluded that the changes to regulatory text which are the focus of the NPRM 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.

For the reasons set forth in the preamble, ETA proposes to amend 20 CFR parts 651, 652, 653 and 658 to read as follows:

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

<AMDPAR>1. The authority citation for part 651 continues to read as follows:

<AUTH><HED>Authority: <P>29 U.S.C. 49a; 38 U.S.C. part III, 4101, 4211; Secs. 503, 3, 189, Pub. L. 113-128, 128 Stat. 1425 (Jul. 22, 2014).

<AMDPAR>2. Amend § 651.10 by:

<AMDPAR>a. Adding the definitions for “*Complaint System Representative*,” “*Employment Service (ES) Office Manager*,” “*Outreach staff*,” “*State Workforce Agency (SWA) official*,” and “*Wagner-Peyser Act Employment Service staff (ES staff)*,” in alphabetical order.

<AMDPAR>b. Revising the definitions of “*Employment Service (ES) office*,” “*Field checks*,” “*Field visits*,” “*Outreach contact*,” and “*Respondent*,” and

<AMDPAR>c. Removing the definitions of “*affirmative action*” and “*Local Office Manager.*”

The additions and revisions read as follows:

<SECTION><SECTNO>§ **651.10** <SUBJECT>**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 co-located 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.

* * * * *

Field checks means random, unannounced appearances by the SWA, through its ES offices, 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.

* * * * *

Wagner-Peyser Act Employment Service staff (ES staff) means individuals, including but not limited to State employees, contractors, 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.

* * * * *

**<PART><HED>PART 652—ESTABLISHMENT AND FUNCTIONING OF STATE
EMPLOYMENT SERVICE**

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

<AUTH><HED>Authority: <P>29 U.S.C. 491-2; Secs. 189 and 503, Public Law 113-128, 128 Stat. 1425 (Jul. 22, 2014).

<AMDPAR>4. Amend § 652.204 by revising the first sentence of the paragraph to read as follows:

<SECTION><SECTNO>§ 652.204 <SUBJECT>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. * * *

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

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

* * * * *

(b) * * *

(3) 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

* * * * *

<AMDPAR>6. Amend § 652.210 by revising the introductory text of paragraphs (b) to read as follows:

<SECTION><SECTNO>§ **652.210** <SUBJECT>**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:

* * * * *

<AMDPAR>7. Revise § 652.215 and the section heading to read as follows:

<SECTION><SECTNO>§ **652.215** <SUBJECT>**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.

<AMDPAR>8. Revise § 652.216 and the section heading to read as follows:

<SECTION><SECTNO>§ **652.216** <SUBJECT>**May the one-stop operator provide guidance to ES 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 Memorandum of Understanding 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 Memorandum of Understanding, and applicable collective bargaining agreements.

<PART><HED>**PART 653—SERVICES OF THE WAGNER-PEYSER ACT
EMPLOYMENT SERVICE SYSTEM**

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

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

<AMDPAR>10. Amend § 653.102 by removing the word “staff” from the third sentence, to read as follows:

<SECTION><SECTNO>§ **653.102** <SUBJECT>**Job information.**

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

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

<SECTION><SECTNO>§ **653.103** <SUBJECT>**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.

<AMDPAR>12. Amend § 653.107 by revising paragraphs (a)(1), intro text of paragraph (2) and (3), paragraph (4), intro text of paragraph (b), (2), (4)(iv), (5) through (11), and (c) to read as follows:

<SECTION><SECTNO>§ **653.107** <SUBJECT>**Outreach and Agricultural Outreach Plan**

(a) * * *

(1) 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 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 meet the criteria in § 653.108(b)(1) through (3).

* * * * *

(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.

* * * * *

(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 the Employment and Training Administration (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 ES staff.

(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 on-site review teams.

* * * * *

<AMDPAR>13. Amend § 653.108 by:

<AMDPAR>a. Revising paragraph (b), (c), (d), (g)(2)(i)(D), (g)(2)(iv), (g)(2)(vii), (g)(3), (o), (s)(2), (3), (9), and (11);

<AMDPAR>b. Revising the first sentence of paragraphs (g)(1), (i) and (o);

<AMDPAR>c. Revising the second sentence of paragraph (g)(2)(v).

The revisions read as follows:

<SECTION><SECTNO>§ **653.108** <SUBJECT>**State Workforce Agency and State Monitor Advocate responsibilities.**

* * * * *

(b) The State Administrator must appoint a State Monitor Advocate 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:

* * * * *

(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 ES 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 appropriate superior officials and the SMA. * * *

* * * * *

(vii) The SMA may recommend that the review described in paragraph (g)(2) of this section be delegated to an ES staff person, 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 ES staff, 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 ES offices are reviewed at least yearly. This review will include accompanying at least one outreach staff from

each significant MSFW ES office 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.

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

<SECTION><SECTNO>§ **653.109** <SUBJECT>**Data collection and performance accountability measures.**

* * * * *

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

* * * * *

<AMDPAR>15. Amend § 653.111 by:

<AMDPAR>a. Revising paragraph (a);

<AMDPAR>b. Removing paragraphs (a)(1) through (2), paragraphs (b) and (b)(1) through (2);

<AMDPAR>c. Revising paragraph (b)(3) and redesignate it as paragraph (b); and

<AMDPAR>d. Adding paragraph (c).

The revisions read as follows:

<SECTION><SECTNO>§ **653.111** <SUBJECT>**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 § 653.108(b)(1) through (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.

<AMDPAR>16. Amend § 653.501 by revising the introductory text in paragraph (a) and paragraphs (c)(3)(vii), (d)(6), and (9) to read as follows:

<SECTION><SECTNO>§ **653.501** <SUBJECT>**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.

* * * * *

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

<SECTION><SECTNO>§ **653.502** <SUBJECT>**Conditional access to the Agricultural Recruitment System.**

* * * * *

(e) * * *

* * * * *

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

* * * * *

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

<SECTION><SECTNO>§ **653.503** <SUBJECT>**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, 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><HED>PART 658—ADMINISTRATIVE PROVISIONS GOVERNING THE
WAGNER-PEYSER ACT EMPLOYMENT SERVICE**

<AMDPAR>19. The authority citation for part 658 continues to read as follows:

<AUTH><HED>Authority:<P> Secs. 189, 503, Pub. L. 113-128, 128 Stat. 1425 (Jul. 22, 2014);
29 U.S.C. chapter 4B.

<AMDPAR>20. Amend § 658.410 by revising paragraphs (b), (c), (c)(6), (f), (g), (h), (k), and
(m) to read as follows:

<SECTION><SECTNO>§ **658.410** <SUBJECT>**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).

* * * * *

(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.

* * * * *

§ 658.410 [Amended]

<AMDPAR>21. Amend § 658.410 paragraph (i) by removing the words “Complaint System representative” and add in its place the words “Complaint System Representative”.

<AMDPAR>22. Amend § 658.411 by:

<AMDPAR>a. Revising paragraph (a)(1);

<AMDPAR>b. Removing in paragraphs (a)(2)(iii), (3), (4) (in the second and third sentences), (b)(1)(ii), (1)(ii)(B) (in the second and third sentences), (1)(ii)(C), (1)(D), (c)(1), (d)(2)(i), (2)(ii), and (3)(i) the words “Complaint System representative” and adding in its place the words “Complaint System Representative”; and

<AMDPAR>c. Revising paragraphs (d)(3)(ii), (5)(ii), and (5)(iii)(G).

The revisions are to read as follows:

<SECTION><SECTNO>§ **658.411** <SUBJECT>**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.

* * * * *

<AMDPAR>23. Amend § 658.419 by revising paragraph (a) to read as follows:

<SECTION><SECTNO>§ **658.419** <SUBJECT>**Apparent violations.**

(a) If a SWA, 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.

* * * * *

<AMDPAR>24. Amend § 658.501 by revising paragraphs (b) and (c) to read as follows:

<SECTION><SECTNO>§ **658.501** <SUBJECT>**Basis for discontinuation of services.**

* * * * *

(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 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.

<AMDPAR>25. Amend § 658.601 by revising paragraphs (a)(1)(ii) and (2)(ii) to read as follows:

<SECTION><SECTNO>§ **658.601** <SUBJECT>**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.

* * * * *

<AMDPAR>26. Amend § 658.602 by revising paragraphs (l), (o)(1), and (s)(2) to read as follows:

<SECTION><SECTNO>§ **658.602** <SUBJECT>**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.

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<AMDPAR>27. Amend § 658.603 by:

<AMDPAR>a. Revising introductory language in paragraph (f);

<AMDPAR>b. Revising paragraph (h);

<AMDPAR>c. Republishing the introductory text of paragraph (n); and

<AMDPAR>d. Revising paragraphs (n)(3), intro text paragraph (r), (r)(1), and (t).

The revisions read as follows:

<SECTION><SECTNO>§ **658.603** <SUBJECT>**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 which 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.

* * * * *

(r) As appropriate, each year during the peak harvest season, the RMA must visit each State in the region not scheduled for an on-site 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.

* * * * *

<AMDPAR>28. In § 658.704, the introductory text of paragraph (a) is republished and paragraph (a)(4) is revised to read as follows:

<SECTION><SECTNO>§ **658.704** <SUBJECT>**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;

* * * * *

Molly E. Conway,
Acting Assistant Secretary for Employment and Training

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