WORK SESSION DOCUMENT

JOINT INTERIM STANDING COMMITTEE ON COMMERCE AND LABOR

Nevada Revised Statutes [NRS] 218E.320

Tuesday, August 23, 2022

INTRODUCTION

The chair and Legislative Counsel Bureau (LCB) staff of the Joint Interim Standing Committee on Commerce and Labor (CL) have prepared this "Work Session Document" (WSD) to assist the Committee in determining which legislative measures it will request for the 2023 Session of the Nevada Legislature, as well as other actions the Committee may endorse. The WSD contains a summary of recommendations presented during public hearings, through communication with individual Committee members, or through correspondence submitted to the Committee members or staff.

The members of the Committee do not necessarily support or oppose the recommendations in this WSD. Committee staff has compiled and organized the proposals so that Committee members can review them and decide whether they want to accept, reject, modify, or take no action on the recommendations. The WSD groups the proposals by topic and they are not preferentially ordered.

Pursuant to NRS 218D.160, the Committee is limited to ten legislative measures, which includes both bill draft requests (BDRs) and requests for the drafting of resolutions. The Committee may vote to: (1) send as many statements or letters of recommendation or support as it chooses; and (2) include statements in its final report.

Committee members are advised that LCB staff, at the direction of the chair, may coordinate with interested parties to obtain additional information for drafting purposes or for information to be included in the Committee's final report.

RECOMMENDATION

A. TEMPORARY OCCUPTIONAL AND PROFESSIONAL LICENSES FOR MEMBERS OF THE MILITARY AND THEIR SPOUSES

1. Request legislation (BDR) to:

a. Require certain occupational and professional licensing boards, under certain circumstances, to issue temporary licenses or certificates to members of the military and spouses who are: (1) licensed in another state or territory of

the United States; (2) in good standing in the state or territory of the United States of licensure or certification; (3) able to provide adequate proof that the individual or the individual's spouse is on military duty in this state; and (4) subject to a criminal background check. The temporary license or certificate is valid for one year;

b. Require an occupational and professional licensing board to issue a temporary license within 30 days of receiving the required paperwork if the results of a criminal background check do not show grounds for denial; and

c. Require boards and commissions under Title 54 ("Professions, Occupations and Businesses") of NRS to provide military-related policies on their Internet websites and applications.

(*Recommendations were developed by Assemblywoman Sandra Jauregui, Chair, CL, and Committee staff in response to testimony and exhibits provided by Kelli May Douglas, Pacific Southwest Regional Liaison, Defense-State Liaison Office, U.S. Department of Defense, at the February 1, 2022, CL meeting. See* ***Attachment 1*** *for a list of proposed occupational and professional licensing boards.*)

B. ELIGIBLE IN-STATE EDUCATIONAL NURSING INSTITUTIONS AND THE GOVERNOR GUINN MILLENNIUM SCHOLARSHIP

2. **Request legislation (BDR) to** expand the list of eligible in-state educational institutions that offer nursing education under the Governor Guinn Millennium Scholarship.

(*Recommendation was submitted by Tess Opferman, Service Employees International Union Local 1107. See* ***Attachment 2.***)

C. CREDENTIAL OF VALUE DEFINITION

3. **Include a statement in the Committee's final report** encouraging the Department of Employment, Training and Rehabilitation (DETR) and the Governor's Office of Workforce Innovation (GOWINN) to develop a shared definition of a "credential of value" and create resources to help Nevadans find career training or learn a new skill. The Department and GOWINN should collaborate with key stakeholders and engage the community to ensure work on the credentials supports inclusion, diversity, equity, and access for all Nevadans.

(*Recommendation was proposed by Elisa P. Cafferata, Director, DETR. See Agenda Item VI at the April 5, 2022, CL meeting.*)

D. STATE MERIT STAFF FOR THE WAGNER-PEYSER ACT OF 1933 (P.L. 73-30) EMPLOYMENT SERVICE (ES) SERVICES

4. **Send a letter** urging Nevada's Congressional Delegation to notify the U.S. Department of Labor (DOL) that the proposed rulemaking (Docket ETA-2022-0003) should allow Nevada flexibility to set its own staffing requirements concerning the use of state merit staff for delivery of ES services when Nevada must respond in a timely manner to demand surges.

(*Recommendation was proposed by Senator Roberta Lange and Assemblywoman Heidi Kasama in response to concerns raised in testimony about the backlog of work at DETR during the Coronavirus Disease of 2019 pandemic. See testimony provided under Agenda Item V at the April 5, 2022, CL meeting. See* ***Attachment 3*** *for a copy of the U.S. DOL proposed rulemaking.)*

E. RELIANCE ON ALTERNATIVE FINANCIAL PRODUCTS AND THE USE OF CERTIFIED FINANCIAL PRODUCTS

5. **Send a letter** encouraging the Nevada Commission on Minority Affairs, Department of Business and Industry, to facilitate the implementation of a Bank On Nevada Initiative to increase the use of certified financial products and reduce reliance on alternative financial products. The Commission should assign a staff member to promote the Bank On Initiative with key stakeholders, such as financial institutions, community organizations, and local and county agencies, and encourage the adoption of programs supported by the Cities for Financial Empowerment Fund, which may reduce the number of unbanked and underbanked communities in Nevada.

(*Recommendation was developed by Chair Jauregui and Committee staff in response to testimony, exhibits, and proposals provided by Nic Steele, Executive Director, Access CDFI, under Agenda Item X at the April 5, 2022, CL meeting.)*

ATTACHMENT 1

PROPOSED OCCUPATIONAL AND PROFESSIONAL LICENSING BOARDS

1. Audiologists, Speech Language Pathologists and Hearing Aid Specialists
2. Physical Therapists, Physical Therapist Assistants and Physical Therapist Technicians
3. Occupational Therapists an Occupational Therapy Assistants
4. Massage Therapy
5. Psychologists
6. Marriage and Family Therapists and Clinical Professional Counselors
7. Social Workers
8. Alcohol, Drug and Gambling Counselors
9. Radiation Therapy
10. Veterinarians
11. Cosmetologists

ATTACHMENT 2

Governor Guinn Millennium Scholarship

Institutions that accept:

- University of Nevada, Las Vegas
- University of Nevada, Reno
- College of Southern Nevada
- Great Basin College
- Nevada State College
- Roseman University of Health Sciences
- Sierra Nevada College
- Truckee Meadows Community College
- Western Nevada College

Following is a full list of nursing programs in Nevada. Programs not covered by the Governor Guinn Millennium Scholarship include:

- Unitek College – Reno, NV
- Chamberlain University – Las Vegas, NV
    - Has a nurse educator program
- Arizona College – Las Vegas, NV
    - Private college – graduates significant number of nurses
- Carrington College – Reno, NV
- Las Vegas College – Henderson, NV (provisional or conditional approval)
- Carrington College – Las Vegas, NV (provisional or conditional approval)
- Grand Canyon University – Las Vegas, NV (provisional or conditional approval)
- Mojave Community College – Kingman, AZ (clinical portion in Nevada)
- Nightingale College – Salt Lake City, UT (clinical portion in Nevada)

Nevada State Board of NURSING

THE BOARD HAS GIVEN **FULL** APPROVAL TO THE FOLLOWING SCHOOLS TO CONDUCT ALL PORTIONS OF THEIR PRE-LICENSURE NURSING PROGRAMS IN NEVADA

University of Nevada, Las Vegas (UNLV)
4505 S. Maryland Pkwy, Las Vegas, NV 89154

- Bachelor of Science in Nursing (BSN Degree)

University of Nevada, Reno (UNR) Orvis School of Nursing
Reno, NV 89557

- Bachelor of Science in Nursing (BSN Degree)

Las Vegas College
170 N. Stephanie St., Henderson, NV 89014

- Associate Degree in Nursing (ADN Degree)

Chamberlain University
9901 Covington Cross Dr, Las Vegas, NV 89144

- Bachelor of Science in Nursing (BSN Degree)

Arizona College
8363 W Sunset Road Las Vegas, NV 89113

- Bachelor of Science in Nursing (BSN Degree)

Carrington College, Reno
5580 Kietzke Ln., Reno, NV 89511

- Associate Degree in Nursing (ADN Degree)

Great Basin College (GBC)
1500 College Pkwy., Elko, NV 89801

- Associate of Applied Science in Nursing (AAS Degree)

Nevada State College (NSC)
1300 Nevada State Drive, Henderson, NV 89002

- Bachelor of Science in Nursing (BSN Degree)

Roseman University of Health Sciences
11 Sunset Way, Henderson, NV 89014

- Bachelor of Science in Nursing (BSN Degree)

Truckee Meadows Community College (TMCC)
Pennington Health Science Center at Redfield18600 Wedge Pkwy, Reno, NV 89511

- Associate of Science in Nursing (AS Degree)

Unitek College
5250 S Virginia St Reno, Nv 89502

- Certificate in Practical Nursing

Western Nevada College (WNC)
2201 W. College Pkwy., Carson City, NV 89701

- Associate of Applied Science in Nursing (AAS Degree)

THE BOARD HAS GIVEN APPROVAL TO THE FOLLOWING SCHOOLS TO CONDUCT ONLY THE CLINICAL PORTION OF THEIR PROGRAM IN NEVADA

Mojave Community College
1971 Jagerson Ave., Kingman AZ 85401

Nightingale College
175 South Main St., Salt Lake City, UT 84111

- Bachelor of Science in Nursing (BSN Degree)

THE BOARD HAS GIVEN ***PROVISIONAL or CONDITIONAL*** APPROVAL TO THE FOLLOWING SCHOOLS TO CONDUCT ALL PORTIONS OF THEIR NURSING PROGRAMS IN NEVADA

**Schools that have provisional approval meet the initial requirements of Nevada laws and regulations to offer a program of nursing education in Nevada. To obtain full approval, they must gain national accreditation (which they cannot do until after their first class is graduated), and they must achieve a first-time pass rate of 80 percent or higher on the NCLEX (an annual average).*

If you graduate from a school that has provisional rather than full approval, ***you will be eligible for Nevada licensure.*** *If you are contemplating getting licensed in other states, you will have to check with those states regarding their licensure requirements.*

*** Schools that have conditional approval meet requirements for full approval but have not maintained a first-time pass rate of 80 percent or higher on the NCLEX for two consecutive years.*

For more information on Nevada's laws and regulations as they pertain to nursing schools, please access the Nurse Practice Act, then use the "find" function in your browser to locate the keywords "schools" and "education" within the NRS and NAC.

***Las Vegas College**
170 N. Stephanie St Henderson Nv 89015

- Certificate in Practical Nursing

***Carrington College, Las Vegas**
5740 Eastern Ave. Ste 140, Las Vegas, NV 89119

- Associate Degree in Nursing (AND Degree)

***Unitek College**
5250 S Virginia St Reno, Nv 89502

- Bachelor of Science in Nursing (BSN Degree)

***Grand Canyon University**
6655 Cimarron Rd., Ste 100, Las Vegas, NV 89113

- Accelerated Baccalaureate of Science in Nursing (ABSN)

****College of Southern Nevada (CSN)**
Health Science Center, W1A
6375 W. Charleston Blvd., Las Vegas, NV89146

- Associate of Applied Science inNursing (AAS Degree)
- Certificate in Practical Nursing
- LPN to RN Bridge

ATTACHMENT 3

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 651, 652, 653, and 658

[Docket No. ETA–2022–0003]

RIN 1205–AC02

Wagner-Peyser Act Staffing

AGENCY: Employment and Training Administration, Labor.

ACTION: Proposed rule; request for comment.

SUMMARY: The U.S. Department of Labor (Department or DOL) is issuing a notice of proposed rulemaking (NPRM) that, if finalized, would require States to use State merit staff to provide Wagner-Peyser Act Employment Service (ES) services. If finalized, this proposal would extend the merit-staffing requirement to those States that previously had been operating different staffing models. The proposed changes would create a uniform standard of ES services provision for all States and align the use of State merit staff for ES services with the requirement that States administer the Unemployment Insurance (UI) programs with State merit staff. The Department is additionally proposing revisions to the ES regulations to strengthen the provision of services to migrant and seasonal farmworkers (MSFWs) and to enhance the protections afforded by the Monitor Advocate System and the Employment Service and Employment-Related Law Complaint System (Complaint System).

DATES: To be ensured consideration, comments must be received on or before June 21, 2022.

ADDRESSES: You may submit written comments electronically via the Federal eRulemaking portal (*https://www.regulations.gov*). Follow the instructions on the website for submitting comments (under "FAQ" > "Commenting"). Label all submissions with docket number ETA–2022–0003 and RIN 1205–AC02.

Please be advised that the Department will post all comments received that relate to this proposed rule on *https://www.regulations.gov* without making any change to the comments or redacting any information. The website is the Federal eRulemaking 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, personal addresses, telephone numbers, and email addresses, included in their comments. It is the responsibility of the commenter to safeguard personal information.

Comments under the Paperwork Reduction Act of 1995 (PRA): In addition to filing comments on any aspect of this proposed rule with the Department, interested parties may submit comments that concern the information collection (IC) aspects of this proposed rule to the Office of Information and Regulatory Affairs at *https://www.reginfo.gov/public/do/PRAMain*. Find relevant information collections by selecting "Currently under Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Heidi Casta, Acting Administrator, Office of Policy Development and Research, Employment and Training Administration, 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).

SUPPLEMENTARY INFORMATION:

Preamble Table of Contents

I. Acronyms and Abbreviations

2020 Final Rule Wagner-Peyser Act Staffing Flexibility; Final Rule, 85 FR 592 (Jan. 6, 2020)
AOP Agricultural Outreach Plan
ARS Agricultural Recruitment System
BFOQ bona fide occupational qualification
BLS U.S. Bureau of Labor Statistics
CFR Code of Federal Regulations
CNPC Chicago National Processing Center
COVID–19 coronavirus disease 2019
Complaint System Employment Service and Employment-Related Law Complaint System
CRC DOL Civil Rights Center
Department *or* DOL U.S. Department of Labor
EEOC Equal Employment Opportunity Commission
E.O. Executive Order
EO Equal Opportunity
ES Wagner-Peyser Act Employment Service
ETA Employment and Training Administration
FR Federal Register
FTE(s) full-time equivalent(s)
FUTA Federal Unemployment Tax Act
IC(s) information collection
ICR(s) information collection request
IPA Intergovernmental Personnel Act of 1970
LEP limited English proficient
MOU(s) memorandum/a of understanding
MSFW(s) migrant and seasonal farmworker(s)
NAICS North American Industry Classification System
NFJP National Farmworker Jobs Program
NMA National Monitor Advocate
NPRM *or* proposed rule notifice of proposed rulemaking
O*NET Occupational Information Network
OEWS Occupational Employment and Wage Statistics
OFLC Office of Foreign Labor Certification
OIRA Office of Information and Regulatory Affairs
OMB Office of Management and Budget
OPM Office of Personnel Management
OSHA Occupational Safety and Health Administration
PIRL Participant Individual Record Layout
PRA Paperwork Reduction Act of 1995
Pub. L. Public Law
PY Program Year
RA(s) Regional Administrator(s)
RFA Regulatory Flexibility Act
RIN Regulation Identifier Number
RMA(s) Regional Monitor Advocate
Secretary Secretary of Labor
SMA(s) State Monitor Advocate(s)
SOC Standard Occupational Classification
SSA Social Security Act
Stat. United States Statutes at Large
SWA(s) State Workforce Agency/ies
TEGL Training and Employment Guidance Letter
UI Unemployment Insurance
UMRA Unfunded Mandates Reform Act of 1995
U.S.C. United States Code
WHD Wage and Hour Division
WIA Workforce Investment Act
WIOA Workforce Innovation and Opportunity Act

their work. Requiring that ES staff be State merit staff would allow the States to use ES staff to carry out both ES services and necessary UI functions.

In response to the COVID–19 pandemic, emergency legislation related to COVID–19 provided States the ability on a limited and temporary emergency basis to recruit staff on a non-merit basis to quickly process UI applications and claims.[7] However, relying on such time-limited legislative action is not a viable, long-term solution, particularly as providing adequate training for UI adjudicators takes several months to a year. Furthermore, emergency legislation related to COVID–19 does not provide flexibility in future emergencies. Requiring ES labor exchange services to be provided by State merit staff will help ensure that States have the ability to shift staff resources during future exigencies affecting State-level functions and UI claims where time-limited legislative solutions are not available and there is a pressing need to have cross-trained staff who are legally permitted to assist with UI services.

In addition, in the Intergovernmental Personnel Act (IPA), 42 U.S.C. 4701, *et seq.*, Congress found that the quality of public service could be improved if government personnel systems are administered consistent with certain merit-based principles. 42 U.S.C. 4701. Requiring States to employ the professionals who deliver ES services in accordance with these principals would help ensure that ES services are delivered by qualified, non-partisan personnel who are directly accountable to the State. Among other things, such professionals would be required to meet objective professional qualifications, be trained to assure high-quality performance, and maintain certain standards of performance. *Id.* They would also be prohibited from using their official authority for purposes of political interference, and States would be required to assure that they are treated fairly and protected against partisan political coercion. *Id.* By contrast, contract staff and subrecipient staff are employed by and accountable to non-State entities, and their individual adherence to State-issued policies and procedures is not directly observable. And, as noted previously, it is important that the States use State merit staff to deliver ES services because of the critical alignment between the ES and UI programs.

In proposing this State merit-staffing requirement, the Department relies on its authority under secs. 3(a) and 5(b)(2) of the Wagner-Peyser Act, as well as authority under sec. 208 of the IPA, 42 U.S.C. 4728, as amended. Each of these provisions, standing alone, provides the Department with the discretion to require States to use State merit staff to provide ES services.

Specifically, sec. 3(a) of the Wagner-Peyser Act requires the Secretary to assist in coordinating the ES offices by "developing and prescribing minimum standards of efficiency." As the court in *Michigan* v. *Herman*, 81 F. Supp. 2d 840 (W.D. Mich. 1998), concluded, "the language in [sec. 3(a)] authorizing the Secretary to develop and prescribe 'minimum standards of efficiency' is broad enough to permit the Secretary . . . to require merit staffing." *Id.* at 848.

In addition, sec. 5(b)(2) of the Wagner-Peyser Act provides that the Secretary shall from time to time certify to the Secretary of the Treasury for payment to each State that, among other things, "is found to have coordinated the public employment services with the provision of unemployment insurance claimant services." As explained previously, the proposed merit-staffing requirement would align the staffing of ES services with the staffing that States are required to use in the administration of UI programs. This would allow cross-trained ES staff to assist States in processing and adjudicating UI claims, and assisting claimants with work search and reemployment services, particularly in times of high need, such as during the pandemic. It would, therefore, be reasonable for the Department to base the finding required by sec. 5(b)(2) of the Wagner-Peyser Act, in part, on a State's agreement to use State merit staff to administer and provide ES services.

Additionally, sec. 208 of the IPA authorizes Federal agencies to require, as a condition of participation in Federal assistance programs, systems of personnel administration consistent with personnel standards prescribed by the Office of Personnel Management (OPM).[8] In accordance with 5 CFR 900.605, the Department has submitted this proposed rule to OPM for review and has received prior approval.

The Department acknowledges that this proposal constitutes a change in its existing position and would require certain States to adjust how they deliver ES services. The Department notes that Federal agencies are permitted to change their existing policies if they acknowledge the change and provide a reasoned explanation for the change. *See, e.g., Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 221–22 (2016). As explained previously, the Department is proposing this change to ensure that more workers will be available in the States if needed to back up the UI system. In the section-by-section discussion that follows, the Department further explains why it is proposing to require that States use State merit-staff employees to provide ES services, acknowledges the reliance interests of States that would need time to come into compliance with this requirement, and addresses those interests by proposing an 18-month transition period.

B. Strengthening the Provision of Services to Migrant and Seasonal Farmworkers

In addition to a merit-staffing requirement, the Department is proposing targeted revisions to the regulations at parts 651, 653, and 658. The proposed revisions are intended to ensure that SWAs provide adequate outreach services to MSFWs and that SMAs, Regional Monitor Advocates (RMAs) and the National Monitor Advocate (NMA) have the authority, tools, and resources that they need to monitor SWA compliance with the ES regulations. As described in detail in the section-by-section discussion that follows, the proposed revisions would strengthen the Monitor Advocate System established in the wake of *NAACP, Western Region et al.* v. *Brennan*, 360 F.Supp. 1006 (D.D.C. 1973), and ensure that SWAs offer and provide ES services to MSFWs in a manner that is qualitatively equivalent and quantitatively proportionate to the ES services that they offer and provide to other job seekers. Additional proposed revisions include technical edits to improve clarity, such as adding commas or cross-references.

[7] *See* sec. 4102(b) of the Families First Coronavirus Response Act (Pub. L. 116–127), including Division D Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA); sec. 2106 of the Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act) (Pub. L. 116–136); sec. 205 of the Continued Assistance Act (Pub. L. 116–260); and sec. 9015 of the American Rescue Plan Act of 2021 (Pub. L. 117–2). This flexibility only applied for responding to workload and increased demand resulting from the spread of COVID–19 and was limited to engaging temporary staff, rehiring retirees or former employees on a non-competitive basis, and other temporary actions to quickly process applications and claims.

[8] 42 U.S.C. 4728(b); *see also* 5 CFR 900.605 (authorizing Federal agencies to adopt regulations that require the establishment of a merit personnel system as a condition for receiving Federal assistance or otherwise participating in an intergovernmental program with the prior approval of OPM).

The Department proposes to amend the definition of *Employment and Training Administration (ETA)* to remove the words "of Labor" after "Department" because *Department* is previously defined in this section as "the United States Department of Labor."

The Department proposes to amend the definition of *Employment Service (ES) office* to replace "Wagner-Peyser Act" with "ES." This change would align the definition with proposed changes to the definition of *Wagner-Peyser Employment Service (ES) also known as the Employment Service (ES)* and make the reference to ES consistent across all parts of the ES regulations.

The Department proposes to amend the definition of *Employment Service (ES) Office Manager* to replace the phrase "all ES activities in a one-stop center" with the phrase "ES services provided in a one-stop center." This change would align the definition with other proposed changes to the regulatory text and definitions, which refer to "ES services," instead of "ES activities." The Department also proposes to replace "individual" with "ES staff person" to clarify that the *ES Office Manager* must be *ES staff*, as defined in this section.

The Department proposes to amend the definition of *Employment Service (ES) staff* in two ways. First, the Department proposes to replace the phrase "individuals, including but not limited to State employees and staff of a subrecipient," with "State government personnel who are employed according to the merit system principles described in 5 CFR part 900, subpart F—Standards for a Merit System of Personnel Administration, and" to conform with the imposition of the merit-staffing requirement proposed in § 652.215. Second, the Department proposes to delete the phrase "to carry out activities authorized under the Wagner-Peyser Act," because this language is unnecessary. The ES regulations in parts 652, 653, and 658 describe the activities and services that ES staff are authorized or required to carry out. The proposed changes are intended to define a term that, when referenced, will clearly identify services or tasks that must be performed by State merit staff, and to simplify terminology throughout all parts. The revised definition also makes clear that ES staff includes a SWA official.

The Department proposes to amend the definition of *field checks* in several ways. First, the Department proposes to replace the term "job order" with "clearance order," which is more accurate because field checks must be conducted on clearance orders as defined in § 651.10. Second, the Department proposes to clarify in the definition that field checks may also be conducted by non-ES State staff, in addition to ES or Federal staff, if the SWA has entered into an arrangement with a State enforcement agency (or agencies) to conduct field checks. This proposed revision aligns the definition with existing practice permitted by the regulation at § 653.503, which allows SWA officials to 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 ES personnel.

Additionally, the Department proposes to remove from the definition that field checks are "random" appearances. The proposed revision would clarify that the selection of the clearance orders on which the SWA will conduct field checks does not need to be random, though random field checks may still occur. The revision clarifies that field checks may be targeted, where necessary, to respond to known or suspected compliance issues, thereby improving MSFW worker protection. In addition, if a SWA makes placements on 9 or fewer clearance orders, the SWA must conduct field checks on 100 percent of those clearance orders. See § 653.503(b). Therefore, in those cases, field checks could not be conducted on a random basis. These proposed revisions would clarify the definition and make it consistent with § 653.503(b).

The Department proposes to amend the definition of *field visits* in several respects. First, the Department proposes to clarify that field visits are announced appearances by SMAs, RMAs, the NMA, or NMA team members. This term is currently defined to include appearances by Monitor Advocates or outreach staff, and the proposed revision would clarify which Monitor Advocates may conduct field visits and that the appearances are announced, and not unannounced, as with field checks. Second, the Department proposes to replace the reference to "employment services" with "ES services" to conform with the use of the "ES" abbreviation throughout the regulatory text. Third, the Department proposes to amend the definition to specify that field visits include discussions on farmworker rights and protections. The Department has observed through monitoring that outreach staff and SMAs do not always discuss farmworker rights and protections during field visits as part of broader discussions about "other employment-related programs," and instead only cover information on ES services. An explicit reference to discussions on farmworker rights and protections in the definition will help ensure that these issues are consistently addressed.

The Department proposes to amend the definition of *Hearing Officer* to remove the words "of Labor" because § 651.10 previously defines "Department" as "the United States Department of Labor."

The Department proposes to amend the definitions of *interstate clearance order* to indicate that it is an agricultural "clearance" order for temporary employment instead of a "job" order. This change aligns the definitions of job order and clearance order in this part.

The Department also proposes to amend the definition of *intrastate clearance order* in two ways. First, the Department proposes to amend the definition to indicate that it is an agricultural "clearance" order for temporary employment instead of a "job" order. This change aligns the definition with the definitions of job order and clearance order in this part. Second, the proposed revision clarifies that the term means an agricultural clearance order for temporary employment describing one or more hard-to-fill job openings, which an ES office uses to request recruitment assistance from *all* other ES offices within the State. The current definition does not include the word "all." Therefore, it was not clear that such a request must go to all other offices in the State, and some ES offices were not distributing the clearance order to all offices. This clarification will help SWAs understand that an intrastate clearance order must be circulated to all ES offices within the State.

The Department proposes to amend the definition of *migrant farmworker* by removing the exclusion of full-time students who are traveling in organized groups. The Department proposes considering anyone who meets the definition of migrant farmworker to be considered as such, including full-time students performing farmwork. This change will make the benefits and protections of the Monitor Advocate System, including safeguards built into the Complaint System, ES service requirements, and equity and minimum service levels, available to full-time students traveling in organized groups. The exclusion of full-time students from existing regulatory text was premised on the fact that full-time students did not need to meet minimum farmwork or income requirements, which no longer exist in the ES regulations. Therefore,

having separate requirements for *significant multilingual MSFW one-stop centers* may inaccurately create the appearance that there are two sets of language access standards, or that requirements for *significant multilingual MSFW one-stop centers* are narrower. Removing the *significant multilingual MSFW one-stop center* definition therefore clarifies that the comprehensive language access requirements at 29 CFR 38.9 apply to all one-stop centers.

The Department proposes to remove the definition of *State Workforce Agency (SWA) official,* because SWA officials would be considered ES staff based on the Department's proposed revisions to the definition of *ES staff* in this rulemaking.

The Department is proposing to amend the definition of *Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES)* to replace the phrase "employment services" with "ES services." This change would simplify the use of terminology throughout all parts. The Department also proposes to remove the words "and are" from the definition for greater clarity.

C. Part 652—Establishment and Functioning of State Employment Service Subpart C—Employment Service Services in a One-Stop Delivery System Environment

1. Subpart A—Employment Service Operations

This subpart includes: An explanation of the scope and purpose of the ES; the rules governing allotments and grant agreements; authorized services; administrative provisions; and rules governing labor disputes. The Department's proposed amendments to subpart A focus solely on administrative provisions governing nondiscrimination requirements.

Section 652.8 Administrative Provisions

Section 652.8 covers administrative matters, including: Financial and program management information systems; recordkeeping and retention of records; required reports; monitoring and audits; costs; disclosure of information; sanctions; and nondiscrimination requirements.

The Department proposes to correct the statutory reference in § 652.8(j)(2) regarding the bona fide occupational qualification (BFOQ) exception currently listed in the regulation as 42 U.S.C. 2000(e)–2(e) to 42 U.S.C. 2000e–2(e).

The Department proposes to amend § 652.8(j)(3) to remove an outdated reference to affirmative action requests to make the Department's regulation consistent with U.S. Supreme Court jurisprudence on race-based affirmative action.[9] The proposed revision clarifies that the States' obligation is to comply with 41 CFR 60–300.84. The regulation at 41 CFR 60–300.84 requires ES offices to refer qualified protected veterans to fill employment openings required to be listed with ES offices by certain Federal contractors; give priority to qualified protected veterans in making such referrals; and, upon request, provide the Office of Federal Contract Compliance Programs with information as to whether certain Federal contractors are in compliance with the mandatory job listing requirements of the equal opportunity clause (41 CFR 60–300.5). Consistent with this proposed amendment, the Department also proposes to remove the phrase "and affirmative action" from the paragraph heading for § 652.8(j). The Department reminds SWAs that they have an affirmative outreach obligation under 29 CFR 38.40 that requires them to take appropriate steps to ensure they are providing equal access to services and activities authorized under the Wagner-Peyser Act, as well as any other WIOA title I-financially assisted programs and activities. As outlined in that regulation, these steps should involve reasonable efforts to include members of the various groups protected by the WIOA sec. 188 regulations, including but not limited to persons of different sexes, various racial and ethnic/national origin groups, members of various religions, individuals with limited English proficiency, individuals with disabilities, and individuals in different age groups.

2. Subpart C—Employment Service 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 ES services; universal service access requirements; provision of services for UI claimants; and State planning. Among other changes, the NPRM's proposed changes to regulations under subpart C are tailored to require all States to use State merit staff to provide ES services, reinstating a longstanding requirement that existed prior to the 2020 Final Rule, and extending the requirement to those States using different staffing arrangements under the rule as it existed prior to the 2020 Final Rule. As was true when the regulations were changed in 2020, none of the changes proposed at this time will impact the personnel requirements of the Vocational Rehabilitation (VR) program, one of the six core programs in the workforce development system that is authorized under title I of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended by title IV of WIOA. The Rehabilitation Act has specific requirements governing the use of State VR agency personnel for performing certain critical functions of the VR program.

Section 652.204 Must funds authorized under the Governor's Reserve flow through the one-stop delivery system?

This section explains that the Governor's Reserve funds may, but are not required to, flow through the one-stop delivery system and provides a list of allowable uses for those funds. The Department proposes to simplify the section heading to remove reference to the Wagner-Peyser Act because reference to the Governor's Reserve is adequate. The Department also proposes to amend this section to reference professional development and career advancement of ES staff instead of SWA officials. Under the proposed revisions to the definitions found in part 651, ES staff would exclusively refer to State merit staff. This NPRM proposes to remove the term SWA official as a defined term in § 651.10, as the term is made redundant under the proposed changes.

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

This section currently provides States the option to provide ES services through a variety of staffing models. For the reasons set forth in this NPRM, the Department proposes to amend § 652.215 to require all States, including the historically exempted "demonstration States," to provide labor exchange services described in § 652.3 of this part through State merit staff. The staffing requirement applies to ES services provided to MSFWs. Specifically, the proposed regulatory text states that labor exchange services must be provided by ES staff. Under proposed revisions to the definitions (§ 651.10), ES staff will exclusively refer to State merit staff.

Historically, the Department relied on authority under sec. 3(a) of the Wagner-Peyser Act, which requires the

[9] *See, e.g., Ricci* v. *DeStefano,* 557 U.S. 557, 585 (2009); *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 238 (1995); *Richmond* v. *J.A. Croson Co.,* 488 U.S. 469, 507 (1989).

with this proposed requirement, the Department proposes to provide 18 months for States to implement the State merit-staffing requirement in order to provide States with adequate time to consider and implement any necessary changes to come into compliance, including time to resolve outstanding contractual obligations and align changes with the timed financial allotments. The Department is open to adjusting this time period and, accordingly, it seeks comments from States regarding whether 18 months is sufficient time to comply with this requirement. The Department also seeks comments from States describing other regulatory changes States believe are necessary to effectuate compliance with the proposed changes.

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

Part 653 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. The regulations in this part establish special services to ensure MSFWs receive the full range of career services, as defined in WIOA sec. 134(c)(2), 29 U.S.C. 3174(c)(2), and contain requirements that SWAs establish a system to monitor their own compliance with ES regulations governing services to MSFWs. As noted elsewhere in this preamble, the proposed State merit-staffing requirement discussed in part 652 would also apply to delivery of all ES services to MSFWs, including outreach services and the Monitor Advocate System discussed in the following section. References to staffing throughout this part of the proposed rule, even where the Department has not proposed changes, refer to State merit staff.

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

Section 653.100 Purpose and Scope of Subpart

The Department proposes to amend § 653.100(a) to clarify that the provision of services for MSFWs must be available in an equitable and nondiscriminatory fashion. The addition of the phrase "and nondiscriminatory" is intended to clarify that SWAs must not discriminate against farmworkers either because they are farmworkers or because of any characteristics protected under the nondiscrimination and equal opportunity provisions of WIOA, which are contained in sec. 188 of WIOA, 29 U.S.C. 3248, and the implementing regulations at 29 CFR part 38. The requirements of section 188 of WIOA apply to ES services because the Wagner-Peyser Act Employment Service is a required one-stop partner, and the requirements of section 188 of WIOA apply to all one-stop partners. 29 CFR 38.4(zz).

Section 653.101 Provision of Services to Migrant and Seasonal Farmworkers

The Department proposes to amend § 653.101 by revising the first sentence to clarify that the SWA is the primary recipient of Wagner-Peyser Act funds and, therefore, is the entity responsible for ensuring that ES staff offer MSFWs the full range of career and supportive services. This clarification is proposed because it is ultimately incumbent upon the SWA to ensure ES staff at one-stop centers are carrying out the appropriate duties with their Wagner-Peyser Act funds. The Department also proposes to replace the requirement to consider and be sensitive to the preferences, needs, and skills of individual MSFWs and the availability of job and training opportunities with a requirement that SWAs ensure the one-stop centers tailor ES services in a way that accounts for individual MSFW preferences, needs, skills, and the availability of job and training opportunities, so that MSFWs are reasonably able to participate in the ES. This proposed change strengthens the requirement to tailor services to the individualized needs of MSFWs. The change also would make the requirement applicable to the SWA to ensure the one-stop centers comply, to align with the SWA's position as the direct recipient of ES funds.

Section 653.102 Job Information

The Department proposes to revise the second sentence of § 653.102 to clarify that the SWA is the entity responsible for assisting MSFWs to access job order information, for the same rationale as described in the same proposed change for § 653.101. The Department's proposed language also clarifies that the requirement applies to ES staff at one-stop centers because the scope of part 653 relates to the ES services program, not all one-stop partner programs. The Department also proposes to remove the word "adequate" as a modifier to the phrase "assistance to MSFWs." The Department has observed that States' interpretation of what it means to provide adequate assistance varies. Removing the word "adequate" will remove subjectivity and clarify that a SWA meets its obligation to assist MSFWs by complying with the requirements in parts 653 and 658.

The Department also proposes to remove the final sentence of § 653.102, which stated that in designated significant MSFW multilingual offices, assistance with accessing job order information must be provided to MSFWs in their native language whenever requested or necessary. The Department proposes to remove this sentence to align language access requirements in the ES regulations with those required by WIOA sec. 188 and its implementing regulations at 29 CFR part 38. Language access requirements are not limited to designated multilingual MSFW one-stop centers, but rather, they apply to LEP individuals regardless of through which office they seek ES services. The existing requirement was written into the regulations in the early 1980s, well before the language access requirements were codified at 29 CFR part 38. Removing the existing requirement, which specifically applies to designated multilingual MSFW one-stop centers, and adding a reference to the broader language access requirements at § 653.103(b) (described in the following section) is intended to strengthen language access for all LEP individuals. This change also aligns with the proposal to remove the definition for *multilingual MSFW one-stop centers* from § 651.10. Accordingly, the Department proposes to add a broader language access requirement to § 653.103, as described in the following section.

Section 653.103 Process for Migrant and Seasonal Farmworkers To Participate in Workforce Development

The Department proposes to make several revisions to § 653.103. In paragraph (a), the Department proposes to change "one-stop center" to "ES office." This change clarifies that the requirement applies to ES staff because part 653 applies to the ES services program, not all one-stop partner programs. In addition to the existing requirement to determine whether *participants*, as defined at § 651.10, are MSFWs, the Department proposes to require that ES offices must determine whether *reportable individuals*, also defined at that section, are MSFWs. This proposed change will help ES staff identify all individuals who engage in ES services who are MSFWs, and not limit that assessment to participants only. With this information, SWAs will be able to better understand the number of MSFWs who engage in the ES and the degree of their engagement. This information is important for SWAs and SMAs to have so that they may

The Department has observed that SWAs commonly assign existing staff to fill outreach staff vacancies, without seeking qualified candidates who speak the language of a significant proportion of the State MSFW population, are from MSFW backgrounds, or have substantial work experience in farmworker activities. The proposed revision is also intended to clarify that SWAs must seek to hire for or assign to outreach staff positions, and put a strong emphasis on hiring or assigning, individuals who speak the language of a significant proportion of the State MSFW population and who either are from MSFW backgrounds or have substantial work experience in farmworker activities. Several revisions impact how a State staffs outreach responsibilities. Changes at 653.107(a) require outreach to be ongoing, changes at 653.107(a)(3) strengthen hiring requirements, and changes at 653.107(a)(4) clarify that full-time outreach work means devoting 100% of their time to outreach. Together, States will be unlikely to be able to fulfill these responsibilities unless they hire staff specifically for outreach. While States can assign outreach responsibilities to existing qualified staff, such staff in significant MSFW States must then devote 100% of their time to outreach, not merely add outreach to other responsibilities. For non-significant MSFW States, outreach staff must devote full time in peak season and part time in non-peak season to outreach.

The Department proposes to maintain the language in § 653.107(a)(3)(i) that SWAs must seek qualified candidates who speak the language of a significant proportion of the State MSFW population. But to strengthen the existing requirement, the Department proposes to add that the SWA must not only seek but also put a strong emphasis on hiring qualified candidates. This language is proposed to increase the likelihood that SWAs will hire candidates with the criteria described in § 653.107(a)(3)(i), instead of simply seeking candidates whom they never hire. To further increase the likelihood that SWAs hire candidates who meet the required criteria, the Department proposes to add a new paragraph at § 653.107(a)(3)(ii) requiring the SWA to inform farmworker organizations and other organizations with expertise concerning MSFWs of outreach staff job openings and encourage them to refer qualified applicants to apply. These additions are proposed to expand the applicant pool for outreach staff positions to include individuals who have the knowledge, skills, and abilities to meet the unique needs of farmworkers. The proposed paragraph also makes requirements for hiring outreach staff consistent with the requirements for appointing an SMA under § 653.108(b). For the SMA position, the SWA is required to inform farmworker organizations and other organizations with expertise concerning MSFWs of the opening and encourage them to refer qualified applicants to apply. As discussed in this section, this requirement helps SWAs expand the applicant pool for SMAs to help the SWA choose from a larger selection of qualified applicants, and the same reasoning applies to outreach staff.

The Department proposes to amend § 653.107(a)(4) by adding the sentence that the Department proposes to remove from § 653.107(a)(1), which provides that each SWA must provide an adequate number of outreach staff to conduct MSFW outreach in their service areas. However, the Department proposes to replace "in their service areas" with "in each area of the State." This change will clarify that SWAs must provide outreach in all areas of the State where there are farmworkers, not only in certain service areas. This change would make the expectation to cover the full State clear. The Department also proposes to replace "provide" with "employ" and add to the end of the sentence language making clear that an adequate number of outreach staff are needed to contact a majority of MSFWs in all of the SWA's service areas annually. These additions are proposed to clarify what it means to employ an "adequate number of outreach staff," all of whom must be State merit staff. Making this determination on an annual basis helps align the assessment of staffing levels with the reporting required in the SMA's Annual Summary.

The Department further proposes to revise the sentence requiring that 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. Specifically, the Department proposes to replace "in guidance issued by the Secretary" with "as identified by the Department." This revision is necessary to conform to guidance issued by the Department.

The Department also proposes to amend § 653.107(a)(4) to add a sentence clarifying what it means to have full-time outreach staff. The proposed sentence explains that full-time means each individual outreach staff person must spend 100 percent of their time on the outreach responsibilities described at § 653.107(b). This requirement is important because having each outreach staff person engage in outreach on a full-time basis gives that person more time to establish a positive working relationship with MSFWs and agricultural employers in their service area. This can be helpful for building trust and engaging in informal resolution of complaints and apparent violations. It is also necessary so that outreach staff are fully available to provide the level of ES and follow-up activities that these regulations describe. The Department proposes to keep the existing requirements that, in the 20 States with the highest estimated year-round MSFW activity, as identified by the Department and defined as significant MSFW States at § 651.10, there must be full-time, year-round outreach staff to conduct outreach duties. In 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. This means that States that are not significant MSFW States may allow outreach staff to conduct other activities that promote farmworker safety, including housing inspections, when they are not in peak harvest season. If outreach staff in States that are not significant MSFW States have additional time available after fulfilling their required outreach responsibilities, those States may leverage outreach staff members, required to be State merit staff under this proposal, to help support other critical functions, such as UI.

Finally, the Department proposes to further clarify outreach staffing requirements by adding a new sentence in § 653.107(a)(4) stating that staffing levels must align with and be supported by information about the estimated number of farmworkers in the State and the farmworker activity in the State as demonstrated in the State's Agricultural Outreach Plan (AOP) pursuant to § 653.107(d). This language will help SWAs understand that the number of full-time or part-time outreach staff must be determined by information provided in the State's AOP. These revisions will give the State a clear method to identify what staffing levels are appropriate.

The Department also proposes to revise § 653.107(b) by adding that outreach staff responsibilities include the activities identified in § 653.107(b)(1) through (11). This addition clarifies the specific activities included in outreach staff responsibilities. The proposed regulatory text also replaces a colon with a period, which helps the

Section 653.108 State Workforce Agency and State Monitor Advocate Responsibilities

Section 653.108 governs what a SWA and SMA must do to monitor a State's provision of ES services to MSFWs. As explained subsequently, the Department proposes several revisions to this section to strengthen the role of the SMA and to enhance the monitoring activities that SMAs perform.

The Department proposes to revise § 653.108(a) to explicitly prohibit the State Administrator or ES staff from retaliating against an SMA for performing the monitoring activities that are required by this section. Specifically, the Department proposes to add at the end of § 653.108(a) a requirement that the State Administrator and ES staff must not retaliate against staff, including the SMA, for self-monitoring or raising any issues or concerns regarding non-compliance with the ES regulations. The addition of this sentence will emphasize the Department's intolerance for retaliation against SMAs for conducting their duties and encourage and protect internal disclosures and discussions about noncompliance.

The Department proposes to revise § 653.108(b), which prescribes criteria that States must consider when appointing an SMA, to require that SWAs not only seek but also put a strong emphasis on hiring qualified candidates for the SMA position who meet one or more of the criteria listed in paragraphs (b)(1) through (3). While the current regulations already require SWAs to "seek" qualified candidates who meet these criteria, the Department proposes to require that SWAs "put a strong emphasis on hiring" such candidates to increase the likelihood that SWAs hire SMAs who meet one or more of these criteria, and not simply seek such individuals. In the Department's view, it is important for SMAs to meet one or more of these existing criteria, so that SMAs understand and have appropriate skills to assess whether the SWA is providing adequate services to MSFWs.

The Department also proposes to remove the requirement in § 653.108(b) that the SMA be a SWA official because the proposed edits to § 651.10 remove *SWA official* as a defined term. The Department proposes to revise § 653.108(c) to require that the SMA be an ES staff employee. As explained previously in this document, the Department is proposing to reinstate the longstanding State merit-staffing requirement that was in effect prior to the 2020 Final Rule. One of the ways in which the Department proposes to effectuate this proposal is to remove the definition of *SWA official* in § 651.10 and to revise the definition of *ES staff* in § 651.10 to mean State government personnel who are employed according to the merit-system principles described in 5 CFR part 900, subpart F (Standards for a Merit System of Personnel Administration) and who are funded, in whole or in part, by Wagner-Peyser Act funds. As relevant here, the Department proposes to remove the requirement in § 653.108(b) for the SMA to be a *SWA Official* and to revise § 653.108(c) to require that the SMA be a senior level *ES staff* employee. While the specifics of this proposal are discussed in detail subsequently, the Department notes here that the term *ES staff* is intended to clarify that the proposed regulation would require the SMA to be not only a State employee, but a State merit-staff employee. This proposal, if finalized, will lead to more consistent delivery of services to ES customers. As a universal access system, it is vital that the ES be administered consistently across all States and that services are delivered effectively and equitably. Returning to the requirement that ES services be provided by State merit staff would help ensure that ES services are delivered by knowledgeable personnel in a manner consistent from State to State and allow for accountability that other staffing models cannot duplicate.

The Department additionally proposes several revisions to § 653.108(c) to strengthen the status of the SMA, as many SMAs have reported difficulty in their ability to fully carry out their duties due to insufficient status within the SWA. With these proposed changes, the Department seeks to align the status of the SMA with that of the Equal Opportunity (E.O.) Officer because the SMA's role is similar to the E.O. Officer's role. Both are charged with ensuring compliance with regulations put in place to ensure individuals have meaningful access to services and equal employment opportunities. In 2016, the DOL Civil Rights Center (CRC) expanded on previous requirements specifying the authority and status that E.O. Officers must have to ensure they can most efficiently and effectively carry out the recipients' nondiscrimination obligations. *See generally,* 29 CFR 38.28 through 38.33.[11] According to CRC's NPRM,[12] the changes were intended to address feedback from E.O. Officers that they lacked sufficient authority to carry out their responsibilities. Similarly, in returning to merit-staffing in this rulemaking, the Department proposes to more specifically describe the required status of the SMA. Prior to the 2020 Final Rule, § 653.108(c) required the SMA to have direct, personal access, when necessary, to the State Administrator, and status and compensation comparable to other State positions assigned similar levels of tasks, complexity, and responsibility. By requiring the SMA to be a senior-level ES staff employee who reports directly to the State Administrator or their designee, this proposed rule would provide concrete ways to ensure that the SMA has status equivalent to what § 653.108(c) required prior to the 2020 Final Rule. This specification will also address feedback from many SMAs, who have reported that they lack sufficient authority to carry out their duties identified in the ES regulations. This change would allow SMAs to more efficiently and effectively carry out the SMA's obligation to monitor whether the SWA is serving farmworkers in a way that is qualitatively equivalent and quantitatively proportionate to all other job seekers.

To achieve these results, the Department proposes to strengthen the status of the SMA in several ways. First, the Department proposes at § 653.108(c) to create new paragraphs (c)(1) through (3). In paragraph (c)(1), the Department proposes to require that the SMA be a senior-level ES staff employee. As previously explained, enhancing the status of the SMA by making the SMA a senior-level official will allow the SMA to have the authority necessary to more effectively carry out their duties. Second, proposed paragraph (c)(2) requires the SMA to report directly to the State Administrator or their designee such as a director or other appropriately titled official in the State Administrator's office, who has the authority to act on behalf of the State Administrator. While current regulations require the SMA to have direct access to the State Administrator, in practice this requirement has been insufficient for the SMA to have the authority necessary to carry out their duties and to communicate with the State Administrator, when the SMA finds it necessary. Reporting directly to the State Administrator will provide more direct access to and interaction with State leadership for the SMAs to

[11] *Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act; Final Rule,* 81 FR 87130, 87176–87179 (Dec. 2, 2016).

[12] *Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act; Notice of Proposed Rulemaking,* 81 FR 4494, 4516–4517 (Jan. 26, 2016).

The Department proposes to redesignate § 653.108(g)(1) as § 653.108(h)(2) and revise the regulatory text by replacing "local offices" with "ES offices" to align with the defined term for ES office in § 651.10. The Department further proposes to revise the paragraph by clarifying that the SMA, if warranted, can notify the SWA of the corrective action(s) necessary to address the deficiencies described earlier in the paragraph, and that the corrective action plan must comply with the requirements at proposed paragraph (h)(3)(v). This revision is intended to clarify that the corrective action plan is the method by which a SWA or ES office achieves compliance with the SMA's compliance findings. The existing regulatory text provides that the SMA may request a corrective action plan, which does not appear to require the SWA or ES office to take corrective action. The proposed revision clarifies that SMAs assure compliance by documenting noncompliance, describing the corrective actions necessary for the SWA to come into compliance, reviewing the corrective action plan that the SWA or ES office develops to implement the identified corrective action(s), documenting compliance or lack of compliance with the corrective action plan, and reporting to ETA any noncompliance. Once noncompliance is identified, SWAs have a responsibility to address it, as described in part 653, subpart D.

The Department proposes to redesignate § 653.108(g)(2) to be § 653.108(h)(3) and to clarify that SMAs must conduct onsite reviews of one-stop centers regardless of whether or not the one-stop center is designated as a significant MSFW one-stop center. This is an important clarification because SMAs often mistakenly think they only need to review significant MSFW one-stop centers. The Department also proposes a clarifying edit to this paragraph by adding that the reviews must follow procedures set forth in paragraphs (h)(3)(i) through (vii) of this section. This is proposed to help the structure of paragraph (h)(3) and its subordinate paragraphs. Correspondingly, current paragraph (g)(2)(ii), which is proposed to be new paragraph (h)(3)(ii), contains proposed clarifying edits, which state "The SMA must ensure. . ." instead of the existing "Ensure. . . ." Finally, the Department proposes to specify that the complaint logs that the SMA must review pursuant to § 653.108(g)(2)(i)(D) (proposed § 653.108(h)(3)(i)(D)) are the complaint logs required by the regulations under part 658 of this chapter.

At § 653.108(g)(2)(iv), which is proposed § 653.108(h)(3)(iv), the Department proposes a few revisions. First, the Department proposes to add a comma after "After each review," for technical clarity and readability. Next, the Department proposes to specify that the SMA's conclusions include findings and areas of concern by adding "including findings and areas of concern," after "The conclusions." The Department proposes this revision to make the SMA's monitoring align with the ETA monitoring format, which § 653.108(g)(3)(ii) requires the SMA use as a guideline. The Department also proposes to add a requirement that the SMA's report be sent directly to the State Administrator.

The Department also proposes to revise current § 653.108(g)(2)(v) (proposed 653.108(h)(3)(v)) in several ways. First, the Department proposes to add that the SMA's report must include the corrective action(s) required. Second, the Department proposes to specify that, to resolve the findings, the ES Office Manager or other appropriate ES staff must develop and propose a written corrective action plan. These changes conform the SMA's monitoring process with the ETA monitoring format, which requires the monitor to identify the corrective actions required. The Department proposes to add "the" before "actions," as a technical edit. The Department also proposes to revise the third sentence to clarify that the corrective action plan should be designed to bring the ES office into compliance within 30 days, and to specify that where a plan is not designed to bring the ES office into compliance within 30 days, the length of and reasons for the expended period must be specifically stated and the plan must specify the major interim steps that the ES office will take to correct the compliance steps identified by the SMA. In other words, only if there is a documented justification for compliance to take longer than 30 days can such efforts be "steps" rather than full compliance. This revision is designed to help ensure SWAs resolve identified compliance issues.

At current § 653.108(g)(2)(vii), which is proposed to be paragraph (h)(3)(vii), the Department proposes to allow the SMA to delegate reviews to their staff instead of "a SWA official" because SMA staff may conduct such reviews under the authority of the SMA. This change will clarify that other persons who conduct reviews on behalf of the SMA must be the SMA's staff, who should share the same objectives of the SMA, helping ensure that the role of the monitor advocate is effectively carried out. The Department also proposes that the SMA may delegate the reviews whenever the SMA finds such delegation necessary, as opposed to when the State Administrator finds such delegation necessary. This proposed change aligns with the proposal for the SMA to be a senior-level official with greater authority within the SWA. The SMA, therefore, should be empowered to make the determination about whether such delegation is necessary. The Department also proposes to remove the words "and when" from the phrase "if and when" in this paragraph. As such, the proposed paragraph now states that the SMA may delegate the review described in § 653.108(h)(1) to the SMA's staff, if the SMA finds such delegation necessary, and in such event, the SMA is responsible for and must approve the written report of the review.

The Department proposes to revise § 653.108(g)(3) (proposed paragraph (h)(4)) to ensure all significant MSFW one-stop centers not reviewed onsite by Federal staff are reviewed at least once per year by the SMA or their staff, instead of "a SWA official." This change is proposed because it is important for these reviews to be conducted by staff who share the SMA's objectives. As previously noted, the SMA's staff are responsible to assist the SMA in carrying out the SMA's duties described at § 653.108.

Paragraph (g)(5), proposed § 653.108(h)(6), currently requires SMAs to review outreach workers' daily logs and other reports including those showing or reflecting the workers' activities "on a random basis." The Department proposes to replace "random" with "regular." SMAs were confused, at times, about what "random" means and, therefore, how frequently they should be reviewing outreach staff's logs. Replacing "random" with "regular" is intended to help clarify the SMA's responsibility that these reviews occur on a regular basis. The frequency of these reviews may vary based on how many outreach staff each SWA has; however, there should be some standard of frequency in each SWA to ensure regular review occurs. For example, in SWAs with one or two outreach staff, it may be possible for the SMA to review outreach logs every month, but in SWAs with many outreach staff, it may be more appropriate to review outreach logs quarterly. The Department also proposes to replace "outreach workers" with "outreach staff" throughout this paragraph to use the defined term at § 651.10.

The Department proposes to revise § 653.108(g)(6), proposed paragraph

contents of this evaluation. Specifically, paragraph (u)(3)(i) would require the SMA to assure that they devote all their time to Monitor Advocate functions, or if the SMA has approval under § 653.108(e) to conduct their functions on a part-time basis, an assessment of whether they can perform all their functions effectively on a part-time basis. Paragraph (u)(3)(ii) would additionally require the SMA to assess whether the performance of SMA functions requires increased time by the SMA (if part time) or an increase in the number of ES staff assigned to assist the SMA in the performance of SMA functions, or both. This information will help the RMA and NMA better understand whether the SMA's status as full- or part-time is sufficient for them to carry out their duties, and whether the SMA requires additional staff to perform all the functions required by this section. The previous requirement for an assurance did not provide the depth, context, or explanation necessary for the State Administrator or the Department to assess whether the SMA has adequate staffing.

The Department proposes to revise § 653.108(s)(4) (iii), proposed § 653.108(u)(4)(iii), to clarify that the summary of any technical assistance the SMA provided must include any technical assistance provided to outreach staff, in addition to technical assistance provided to the SWA and ES offices. While outreach staff are considered part of the SWA, the Department proposes to clarify that the summary must specifically identify the technical assistance that the SMA provided to outreach staff, so that the State Administrator and the Department may better assess whether outreach staff are obtaining the knowledge and resources necessary to fulfill their duties.

The Department proposes to revise § 653.108(s)(5), proposed § 653.108(u)(5), to specify that when the SMA summarizes the outreach efforts undertaken by all significant and non-significant MSFW ES offices in the State, the SMA must include the results of those efforts and analyze whether the outreach levels and results were adequate. Through this analysis, the Department would like to understand whether the SMA believes the SWA has allocated sufficient outreach staff and resources to complete the outreach duties identified at § 653.107, including whether outreach staff are able to reach the majority of MSFWs in the State.

The Department proposes to revise § 653.108(s)(7), proposed § 653.108(u)(7), by adding that in addition to providing a summary of how the SMA is working with WIOA sec. 167 NFJP grantees, the SMA must provide a summary of how they are working with the State-level E.O. Officer. This revision aligns with the proposed requirement at proposed § 653.108(m) for the SMA to establish an ongoing liaison with the State-level E.O. Officer. The inclusion of this information in the Annual Summary will allow State Administrators, RMAs, and the NMA to review what the SMA is doing to fulfill the new liaison requirement (*e.g.,* how frequently are they meeting with the State-level E.O. Officer, the type of information that is shared, any best practices or lessons learned).

The Department proposes to revise § 653.108(s)(10), proposed § 653.108(u)(10), which currently requires the SMA to provide a summary of activities related to the AOP and an explanation of how those activities helped the State reach the goals and objectives described in the AOP. At the end of the 4-year AOP cycle, the summary must include a synopsis of the SWA's achievements over the previous 4 years to accomplish the goals set forth in the AOP, and a description of the goals which were not achieved and the steps the SWA will take to address those deficiencies. The Department proposes to replace the requirement to explain "how" the activities helped the State reach the goals and objectives described in the AOP with a requirement to explain "whether" the activities helped the State reach the objectives described in the AOP. This revision better reflects the information that the Department seeks (*i.e.,* whether these activities helped the State meet its objectives). The Department also proposes to remove "goals" from the first sentence and to replace "goals" with "objectives" in the second sentence, because the Department does not ask States to identify specific goals in the AOP. Rather, the SWA provides objectives in its AOP, and the SMA's Annual Summary should explain whether the activities that the SWA performed that year are meeting the identified objectives.

The Department proposes two clarifying edits to § 653.108(s)(11), proposed § 653.108(u)(11). First, the Department proposes to replace significant MSFW "ES offices" with significant MSFW "one-stop centers" to align with the defined term at § 651.10. Second, the Department proposes to revise the requirement for the SMA to summarize the State's efforts to provide ES staff in accordance with § 653.111, to require the SMA to summarize the State's efforts to comply with § 653.111. The Department anticipates that this change will put greater emphasis on compliance with the requirements of § 653.111.

Section 653.109 Data Collection and Performance Accountability Measures

Section 653.109 specifies data collection and performance accountability measures specific to MSFWs. The Department proposes to make several revisions to this section.

First, the Department proposes to add a new data collection requirement in paragraph (b) of this section. Specifically, the Department proposes to add § 653.109(b)(10), which would require SWAs to collect the number of reportable individuals and participants who are MSFWs. The Department anticipates that access to this information will help the SWAs and the Department to better understand how many MSFWs are engaging with the ES, either as reportable individuals or participants, and to identify potential issues surrounding MSFW access to ES services. Specifically, Monitor Advocates will be able to compare the number of MSFW reportable individuals and the number of MSFW participants and use this data to identify potential areas where MSFWs are not being offered participant-level services. The collection of this data is consistent with the Monitor Advocate System's purpose to monitor whether MSFWs have meaningful access to services in a way that is appropriate to their particular needs. SWAs commonly report few or no MSFW ES participants, which creates the concern that MSFWs do not have access to ES services. This piece of information will enable Monitor Advocates to identify cases where there may be larger numbers of MSFW reportable individuals, but few or no MSFW participants. Without this information, Monitor Advocates and the Department lack data necessary to identify whether that problem exists, and cannot work to correct the problem, if it is present.

Second, the Department proposes to redesignate § 653.109(b)(10) as § 653.109(b)(11), as a technical edit to account for the insertion of proposed § 653.109(b)(10).

Third, the Department proposes several revisions to § 653.109(h), which sets forth the minimum levels of service that significant MSFW States must meet. First, the Department proposes to replace the requirement that a significant MSFW State measure the number of outreach contacts per "week" with the number of outreach contacts per "quarter" to align with the SWA's quarterly data submissions to the Department. SMAs have provided

would be redundant and unnecessary. The Department also proposes to remove the requirement that SWAs must use a standard format provided by the Department (such as Form WH516 or a successor form) to provide workers referred to clearance orders a checklist summarizing wages, working conditions, and other material specifications in the clearance order. Removing this requirement would provide SWAs with greater flexibility to develop and use their own forms that meet their needs. Under the proposed revision, SWAs may still use standard forms, including the WH516, but they would not be required to use a standard form. Regardless, the checklist that the SWA provides workers must include the material terms and conditions of employment that are required to be included in clearance orders pursuant to § 653.501(c)(1)(iv).

Finally, the Department proposes to revise § 653.501(d)(11) to replace the reference to the Department's "ARS Handbook" with a reference to "Departmental guidance." As proposed, § 653.501(d)(11) would require the applicant-holding office to give each referred worker a copy of the list of worker's rights described in Departmental guidance. This revision is intended to reflect the fact that this list of worker's rights may be available in different documents and formats in the future.

Section 653.503 Field Checks

The Department proposes to make two conforming and clarifying edits to the regulations governing field checks in § 653.503. First, the Department proposes to revise § 653.503(a) to add "transportation" to the list of conditions that SWAs must assess and document when performing a field check. This change would increase health and safety of MSFWs by adding an additional safeguard against dangerous transportation tied to their employment.

Second, the Department also proposes to remove that the field checks are "random." The proposed revision would clarify that the selection of the clearance orders on which the SWA will conduct field checks does not need to be random, and may respond to known or suspected compliance issues, thereby improving MSFW worker protection. In addition, if a SWA makes placements on 9 or fewer clearance orders, the SWA must conduct field checks on 100 percent of those clearance orders. See § 653.503(b). Therefore, in those cases, field checks could not be conducted on a random basis.

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

This part sets forth the regulations governing the Complaint System for the Wagner-Peyser Act Employment Service (ES) at the State and Federal levels. Specifically, the Complaint System processes complaints against an employer about the specific job to which the applicant was referred through the ES, and complaints involving the failure to comply with ES regulations under 20 CFR parts 651, 652, 653, and 654. The Complaint System also accepts, refers, and, under certain circumstances, tracks complaints involving employment-related laws as defined in § 651.10. While the Complaint system is available to MSFWs and non-MSFWs, the Complaint System includes additional shorter processing timelines and additional follow-up on MSFW-related complaints, which are designed to provide increased protection for MSFWs. The Department proposes to revise several regulations within this part to conform with proposed revisions to definitions listed at § 651.10, remove redundancies and make other non-substantive technical edits, clarify or modify certain requirements, and improve equity and inclusion for MSFWs in the ES system. The Department also proposes to remove the requirement that the SMA serve as a Complaint System Representative and eliminate the requirement that SMAs must process MSFW complaints. The Department is proposing these revisions because § 653.108 requires the SMA to monitor the Complaint System, and the proposed revisions would remove the challenge that exists when the SMA is required to monitor their own actions in processing MSFW complaints. The Department anticipates that an SMA will be more objective in monitoring the Complaint System if they are not tasked with monitoring their own actions. The proposed revisions would maintain the integrity of the Monitor Advocate System as it provides safeguards to MSFWs who participate in the Complaint System, and they would allow SMAs to focus their attention on monitoring the ES services that are provided to MSFWs in their State.

The Department has observed through analysis of SWA quarterly Labor Exchange Agricultural Reporting System 5148 Reports, meetings with SMAs and RMAs, and other communications with SWAs, that SWAs misunderstand several of the requirements currently in part 658. These misunderstandings have caused inaccurate recordkeeping and reporting, which impede the ability of SMAs and the Department to monitor MSFW complaints to determine whether the Complaint System is processing MSFW complaints consistently with the governing regulations. The Department also has received information, through 5148 Reports and Monitor Advocate Annual Summaries, that Complaint System activity is low in many States. Through Wage and Hour Division (WHD) investigations, news reports, SMA Annual Summaries, conversations with farmworkers and farmworker advocacy organizations, and anecdotal information SMAs share with the Department, the Department concludes that violations of employment-related laws against MSFWs may be prevalent across the country—therefore, it is concerning that Complaint System activity is low. In Program Year 2019 (July 2019-June 2020), which is the most recent complete set of data available, at least eight States did not report any MSFW complaints. RMAs and the NMA have communicated concerns to the Department that one of the reasons complaint numbers may be low is because MSFWs are unaware of the Complaint System, or SWAs are not processing or recording complaints correctly.

Through SWA 5148 Reports and RMA monitoring, the Department has identified several common requirements in the regulatory text that SWAs may misunderstand. These misunderstandings have a direct impact on the availability and correct processing of complaints. To address these issues, several of the proposed revisions are more prescriptive than the existing regulatory text and specifically clarify terms and other requirements.

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

Section 658.410 Establishment of Local and State Complaint Systems

The Department proposes to amend § 658.410(c) to replace the word "SWA" with "State" so that it clearly points to the defined term "State Administrator." This change will clarify which specific individual is responsible to ensure a central complaint log is maintained.

The Department proposes to remove language in § 658.410(c)(6) that the complaint log must include actions taken on apparent violations and, instead, add several specific references in § 658.410(c)(1) through (6) that explain that each requirement also applies to apparent violations. These proposed changes are intended to clarify

technical grammar edit. The Department also proposes to clarify the appropriate steps for processing employment-related law complaints involving alleged violations of nondiscrimination laws or reprisal for protected activity by revising § 658.411(b)(1), to add a reference to § 658.411(c). This revision would clarify that the procedures in § 658.411(c) apply to any employment-related law complaint alleging unlawful discrimination or reprisal for protected activity in violation of nondiscrimination laws, such as those enforced by the EEOC or the DOL's CRC, or in violation of the Immigration and Nationality Act's anti-discrimination provision found at 8 U.S.C. 1324b.

The Department proposes three changes to § 658.411(b)(1)(ii)(B). First, the Department proposes to remove both references to the SMA making determinations and taking actions on employment-related law complaints and replace the first with a reference to the "Complaint System Representative." This proposal is consistent with other changes throughout part 658 that remove the SMA's direct involvement in the Complaint System, including the proposed removal of the SMA being designated to process MSFW complaints. As explained earlier, the Department is proposing to remove the SMA from Complaint System processing because the SMA duties outlined at § 653.108 include monitoring the Complaint System, and the Department anticipates that SMAs will be more objective in performing this monitoring if they are not tasked with monitoring their own actions for compliance. Second, the Department proposes to replace the word "employment" with "ES" before "services" in the last sentence to conform with the defined term *Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES)*. The Department also proposes to change "and except" to "or" to clarify that immediate action must be taken in cases where either the Complaint System Representative determines that it is necessary or where informal resolution would be detrimental to the complainant.

Consistent with the proposed removal of the SMA from § 658.411(b)(1)(ii)(B), the Department proposes to amend § 658.411(b)(1)(ii)(D) to remove the requirement for the ES office or SWA Complaint System Representative to refer the complaint to the SMA who must immediately refer the complaint. Instead, under the proposed regulatory text, the ES office or SWA Complaint System Representative would themselves refer the complaint immediately to the appropriate enforcement agency for prompt action. This change would remove the SMA from Complaint System processing for the same reasons that the Department proposes to remove the SMA from other aspects of Complaint System processing. This proposed change is consistent with the SWA's requirements in processing non-MSFW complaints, where staff other than the SMA refer complaints to enforcement agencies. Additionally, this proposed change would decrease the amount of administrative time for complaints to be referred for prompt action by enforcement agencies. It is important to note that this regulation specifically deals with complaints that ES offices or SWA staff have determined need to be referred to a State or Federal agency. Requiring staff to refer the complaint first to the SMA, who then refers to the applicable agency, adds unnecessary time, which may cause avoidable harm to complainants in sensitive or otherwise serious, time-sensitive situations.

The Department proposes to remove all references to the "SMA" in 20 CFR 658.411(b)(1)(ii)(D) and (E) to conform with the Department's proposal to remove the SMA from playing a direct role in Complaint System processing. Under the proposed changes, the complaint will not be referred to the SMA. Instead, the Complaint System Representative must notify the complainant of the enforcement agency to which the complaint was referred, rather than for the SMA to notify the complainant.

The Department proposes to add § 658.411(b)(1)(ii)(F) to provide steps ES offices and SWAs must take when they receive complaints alleging an employer in a different State has violated an employment-related law, when such complaints are filed by or on behalf of MSFWs. The proposed changes would require SWAs and ES offices to use the same process for processing employment-related law complaints as § 658.411(d)(ii) currently requires for ES complaints involving an employer in another State. This situation comes up periodically, and the Department has advised SWAs to follow the same procedures for when an ES complaint is filed in a different State, which includes sending the complaint to the SWA in the other State. This addition is intended to make the employment-related law complaint regulations consistent with current SWA practices. Because the regulations currently do not address this scenario, the regulations currently are unclear as to whether ES offices and SWAs must immediately refer employment-related law complaints against out-of-State employers to enforcement agencies or if they should attempt to resolve MSFW-related complaints involving employers in other States. The Department believes that the most beneficial option is for these complaints to be referred to the SWA in the other State, consistent with how SWAs process complaints involving employers in other States. Additionally, the entity best situated to process a complaint is the SWA for the State where the employer is located, because that SWA has greater knowledge of applicable employment-related laws and may have other records for the employer that impact appropriate decision making. The proposed changes also specifically require the ES office or SWA receiving the complaint to ensure the Complaint/Referral Form is adequately completed before sending the Complaint/Referral Form and copies of any relevant documents to the SWA in the other State. This language is designed to correct issues the Department has observed, where SWAs have informed SWAs in other States of complaint information but have not completed the Complaint/Referral Form or provided copies of any relevant documents. As a result, the other State SWAs were not able to contact the complainant or identify other critical information to act on the complaint, including material facts and allegations and the identity of the employer respondent. The proposed changes explicitly require the referring SWA to provide this necessary documentation so that the SWA receiving the complaint can address it appropriately.

The Department proposes to revise the heading and text of § 658.411(c) to clarify that all complaints under this subpart alleging unlawful discrimination or reprisal for protected activity should be handled in accordance with the procedures in this paragraph. In addition, the Department proposes to modify the procedures in this paragraph to require an ES office or SWA in receipt of such a complaint to log and immediately refer it to the State-level E.O. Officer. The process set forth in the existing regulations has proven to be confusing, because it identifies multiple officials to which nondiscrimination complaints should be referred and requires ES staff to determine which nondiscrimination laws are at issue. The revisions that the Department proposes here would simplify the process by requiring ES offices and SWAs to treat all nondiscrimination complaints that they receive under this subpart in the same manner. Specifically, under the

procedures for ES offices and SWAs (and not ETA regional offices).

Section 658.422 Processing of Employment-Related Law Complaints by the Regional Administrator

The Department proposes several revisions to § 658.422. First, the Department proposes to revise paragraph (a) to clarify that this section applies to all "employment-related law" complaints submitted directly to the ETA Regional Administrator or their representative. Second, the Department proposes to add a sentence to the end of paragraphs (b) and (c) to conform with the proposed revisions to § 658.420(b)(1). In particular, proposed paragraphs (b) and (c) each include an additional sentence to specify that when a complaint described in the paragraph alleges a violation of nondiscrimination laws or reprisal for protected activity, then it must be referred to the appropriate State-level E.O. Officer in accordance with § 658.420(b)(1).

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

Section 658.501 Basis for Discontinuation of Services

The Department proposes to amend § 658.501(a)(4) to add that SWA officials must initiate procedures for discontinuation of services to employers who are currently debarred or disqualified from participating in one of the Department's foreign labor certification programs. This revision corresponds to the proposed addition in § 653.501(a)(4), which would require ES staff to consult the Department's OFLC and Wage and Hour Division debarment lists prior to placing a job order into intrastate or interstate clearance, and to initiate discontinuation of services pursuant to this subpart if the employer requesting access to the clearance system is currently debarred or disqualified from participating in one of the Department's foreign labor certification programs. As explained in the section of this preamble addressing the proposed addition in § 653.501(a)(4), the Department is proposing this requirement to protect workers that are referred to employers through the ARS by ensuring that the ARS is not used to place a worker with an employer that has failed to comply with its obligation(s) as an employer of foreign workers.

The Department proposes to amend § 658.501(b) to correct an error in the existing regulatory text, which improperly references § 658.501, instead of § 658.502. Specifically, the regulatory text currently provides that SWA officials may discontinue services immediately if, in the judgment of the State Administrator, exhaustion of the administrative procedures set forth in § 658.501(a)(1) through (7) would cause substantial harm to a significant number of workers. The reference to paragraphs (a)(1) through (7) of § 685.501 appears to have been made in error, because § 658.501 does not set forth administrative procedures but rather the bases for discontinuation of services. Section 658.502, by contrast, sets forth the process by which SWAs must generally follow when discontinuing the provision of ES services. Accordingly, the Department proposes to replace the cross reference in 658.501(b) to 658.501(a)(1) through (7) with a cross reference to § 658.502, which will clarify that the administrative procedures that must otherwise be exhausted are set forth in § 658.502. This revision is necessary to clarify when a SWA official may discontinue services immediately.

The Department proposes to amend § 658.501(c) to correct an error in the regulatory text like the cross-referencing error in § 658.501(b). This section incorrectly references the bases on which a SWA may discontinue services to an employer in § 658.501(a)(1) through (8), instead of the procedures to discontinue such services set forth in § 658.502. Accordingly, the Department proposes to replace the reference to § 658.501(a)(1) through (8) with a cross reference to § 658.502.

The Department proposes to amend § 658.502(a)(4) to add that where a SWA's decision to discontinue services is based on the fact that the employer is currently debarred or disqualified from participating in one of the Department's foreign labor certification programs, the SWA must specify the time period for which the employer is debarred or disqualified. The proposed revision would further specify that the employer must be notified that all ES services will be terminated in 20 working days unless, within that time, the employer provides adequate evidence that the Department's disbarment or disqualification is no longer in effect or will terminate before the employer's anticipated date of need. Similar to the proposed revision to § 658.501(a)(4) discussed previously, the revisions proposed here correspond to the proposed addition in § 653.501(a)(4), which would require ES staff to consult the Department's OFLC and Wage and Hour Division debarment lists prior to placing a job order into intrastate or interstate clearance, and to initiate discontinuation of services pursuant to this subpart if the employer requesting access to the clearance system is currently debarred or disqualified from participating in one of the Department's foreign labor certification programs.

3. Subpart G—Review and Assessment of State Workforce Agency Compliance With Employment Service Regulations

Section 658.602 Employment and Training Administration National Office Responsibility

The Department proposes to amend § 658.602(g) to refer to § 653.108(a) instead of § 653.108(b). This is necessary to correct the inaccurate citation to § 653.108(b), which does not contain self-monitoring requirements. This proposed revision will clarify the location of self-monitoring requirements for readers.

The Department proposes to amend the introductory text of § 658.602(n) to replace the phrase "in the course of" with the word "during" for purposes of clarity.

The Department proposes to amend § 658.602(n)(1) to replace the phrase "outreach workers" with "outreach staff" because *outreach staff* is a defined term in § 651.10. Using the defined term will make the regulatory text more clear regarding which staff it references.

The Department proposes to amend § 658.602(n)(2) to remove the word "random" from the requirement for the NMA to participate in field check(s) of migrant camps or work site(s) where MSFWs have been placed. The proposed revision would clarify that the selection of migrant camps or work sites for which the NMA will participate in field checks does not need to be random, and may be targeted, where necessary, to respond to known or suspected compliance issues, thereby improving MSFW worker protection.

The Department proposes to amend § 658.602(o) to remove "(8)" from the reference to paragraph (f)(8) as a technical edit. Paragraph (f) of § 658.602 does not have a subordinate paragraph (8).

Section 658.603 Employment and Training Administration Regional Office Responsibility

The Department proposes to amend § 658.603(d)(7) to replace uses of "job order" with "clearance order." This change will make the provision conform with the proposed changes to the definition of *clearance order* in § 651.10. The change will also clarify that field checks should only be conducted on orders that have been cleared for intrastate and/or interstate recruitment, not including local job

ES labor exchange services in the four States that currently have non-State-merit staff providing ES labor exchange services: Colorado, Delaware, Massachusetts, and Michigan.

The benefits of the merit-staffing provisions in the proposed rule would include the ability for States to shift staff resources during future surges in UI claims when time-limited legislative flexibilities in the delivery of UI services are not available. The Department also is proposing amendments to the regulations that govern labor exchange services provided to MSFWs, the Monitor Advocate System, and the Complaint System. These amendments would remove redundancies, clarify requirements, and improve equity and inclusion for MSFWs in the ES system.

1. Costs

The Department anticipates that the proposed rule would result in costs related to rule familiarization, staff transition, and information collection.

a. Rule Familiarization Costs

Regulatory familiarization costs represent direct costs to States associated with reviewing the new regulation. The Department's analysis [14] assumes that the changes introduced by the rule would be reviewed by Human Resources Managers (SOC code 11–3121) employed by SWAs. The Department anticipates that it would take a Human Resources Manager an average of 1 hour to review the rule.

The U.S. Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) data show that the median hourly wage of State government Human Resources Managers is $43.75.[15] The Department used a 61 percent benefits rate [16] and a 17 percent overhead rate,[17] so the fully loaded hourly wage is $77.88 [= $43.75 + ($43.75 × 61%) + ($43.75 × 17%)].

[14] This analysis uses codes from the Standard Occupational Classification (SOC) system and the North American Industry Classification System (NAICS).

[15] BLS, "Occupational Employment and Wage Statistics, National Industry-Specific Occupational Employment and Wage Estimates, NAICS 999200," SOC Code 11–3121, May 2020, *https://www.bls.gov/oes/current/naics4_999200.htm* (last visited Aug. 2, 2021).

[16] BLS, "National Compensation Survey, Employer Costs for Employee Compensation," *https://www.bls.gov/ncs/data.htm* (last visited Aug. 2, 2021). For State and local government workers, wages and salaries averaged $32.72 per hour worked in 2020, while benefit costs averaged $20.09, which is a benefits rate of 61 percent.

[17] Cody Rice, U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002, *https://www.regulations.gov/document/EPA-HQ-OPPT-2014-0650-0005* (last visited Aug. 2, 2021).

Therefore, the one-time rule familiarization cost for all 57 jurisdictions (the 50 States, the District of Columbia, Puerto Rico, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, the Republic of Palau, and the U.S. Virgin Islands) is estimated to be $4,439 (= $77.88 × 1 hour × 57 jurisdictions).

b. Transition Costs

Four States would potentially incur one-time costs associated with the proposal to require all ES labor exchanges services to be provided by State merit staff. Colorado, Delaware, Massachusetts, and Michigan currently have some non-State-merit staff who provide labor exchange services, and these States may incur transition expenses, such as recruitment, training, or technology costs, as well as costs related to the State budgeting process. Moreover, job seekers and employers may experience nonquantifiable transition costs associated with service interruptions during the time period in which the State is making staff changes to comply with the provisions of this proposed rule.

The Department used a survey to ask the four States to estimate these potential expenses. One State anticipates that transition expenses would be minimal unless one of the local one-stop centers goes through an "upheaval" due to the proposed change. The State explained that the SWA provides employee training, and this would not change under the provisions in the proposed rule. Moreover, technology costs have always been shared costs, and recruitment is conducted by local management teams on an on-going basis. The State noted, however, that there would be significant disruptions in the workforce areas that use non-State merit-staffed employees to provide ES labor exchange services; those areas constitute 25 percent of the State's workforce areas. Hiring State merit-staffed employees in those areas would take months; moreover, the State would need to add State supervision and engage in union negotiations.

A second State estimated that the transition costs related to training and technology would be minimal. However, obtaining additional FTE State merit-staffed employees would generate nonquantifiable costs. The State explained that the process would entail requesting and justifying new positions, preparing and submitting a budget request, posting the positions, interviewing candidates, checking references, and onboarding new hires. The State estimated that the process would take at least 12 to 18 months.

The Department is not able to quantify the transition costs to the four States due to the lack of data. The Department is seeking additional input from the four States on their potential transition expenses such as recruitment, training, or technology costs, as well as costs related to the State budgeting process. The Department is also seeking input on the potential costs associated with service interruptions during the time period in which the State is making staff changes to comply with the provisions of this proposed rule.

c. Information Collection Costs

IC costs represent direct costs to States associated with the proposed information collection requests (ICRs) under this proposed rule.

The first ICR pertains to the proposed requirement that SWA Wagner-Peyser programs document Participant Individual Record Layout (PIRL) data element 413 for all reportable individuals. The Department assumes that this provision would entail three costs: (1) Computer programming; (2) additional time for ES staff to help individuals register for services, and (3) additional time for SMAs to check the accuracy of the MSFW coding. SWAs would need to reprogram their ES registration systems to ask MSFW status (PIRL 413) questions earlier in the registration process. The Department assumes reprogramming would cost an average of $4,000 per jurisdiction,[18] so the total one-time cost for reprogramming is estimated at $228,000 (= $4,000 × 57 jurisdictions). For the additional annual burden on ES staff, the Department anticipates that it would take an ES staff member an average of 2 minutes per reportable individual to ask the additional MSFW questions and record the answers. To estimate this cost, the Department used the median hourly wage of $26.85 for educational, guidance, and career counselors and advisors (SOC code 21–1012) employed by State governments (NAICS 999200).[19] The Department used a 61-percent benefits rate and a 17-percent overhead rate, so the fully loaded hourly wage is $47.79 [= $26.85 + ($26.85 × 61%) + ($26.85 × 17%)]. Assuming ES staff assist in registering half of the 10.2 million reportable individuals (based on the average for Program Years 2018, 2019, and 2020), the annual cost is

[18] Anecdotal evidence from States indicates a range of $2,000 to $6,000 to add one yes/no question to an existing data collection.

[19] BLS, "Occupational Employment and Wage Statistics, National Industry-Specific Occupational Employment and Wage Estimates, NAICS 999200, SOC 21–1012," *https://www.bls.gov/oes/current/naics4_999200.htm.*

managers (SOC code 11–9151), and 10 percent (or 3 FTEs) are office and administrative support workers (SOC code 43–0000). To calculate the change in wage costs for Massachusetts, the Department used OEWS data on median annual wages in Massachusetts for the three occupations identified previously. The median wage rates for private sector workers are not available by State and occupation; therefore, the Department used the median wage rates for all sectors in Massachusetts as a proxy because private sector jobs constitute 85 percent of total employment.[23] The median annual wage for educational, guidance, and career counselors and advisors in Massachusetts is $69,722, the median for social and community service managers is $67,309, and the median for office and administrative support workers is $46,342.[24]

Massachusetts reported that the median annual salary for State merit-staffed ES services representatives and State merit-staffed job specialists is $59,689, the median for State merit-staffed program managers is $75,880, and the median for State merit-staffed office support specialists is $47,176.[25] The Department adjusted the annual wages to account for fringe benefits (61 percent) and overhead costs (17 percent). Then, the Department calculated the difference between the fully loaded wage rates of the 30 current non-State-merit staff and 30 potential State merit staff. The decrease in wage costs for Massachusetts is estimated at $378,387 per year.[26]

Michigan reported that it currently has approximately 192 FTE non-State-merit staff. A wide range of occupational titles for non-State-merit staff providing ES services was reported; however, most of the staff members are program managers, employment and job specialists (or other professional occupations), or office and administrative support workers. Based on the occupational distribution of the State merit staff reported by Michigan, the Department assumes that 7 percent (or 14.3 FTEs) of the 192 FTE non-State-merit staff are program managers, 83 percent (or 159.3 FTEs) are employment and job specialists, and 9 percent (or 18.1 FTEs) are office and administrative support workers. Michigan reported that the median annual salary plus benefits and other associated employment costs for non-State, merit-staffed program managers is $86,494, the median for employment and job specialists (or other professional occupations) is $50,955, and the median for non-State, merit-staffed office support specialists is $43,602.

Michigan also reported that the median annual salary plus benefits and other associated employment costs for State merit-staffed State administrative managers is $189,639, the median for State merit-staffed migrant service workers is $100,894, and the median for State merit-staffed office secretaries is $102,135.[27]

The Department did not adjust the annual wages to account for fringe benefits or overhead costs because the wages reported by Michigan already included benefits and other employment costs. The Department calculated the difference between the fully loaded wage rates of the 192 current non-State-merit staff and 192 potential State merit staff. The wage cost increase for Michigan is estimated at $10,489,704 per year.[28]

In total, the proposed rule is expected to have annual transfer payments of $10,109,091 for Delaware, Massachusetts, and Michigan (= −$2,225 − $378,387 + $10,489,704). The Department continues to seek data from Colorado and intends to include in the final rule an analysis of any pertinent data received.

This proposed rule may impact the demographic composition of the staff delivering ES labor exchange services. State government employees are more likely than private sector employees to be women or black. Current Population Survey data show that 60 percent of State government employees in 2020 were women compared to 46 percent of private sector employees. With respect to race, 75 percent of State government employees in 2020 were white compared to 78 percent of employees in the private sector, 15 percent of State government employees were black compared to 12 percent of employees in the private sector, and 6 percent of State government employees were Asian compared to 7 percent of employees in the private sector. As far as the ethnic composition of these two labor forces, 12 percent of State government employees in 2020 were Hispanic compared to 18 percent of employees in the private sector.[29]

3. Nonquantifiable Benefits

The Department is proposing to reinstate the longstanding requirement that States use only State merit staff to deliver ES labor exchange services, with no exceptions. The COVID–19 pandemic placed an enormous burden on State UI programs due to the significant increase in UI claims from the massive number of unemployed workers. The number of continued claims rose from fewer than 2 million before the pandemic to more than 20 million in the week ended May 9, 2020. It became evident to the Department that, during a crisis that displaces a large number of workers in a short time, it could become imperative for States to shift staff resources from ES services to support urgent UI services. Being able to do so, however, would require that ES labor exchange services be provided only by State merit staff because UI services are required to be delivered solely by State merit staff pursuant to sec. 303(a)(1) of the Social Security Act. Requiring labor exchange services to be provided by State merit staff will help ensure that States have the flexibility to shift staff resources during future surges in UI claims where time-limited legislative flexibilities to UI services are not available.

The benefits of requiring States to use only State merit staff to deliver ES labor exchange services are not entirely quantifiable. Yet, in addition to States benefiting from the availability of State merit staff to assist with a surge in UI services, benefits also accrue to individuals accessing labor exchange services delivered by State merit personnel. State merit-staffed employees are accountable only to their State government, are hired through objective, transparent standards, and must deliver

[23] In May 2020, total employment was 139,099,570 (*https://www.bls.gov/oes/current/oes_nat.htm*), with 117,718,070 jobs (85 percent) in the private sector (*https://www.bls.gov/oes/current/000001.htm*) and 21,381,500 jobs (15 percent) in the government sector (*https://www.bls.gov/oes/current/999001.htm*).

[24] BLS, "OEWS, May 2020 State Occupational Employment and Wage Estimates: Massachusetts." *https://www.bls.gov/oes/current/oes_ma.htm* (last visited Aug. 2, 2021).

[25] The Department assumes that Massachusetts would replace non-State, merit-staffed educational, guidance, and career counselors and advisors with State merit-staffed ES services representatives or job specialists; non-State, merit-staffed social and community service managers with State merit-staffed program managers; and non-State, merit-staffed office and administrative support workers with State merit-staffed office support specialists.

[26] ($59,689 − $69,722) × 24 × 1.78 + ($75,880 − $67,309) × 3 × 1.78 + ($47,176 − $46,342) × 3 × 1.78 = −$378,387.

[27] The Department assumes that Michigan will replace non-State merit-staffed program managers with State merit-staffed employees paid at a rate similar to State administrative managers; non-State merit-staffed employment and job specialists (and other professional occupations) with State merit-staffed employees paid at a rate similar to migrant service workers; and non-State merit-staffed office and office support specialists with State merit-staffed employees paid at a rate similar to office secretaries. In categorizing each non-State employee, the Department used the job title and compensation rate provided by the State.

[28] ($189,639 − $86,494) × 14.3 + ($100,394 − $50,955) × 159.3 + ($102,135 − $43,602) × 18.1 = $10,489,704.

[29] BLS, Current Population Survey, unpublished tables.

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, and small governmental jurisdictions. The Department must determine whether the proposed rule would impose a significant economic impact on a substantial number of such small entities. The Department concludes that this proposed rule does not regulate any small entities directly, so any regulatory effect on small entities will be indirect. Accordingly, the Department has determined this proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

C. Paperwork Reduction Act of 1995

The purposes of the 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 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 four ICRs to OMB in concert with the publishing of this proposed rule. This provides the public the opportunity to submit comments on the ICs, 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 *https://www.regulations.gov*. See the **ADDRESSES** section of this proposed rule for more information about submitting comments.

The ICs in this proposed rule are summarized as follows.

Agency: DOL–ETA.

Title of Collection: DOL–Only Performance Accountability, Information, and Reporting System for Reportable Individuals.

Type of Review: New Collection.

OMB Control Number: 1205–0NEW.

Description: The Department is requesting a new OMB control number for this collection. The request for a new control number is for administrative reasons only. The proposed changes to §§ 653.103(a) and 653.109(a)(10) in this rulemaking described subsequently will eventually be included in OMB Control Number 1205–0521. The Department is anticipating that a few different upcoming rulemakings will impact the ICs contained in OMB Control Number 1205–0521. Once all outstanding actions are final and complete, the Department intends to submit a nonmaterial change request to transfer the burden from the new ICR to the existing OMB control number for the DOL–Only Performance Accountability, Information, and Reporting System (1205–0521) and proceed to discontinue the use of the new control number.

This NPRM proposes to add a requirement that SWA Wagner-Peyser programs must document PIRL data element 413 for reportable individuals. The DOL-only PIRL ETA 9172 already requires Wagner-Peyser programs to document data element 413 for participants. This proposed change will help ES staff identify all individuals who engage in ES services who are MSFWs and the degree of their engagement, so that SWAs, SMAs, and the Department may better assess whether all Wagner-Peyser services are provided to MSFWs on an equitable basis. The NPRM also proposes changes to the definitions of migrant farmworker and seasonal farmworker. The Department plans to submit a new ICR that will update ETA 9172 to indicate that Wagner-Peyser programs must document and keep records of PIRL data element 413 for reportable individuals and align the definitions of migrant farmworker and seasonal farmworker with proposed revisions at § 651.10.

Affected Public: State Governments.

Obligation to Respond: Required to Obtain or Retain Benefits.

Estimated Total Annual Respondents: 22,687,331.

Estimated Total Annual Responses: 46,167,618.

Estimated Total Annual Burden Hours: 10,610,629,971.

Estimated Total Annual Other Burden Costs: $9,719,287.

Regulations Sections: §§ 653.103(a), 653.109(a)(10).

Agency: DOL–ETA.

Title of Collection: Agricultural Recruitment System Forms Affecting Migrant and Seasonal Farmworkers.

Type of Review: New Collection.

OMB Control Number: 1205–0NEW.

Description: This NPRM proposes to add a new IC to address the requirement for SWAs to provide certain workers with checklists summarizing wages, working conditions, and other material specifications. Specifically, pursuant to proposed 20 CFR 653.501(d)(6), ES staff would be required to provide farmworkers with "checklists showing wage payment schedules, working conditions, and other material specifications of the clearance order." In addition, pursuant to proposed 20 CFR 653.501(d)(10), SWA applicant-holding offices must provide workers referred on clearance orders with a checklist summarizing wages, working conditions and other material specifications in the clearance order. The Department also proposes that this ICR include a new Agricultural Clearance Order Form, ETA Form 790B, which will be attached to the Agricultural Clearance Order Form, ETA Form 790 (see OMB Control Number 1205–0466). The Department previously proposed the ETA Form 790B through OMB Control Number 1205–0134, which is an expired ICR for which a submission requesting reinstatement is currently pending at OMB. The Department proposes to withdraw OMB Control Number 1205–0134 and to instead attach ETA Form 790B to this ICR because the subjects are related. ETA Form 790B is only used for employers who submit clearance orders requesting U.S. workers for temporary agricultural jobs, which are not attached to requests for foreign workers through the H–2A visa program. ETA is including the estimated burden to the public for the completion of ETA Form 790 in addition to the estimated burden for the ETA Form 790B, because employers would fill out both forms.

Affected Public: State Governments, Private Sector: Business or other for-

further the policies of the Unfunded Mandates Reform Act of 1995 (UMRA). Further, agencies must strictly adhere to constitutional principles. Agencies must closely examine the constitutional and statutory authority supporting any action that would limit the policymaking 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 proposed rule in light of these requirements and has concluded that it is properly premised on the statutory authority given to the Secretary to set standards under the Wagner-Peyser Act.

Accordingly, the Department has reviewed this proposed rule and has concluded that the rulemaking has no substantial direct effects on States, the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government as described by E.O. 13132. Therefore, the Department has concluded that this proposed rule does not have a sufficient Federalism implication to require further agency action or analysis.

E. Unfunded Mandates Reform Act of 1995

Title II of UMRA, Public Law 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. This proposed rule, if finalized, does not exceed the $100 million expenditure in any one year when adjusted for inflation. Therefore, the requirements of title II of UMRA do not apply, and the Department has not prepared a statement under UMRA.

F. Executive Order 13175 (Indian Tribal Governments)

The Department has reviewed this proposed rule under the terms of E.O. 13175 and DOL's Tribal Consultation Policy and has concluded that the changes to regulatory text would not have tribal implications. 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 Tribal Governments.

G. Plain Language

E.O. 12866, E.O. 13563, and the Presidential Memorandum of June 1, 1998 (Plain Language in Government Writing), direct executive departments and agencies to use plain language in all rulemaking documents published in the **Federal Register**. The goal is to make the government more responsive, accessible, and understandable in its communications with the public. Accordingly, the Department drafted this NPRM in plain language.

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 discussed in the preamble, the Department of Labor proposes to amend 20 CFR parts 651, 652, 653, and 658, as follows:

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

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

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

■ 2. Amend § 651.10 by:
■ a. Revising the introductory text;
■ b. Adding in alphabetical order a definition for "Apparent violation";
■ c. Revising the definitions of "Applicant holding office," "Bona fide occupational qualification (BFOQ)," "Career services," "Clearance order," "Complaint System Representative," "Decertification," "Employment and Training Administration (ETA)," "Employment Service (ES) office," "Employment Service (ES) Office Manager," "Employment Service (ES) staff," "Field checks," "Field visits," "Hearing Officer," "Interstate clearance order," "Intrastate clearance order," and "Migrant farmworker";
■ d. Removing the definition of "Migrant food processing worker";
■ e. Revising the definitions of "Occupational Information Network (O*NET)," "O*NET–SOC," "Outreach staff," "Participant," "Placement," "Reportable individual," "Respondent," "Seasonal farmworker," "Significant MSFW one-stop centers," and "Significant MSFW States";
■ f. Removing the definitions of "Significant multilingual MSFW one-stop centers" and "State Workforce Agency (SWA) official"; and
■ g. Revising the definition of "Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES)."

The addition and revisions read as follows:

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

In addition to the definitions set forth in sec. 3 of the Workforce Innovation and Opportunity Act (WIOA), codified at 29 U.S.C. 3101 *et seq.*, the following definitions apply to the regulations in parts 652, 653, 654, and 658 of this chapter:

* * * * *

Apparent violation means a suspected violation of employment-related laws or employment service (ES) regulations, as set forth in § 658.419 of this chapter.

Applicant holding office means an ES office that is in receipt of a clearance order and has access to U.S. workers who may be willing and available to perform farmwork on less than year-round basis.

* * * * *

Bona fide occupational qualification (BFOQ) means that an employment decision or request based on age, sex, national origin, or religion is based on a finding that such characteristic is necessary to the individual's ability to perform the job in question. Since a BFOQ is an exception to the general prohibition against discrimination on the basis of age, sex, national origin, or religion, it must be interpreted narrowly in accordance with the Equal Employment Opportunity Commission regulations set forth at 29 CFR parts 1604, 1605, and 1627.

Career services means the services described in sec. 134(c)(2) of WIOA and § 678.430 of this chapter.

Clearance order means a job order that is processed through the clearance system under the Agricultural Recruitment System (ARS) at part 653, subpart F, of this chapter.

* * * * *

Complaint System Representative means a trained ES staff individual who is responsible for processing complaints.

exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. Workers who move from one seasonal activity to another, while employed in farmwork, are employed on a seasonal basis even though they may continue to be employed during a major portion of the year. Workers are employed on a temporary basis where they are employed for a limited time only or their performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.

* * * * *

Significant MSFW one-stop centers are those designated by the Department and include those ES offices where MSFWs account for 10 percent or more of annual participants or reportable individuals in ES and those local ES offices that the administrator determines must be included due to special circumstances such as an estimated large number of MSFWs in the service area. In no event may the number of significant MSFW one-stop centers be less than 100 centers on a nationwide basis.

Significant MSFW States are those States designated by the Department and must include the 20 States with the highest estimated number of MSFWs.

* * * * *

Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES) means the national system of public ES offices described under the Wagner-Peyser Act. ES services are delivered through a nationwide system of one-stop centers, managed by SWAs and the various local offices of the SWAs, and funded by the United States Department of Labor.

* * * * *

PART 652—ESTABLISHMENT AND FUNCTIONING OF STATE EMPLOYMENT SERVICE

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

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

■ 4. Amend § 652.8 by revising paragraphs (h), introductory text of paragraph (j), (j)(2), and (3) to read as follows:

§ 652.8 Administrative provisions.

* * * * *

(h) *Other violations.* Violations or alleged violations of the Wagner-Peyser Act, regulations, or grant terms and conditions except those pertaining to audits or discrimination must be determined and processed in accordance with part 658, subpart H, of this chapter.

* * * * *

(j) *Nondiscrimination requirements.* States must:

(1) * * *

(2) Assure that discriminatory job orders will not be accepted, except where the stated requirement is a bona fide occupational qualification (BFOQ). See, generally, 42 U.S.C. 2000e–(2)(e) and 29 CFR parts 1604, 1606, and 1625.

(3) Assure that ES offices are in compliance with the veteran referral and job listing requirements at 41 CFR 60–300.84.

* * * * *

■ 5. Revise the heading for Subpart C to read as follows:

Subpart C—Employment Service Services in a One-Stop Delivery System Environment

■ 6. Amend § 652.204 by revising the section heading and the first sentence to read as follows:

§ 652.204 Must funds authorized under 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 ES staff as applicable, and services for groups with special needs. * * *

■ 7. Amend § 652.205 by revising paragraph (b)(3) to read as follows:

§ 652.205 May funds authorized under the Wagner-Peyser Act be used to supplement funding for labor exchange programs authorized under separate legislation?

* * * * *

(b) * * *

(3) The activity provides services that are coordinated with ES services; and

* * * * *

■ 8. Amend § 652.207 by revising the section heading and paragraph (a) to read as follows:

§ 652.207 How does a State meet the requirement for universal access to Employment Service services?

(a) A State has discretion in how it meets the requirement for universal access to ES services. In exercising this discretion, a State must meet the Wagner-Peyser Act's requirements.

* * * * *

■ 9. Revise § 652.215 to read as follows:

§ 652.215 What staffing models must be used to deliver services in the Employment Service?

(a) *Staffing requirement.* The Secretary requires that the labor exchange services described in § 652.3 be provided by ES staff, as defined in part 651 of this chapter.

(b) *Effective date.* This section becomes effective [60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**].

(c) *Compliance date.* All obligations in this section become enforceable [18 MONTHS AFTER EFFECTIVE DATE OF THE FINAL RULE].

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

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

Authority: 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.

■ 11. Amend § 653.100 by revising paragraph (a) to read as follows:

§ 653.100 Purpose and scope of subpart.

(a) This subpart sets forth the principal regulations of the Wagner-Peyser Act Employment Service (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 and nondiscriminatory fashion. This includes ensuring MSFWs have access to these services in a way that meets their unique needs. MSFWs must receive services on a basis which is qualitatively equivalent and quantitatively proportionate to services provided to non-MSFWs.

* * * * *

■ 12. Revise § 653.101 to read as follows:

§ 653.101 Provision of services to migrant and seasonal farmworkers.

SWAs must ensure that ES staff at one-stop centers offer MSFWs the full range of career and supportive services, benefits and protections, and job and training referral services as are provided to non-MSFWs. SWAs must ensure ES staff at the one-stop centers tailor such ES services in a way that accounts for individual MSFW preferences, needs, skills, and the availability of job and training opportunities, so that MSFWs are reasonably able to participate in the ES.

■ 13. Amend § 653.102 by revising the third sentence and removing the fourth sentence to read as follows:

part-time outreach staff positions in the State and demonstrating that there is sufficient outreach staff to contact a majority of MSFWs in all the State's service areas annually;

(iv) Describe the activities planned for providing the full range of ES services to the agricultural community, including both MSFWs and agricultural employers, through the one-stop centers; and

(v) Include a description of how the SWA intends to provide ES staff in significant MSFW one-stop centers in accordance with § 653.111.

* * * * *

(4) The AOP must be submitted in accordance with paragraph (d)(1) of this section and planning guidance issued by the Department.

(5) The Annual Summaries required at § 653.108(u) must update the Department on the SWA's progress toward meeting the objectives set forth in the AOP.

* * * * *

■ 16. Revise § 653.108 to read as follows:

§ 653.108 State Workforce Agency and State Monitor Advocate responsibilities.

(a) State Administrators must ensure their SWAs monitor their own compliance with ES regulations in serving MSFWs on an ongoing basis. The State Administrator has overall responsibility for SWA self-monitoring. The State Administrator and ES staff must not retaliate against staff, including the SMA, for self-monitoring or raising any issues or concerns regarding noncompliance with the ES regulations.

(b) The State Administrator must appoint an SMA. 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 and put a strong emphasis on hiring persons:

(1) Who are from MSFW backgrounds; or

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

(3) Who have substantial work experience in farmworker activities.

(c) The SMA must be an individual who:

(1) Is a senior-level ES staff employee;

(2) Reports directly to the State Administrator or State Administrator's designee, such as a director or other appropriately titled official in the State Administrator's office, who has the authority to act on behalf of the State Administrator, except that if a designee is selected, they must not be the individual who has direct program oversight of the ES; and

(3) Has the knowledge, skills, and abilities necessary to fulfill the responsibilities as described in this subpart.

(d) The SMA must have sufficient authority, staff, resources, and access to top management to monitor compliance with the ES regulations. Staff assigned to the SMA are intended to help the SMA carry out the duties set forth in this section and must not perform work that conflicts with any of the SMA's monitoring duties, such as outreach responsibilities required by § 653.107, ARS processing under subpart F of this part, and complaint processing under subpart E of part 658. The number of ES staff positions assigned to the SMA 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.

(e) The SMA must devote full-time staffing to SMA functions. No State may dedicate less than full-time staffing for the SMA position, unless the Regional Administrator, with input from the Regional Monitor Advocate, provides written approval. Any State that proposes less than full-time dedication must demonstrate to the Regional Administrator and Regional Monitor Advocate that all SMA functions can be effectively performed with part-time staffing.

(f) All SMAs and their staff must attend training session(s) offered by the Regional Monitor Advocate(s) and National Monitor Advocate and their team and those necessary to maintain competency and enhance the SMA's understanding of the unique needs of farmworkers. Such trainings must include those identified by the SMA's Regional Monitor Advocate and may include those offered by the Occupational Safety and Health Administration, the Department's Wage and Hour Division, U.S. Equal Employment Opportunity Commission, the Immigrant and Employee Rights Section of the Department of Justice's Civil Rights Division, the Department's Civil Rights Center, and other organizations offering farmworker-related information.

(g) The SMA must provide any relevant documentation requested from the SWA by the Regional Monitor Advocate or the National Monitor Advocate.

(h) The SMA must:

(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. This includes:

(i) Monitoring compliance with § 653.111;

(ii) Monitoring the ES services that the SWA and one-stop centers provide to MSFWs to assess whether they are qualitatively equivalent and quantitatively proportionate to the services that the SWA and one-stop centers provide to non-MSFWs; and

(iii) Reviewing the appropriateness of informal resolution of complaints and apparent violations as documented in the complaint logs.

(2) Without delay, must advise the SWA and ES offices of problems, deficiencies, or improper practices in the delivery of services and protections afforded by these regulations and, if warranted, specify the corrective action(s) necessary to address these deficiencies. When the SMA finds corrective action(s) necessary, the ES Office Manager or other appropriate ES staff must develop a corrective action plan in accordance with the requirements identified at paragraph (h)(3)(v) of this section. The SMA also must advise the SWA on means to improve the delivery of services.

(3) Participate in on-site reviews of one-stop centers on a regular basis (regardless of whether or not they are designated significant MSFW one-stop centers) using the procedures set forth in paragraphs (h)(3)(i) through (vii) of this section.

(i) Before beginning an onsite review, the SMA or review staff must study:

(A) Program performance data;

(B) Reports of previous reviews;

(C) Corrective action plans developed as a result of previous reviews;

(D) Complaint logs, as required by the regulations under part 658 of this chapter, including logs documenting the informal resolution of complaints and apparent violations; and

(E) Complaints elevated from the office or concerning the office.

(ii) The SMA must ensure that the onsite review format, developed by ETA, is used as a guideline for onsite reviews.

(iii) Upon completion of an onsite monitoring review, the SMA must hold one or more wrap-up sessions with the ES Office Manager and staff to discuss any findings and offer initial recommendations and appropriate technical assistance.

(iv) After each review, the SMA must conduct an in-depth analysis of the review data. The conclusions, including findings and areas of concern and recommendations of the SMA, must be put in writing and must be sent directly

SMA identified in the delivery of services;

(ii) A summary of the actions taken by the SWA to resolve the problems, deficiencies, or improper practices described in its service delivery; and

(iii) A summary of any technical assistance the SMA provided for the SWA, ES offices, and outreach staff.

(5) A summary and analysis of the outreach efforts undertaken by all significant and non-significant MSFW ES offices, as well as the results of those efforts, and an analysis of whether the outreach levels and results were adequate.

(6) A summary of the State's actions taken under the Complaint System described in part 658, subpart E, of this chapter, identifying any challenges, complaint trends, findings from reviews of the Complaint System, trainings offered throughout the year, and steps taken to inform MSFWs and employers, and farmworker advocacy groups about the Complaint System.

(7) A summary of how the SMA is working with WIOA sec. 167 NFJP grantees, the State-level E.O. Officer, and other organizations serving farmworkers, employers, and employer organizations in the State, and an assurance that the SMA is meeting at least quarterly with these individuals and representatives of these organizations.

(8) A summary of the statistical and other MSFW-related data and reports gathered by SWAs and ES offices for the year, including an overview of the SMA's involvement in the SWA's reporting systems.

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

(10) A summary of activities related to the AOP and an explanation of whether those activities helped the State reach the objectives described in the AOP. At the end of the 4-year AOP cycle, the summary must include a synopsis of the SWA's achievements over the previous 4 years to accomplish the objectives set forth in the AOP, and a description of the objectives which were not achieved and the steps the SWA will take to address those deficiencies.

(11) For significant MSFW one-stop centers, a summary of the State's efforts to comply with § 653.111.

■ 17. Amend § 653.109 by:

■ a. Revising paragraph (b)(9);

■ b. Redesignating paragraph (b)(10) as paragraph (b)(11);

■ c. Adding a new paragraph (b)(10); and

■ d. Revising paragraphs (g), (h), and (h)(1).

The revision, redesignation, and additions read as follows:

§ 653.109 Data collection and performance accountability measures.

* * * * *

(b) * * *

(9) Agricultural clearance orders (including field checks), MSFW complaints and apparent violations, and monitoring activities;

(10) The number of reportable individuals and participants who are MSFWs; and

(11) Any other data required by the Department.

* * * * *

(g) Meet equity indicators that address ES controllable services and include, at a minimum, individuals referred to a job, receiving job development, and referred to supportive or career services.

(h) Meet minimum levels of service in significant MSFW States. That is, only significant MSFW States will be required to meet minimum levels of service to MSFWs. Minimum level of service indicators must include, at a minimum, individuals placed in a job, individuals placed long-term (150 days or more) in a non-agricultural job, a review of significant MSFW ES offices, field checks conducted, outreach contacts per quarter, and processing of complaints. The determination of the minimum service levels required of significant MSFW States must be based on the following:

(1) Past SWA performance in serving MSFWs, as reflected in on-site reviews and data collected under paragraph (b) of this section.

* * * * *

■ 18. Amend § 653.110 by revising paragraph (b) to read as follows:

§ 653.110 Disclosure of data.

* * * * *

(b) If a request for data held by a SWA is made to the ETA national or regional office, ETA must forward the request to the SWA for response.

* * * * *

■ 19. Amend § 653.111 by revising the section heading and paragraphs (a) and (b) to read as follows:

§ 653.111 State Workforce Agency staffing requirements for significant MSFW one-stop centers.

(a) The SWA must staff significant MSFW one-stop centers in a manner facilitating the delivery of ES services tailored to the unique needs of MSFWs. This includes recruiting qualified candidates who meet the criteria in § 653.107(a)(3).

(b) The SMA, Regional Monitor Advocate, or the National Monitor Advocate, as part of their 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.

* * * * *

■ 20. Amend § 653.501 by:

■ a. Revising the introductory text of paragraph (a) and paragraph (a)(1);

■ b. Adding paragraph (b)(4);

■ c. Revising paragraph (c)(3) introductory text; and

■ d. Revising the first sentence in the introductory text of paragraph (d)(1) and paragraphs (d)(3), (6), (10), and (11).

The revisions and additions read as follows:

§ 653.501 Requirements for processing clearance orders.

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

(1) The ES office and employer have attempted and have not been able to obtain sufficient workers within the local labor market area; or

* * * * *

(b) * * *

(4) Prior to placing a job order into intrastate or interstate clearance, ES staff must consult the Department's Office of Foreign Labor Certification and Wage and Hour Division debarment lists. If the employer requesting access to the clearance system is currently debarred or disqualified from participating in one of the Department's foreign labor certification programs, the SWA must initiate discontinuation of services pursuant to part 658, subpart F of this chapter.

(c) * * *

(3) SWAs must ensure that the employer makes the following assurances in the clearance order: * * *

* * * * *

(d) * * *

(1) The order-holding ES office must transmit an electronic copy of the approved clearance order to its SWA. * * *

* * * * *

(3) The approval process described in this paragraph does not apply to clearance orders that are attached to applications for foreign temporary agricultural workers pursuant to part 655, subpart B, of this chapter; such clearance orders must be sent to the processing center as directed by ETA in guidance. For noncriteria clearance orders (orders that are not attached to applications under part 655, subpart B, of this chapter), the ETA regional office must review and approve the order

complaint form prescribed or approved by the Department or submits complaint information which satisfies paragraph (a)(4) of this section. The Complaint/Referral Form must be used for all complaints, including complaints about unlawful discrimination, except as provided in paragraph (a)(4) of this section. The staff must offer to assist the complainant in filling out the form and submitting all necessary information and must do so if the complainant desires such assistance. If the complainant also represents several other complainants, all such complainants must be named. The complainant, or their representative, must sign the completed form in writing or electronically. The identity of the complainant(s) and any persons who furnish information relating to, or assisting in, an investigation of a complaint must be kept confidential to the maximum extent possible, consistent with applicable law and a fair determination of the complaint. A copy of the completed complaint submission must be given to the complainant(s), and the complaint form must be given to the appropriate Complaint System Representative described in § 658.410(g).

(4) Any complaint in a reasonable form (letter or email) which is signed by the complainant, or their representative, and includes sufficient information to initiate an investigation must be treated as if it were a properly completed Complaint/Referral Form filed in person. * * *

(b) * * *

(1) When a complaint is filed regarding an employment-related law with an ES office or a SWA, and paragraph (c) of this section does not apply, the office must determine if the complainant is an MSFW.

(i) If the complainant is a non-MSFW, the office must immediately refer the complainant to the appropriate enforcement agency, another public agency, a legal aid organization, and/or a consumer advocate organization, as appropriate, for assistance. Upon completing the referral, the local or State representative is not required to follow-up with the complainant.

(ii) * * *

(A) Take from the MSFW or their representative, in writing (hard copy or electronic), the complaint(s) describing the alleged violation(s) of the employment-related law(s); and

(B) Attempt to resolve the issue informally at the local level, except in cases where the complaint was submitted to the SWA and the Complaint System Representative determines that they must take immediate action or in cases where informal resolution at the local level would be detrimental to the complainant(s). In cases where informal resolution at the local level would be detrimental to the complainant(s), the Complaint System Representative must immediately refer the complaint to the appropriate enforcement agency. Concurrently, the Complaint System Representative must offer to refer the MSFW to other ES services should the MSFW be interested.

* * * * *

(D) If the ES office or SWA Complaint System Representative determines that the complaint must be referred to a State or Federal agency, they must refer the complaint immediately to the appropriate enforcement agency for prompt action.

(E) If the complaint was referred under paragraph (b)(1)(ii)(D) of this section, the representative must notify the complainant of the enforcement agency to which the complaint was referred.

(F) When a complaint alleges an employer in a different State from where the complaint is filed has violated an employment-related law:

(*1*) The ES office or SWA receiving the complaint must ensure the Complaint/Referral Form is adequately completed and then immediately send a copy of the Complaint/Referral Form and copies of any relevant documents to the SWA in the other State. Copies of the referral letter must be sent to the complainant, and copies of the complaint and referral letter must be sent to the ETA Regional Office(s) with jurisdiction over the transferring and receiving State agencies. All such copies must be sent via hard copy or electronic mail.

(*2*) The SWA receiving the complaint must process the complaint as if it had been initially filed with that SWA.

(*3*) The ETA Regional Office with jurisdiction over the receiving SWA must follow up with it to ensure the complaint is processed in accordance with these regulations.

* * * * *

(c) *Complaints alleging unlawful discrimination or reprisal for protected activity.* All complaints received under this subpart by an ES office or a SWA alleging unlawful discrimination or reprisal for protected activity in violation of nondiscrimination laws, such as those enforced by the Equal Employment Opportunity Commission (EEOC) or the Department of Labor's Civil Rights Center (CRC), or in violation of the Immigration and Nationality Act's anti-discrimination provision found at 8 U.S.C. 1324b, must be logged and immediately referred to the State-level E.O. Officer. The Complaint System Representative must notify the complainant of the referral in writing.

(d) * * *

(1) When an ES complaint is filed with an ES office or a SWA, and paragraph (c) of this section does not apply, the following procedures apply:

(i) When an ES complaint is filed against an employer, the proper office to process the complaint is the ES office serving the area in which the employer is located.

(ii) * * *

(A) The ES office or SWA receiving the complaint must ensure the Complaint/Referral Form is adequately completed, and then immediately send a copy of the Complaint/Referral Form and copies of any relevant documents to the SWA in the other State. Copies of the referral letter must be sent to the complainant, and copies of the complaint and referral letter must be sent to the ETA Regional Office(s) with jurisdiction over the transferring and receiving State agencies. All such copies must be sent via hard copy or electronic mail.

(B) The SWA receiving the complaint must process the complaint as if it had been initially filed with that SWA.

(C) The ETA regional office with jurisdiction over the receiving SWA must follow-up with it to ensure the complaint is processed in accordance with these regulations.

(D) If the complaint is against more than one SWA, the complaint must so clearly state. Additionally, the complaints must be processed as separate complaints and must be processed according to procedures in this paragraph (d).

(iii) When an ES complaint is filed against an ES office, the proper office to process the complaint is the ES office serving the area in which the alleged violation occurred.

(iv) When an ES complaint is filed against more than one ES offices and is in regard to an alleged agency-wide violation, the SWA representative or their designee must process the complaint.

* * * * *

(3) When a non-MSFW or their representative files a complaint regarding the ES regulations with a SWA, or when a non-MSFW complaint is referred from an ES office the following procedures apply:

* * * * *

(4)(i) When a MSFW or their representative files a complaint

§ 658.422 Processing of employment-related law complaints by the Regional Administrator.

(a) This section applies to all complaints submitted directly to the Regional Administrator or their representative.

(b) Each complaint filed by an MSFW alleging violation(s) of employment-related laws must be taken in writing, logged, and referred to the appropriate enforcement agency for prompt action. If such a complaint alleges a violation of nondiscrimination laws or reprisal for protected activity, it must be referred to the appropriate State-level E.O. Officer in accordance with § 658.420(b)(1).

(c) Each complaint submitted by a non-MSFW alleging violation(s) of employment-related laws must be logged and referred to the appropriate enforcement agency for prompt action. If such a complaint alleges a violation of nondiscrimination laws or reprisal for protected activity, it must be referred to the appropriate State-level E.O. Officer in accordance with § 658.420(b)(1).

* * * * *

■ 32. Amend § 658.424 by revising paragraph (d) to read as follows:

§ 658.424 Proceedings before the Office of Administrative Law Judges.

* * * * *

(d) The ALJ may decide to consolidate cases and conduct hearings on more than one complaint concurrently if they determine that the issues are related or that the complaints will be processed more expeditiously.

* * * * *

■ 33. Amend § 658.425 by revising paragraph (a)(1) to read as follows:

§ 658.425 Decision of Department of Labor Administrative Law Judge.

(a) * * *

(1) Rule that they lack jurisdiction over the case:

* * * * *

■ 34. Amend § 658.501 by revising paragraphs (a)(4), (b), and (c) to read as follows:

§ 658.501 Basis for discontinuation of services.

(a) * * *

(4) Are found by a final determination by an appropriate enforcement agency to have violated any employment-related laws and notification of this final determination has been provided to the Department or the SWA by that enforcement agency or are currently debarred or disqualified from participating in one of the Department's foreign labor certification programs;

* * * * *

(b) SWA officials may discontinue services immediately if, in the judgment of the State Administrator, exhaustion of the administrative procedures set forth in § 658.502 would cause substantial harm to a significant number of workers. In such instances, procedures at §§ 658.503 and 658.504 must be followed.

(c) If it comes to the attention of an ES office or a SWA that an employer participating in the ES may not have complied with the terms of its temporary labor certification, under, for example the H–2A and H–2B visa programs, SWA officials must engage in the procedures for discontinuation of services to employers pursuant to § 658.502 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.

* * * * *

■ 35. Amend § 658.502 by revising the introductory text of paragraphs (a)(1) through (3), (a)(4), introductory text of (a)(5) through (7), (a)(7)(i) and (iii), and (b) to read as follows:

§ 658.502 Notification to employers.

(a) * * *

(1) Where the decision is based on submittal and refusal to alter or to withdraw job orders containing specifications contrary to employment-related laws, the SWA must specify the date the order was submitted, the job order involved, the specifications contrary to employment-related laws and the laws involved. The SWA must notify the employer in writing that all ES services will be terminated in 20 working days unless the employer within that time: * * *

(2) Where the decision is based on the employer's submittal of an order and refusal to provide assurances that the job is in compliance with employment-related laws or to withdraw the order, the SWA must specify the date the order was submitted, the job order involved, and the assurances involved. The employer must be notified that all ES services will be terminated within 20 working days unless the employer within that time: * * *

(3) Where the decision is based on a finding that the employer has misrepresented the terms or conditions of employment specified on job orders or failed to comply fully with assurances made on job orders, the SWA must specify the basis for that determination. The employer must be notified that all ES services will be terminated in 20 working days unless the employer within that time: * * *

(4) Where the decision is based on a final determination by an enforcement agency or the employer is currently debarred or disqualified from participating in one of the Department's foreign labor certification programs, the SWA must specify the enforcement agency's findings of facts and conclusions of law and, if applicable, the time period for which the employer is debarred or disqualified from participating in one of the Department's foreign labor certification programs. The employer must be notified that all ES services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that the enforcement agency has reversed its ruling and that the employer did not violate employment-related laws; or

(ii) Provides adequate evidence that the Department's disbarment or disqualification is no longer in effect or will terminate before the employer's anticipated date of need; or

(iii) Provides adequate evidence that the appropriate fines have been paid and/or appropriate restitution has been made; and

(iv) Provides assurances that any policies, procedures, or conditions responsible for the violation have been corrected and the same or similar violations are not likely to occur in the future.

(5) Where the decision is based on a finding of a violation of ES regulations under § 658.411, the SWA must specify the finding. The employer must be notified that all ES services will be terminated in 20 working days unless the employer within that time: * * *

(6) Where the decision is based on an employer's failure to accept qualified workers referred through the clearance system, the SWA must specify the workers referred and not accepted. The employer must be notified that all ES services will be terminated in 20 working days unless the employer within that time: * * *

(7) Where the decision is based on lack of cooperation in the conduct of field checks, the SWA must specify the lack of cooperation. The employer must be notified that all ES services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that it did cooperate; or

* * * * *

(iii) Provides assurances that it will cooperate in future field checks in further activity; or

* * * * *

administering the Complaint System, and any other ES services as appropriate.

(3) Recommend to the Regional Administrator specific instructions for action by regional office staff to correct any ES-related systemic deficiencies. Prior to any ETA review of regional office operations concerning ES services to MSFWs, the NMA must provide to the Regional Administrator a brief summary of ES-related services to MSFWs in that region and their recommendations for incorporation in the regional review materials as the Regional Administrator and ETA reviewing organization deem appropriate.

* * * * *

■ 38. Amend § 658.603 by revising paragraphs (d)(7), (f)(1) through (3), (g), (i), introductory text of paragraph (k), (k)(7) and (8), (m), (n)(2) and (3), (o)(1), (p), (q), and (s) through (v) to read as follows:

§ 658.603 Employment and Training Administration regional office responsibility.

* * * * *

(d) * * *

(7) Unannounced field checks of a sample of agricultural work sites to which ES placements have been made through the clearance system to determine and document whether wages, hours, and working and housing conditions are as specified on the clearance order. If regional office staff find reason to believe that conditions vary from clearance order specifications, findings must be documented on the Complaint/Apparent Violation Referral Form and provided to the State Workforce Agency to be processed as an apparent violation under § 658.419.

* * * * *

(f) * * *

(1) Review the effective functioning of the SMAs in their region;

(2) Review the performance of SWAs in providing the full range of ES services to MSFWs;

(3) Take steps to resolve ES-related problems of MSFWs which come to their attention;

* * * * *

(g) The RMA must be appointed by the Regional Administrator after informing farmworker organizations and other organizations in the region with expertise concerning MSFWs of the opening and encouraging them to refer qualified applicants to apply through the Federal merit system. The RMA must have direct personal access to the Regional Administrator wherever they find it necessary. Among qualified candidates, individuals must be sought who meet the criteria used in the selection of the SMAs, as provided in § 653.108(b) of this chapter.

* * * * *

(i) The RMA must participate in training sessions including those offered by the National Office and those necessary to maintain competency and enhance their understanding of issues farmworkers face (including trainings offered by OSHA, WHD, EEOC, CRC, and other organizations offering farmworker-related information).

* * * * *

(k) At the ETA regional level, the RMA must have primary responsibility for ensuring SWA compliance with ES regulations as it pertains to services to MSFWs is monitored by the regional office. They must independently assess on a continuing basis the provision of ES services to MSFWs, seeking out and using: * * *

(7) Any other pertinent information which comes to their attention from any possible source.

(8) In addition, the RMA must consider their personal observations from visits to ES offices, agricultural work sites, and migrant camps.

* * * * *

(m) The Regional Administrator's quarterly report to the National Office must include the RMA's summary of their independent assessment as required in paragraph (f)(5) of this section. The fourth quarter summary must include an Annual Summary from the region. The summary also must include both a quantitative and a qualitative analysis of their reviews and must address all the matters with respect to which they have responsibilities under these regulations.

(n) * * *

(2) Is being impeded in fulfilling their duties; or

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

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

* * * * *

(p) The RMA must participate in the review and assessment activities required in this section and §§ 658.700 through 658.711. The RMA, an assistant, or another RMA must participate in National Office and regional office on-site statewide reviews of ES services to MSFWs in States in the region. The RMA must engage in the following activities in the course of participating in an on-site SWA review:

(1) Accompany selected outreach staff on their field visits;

(2) Participate in a field check of migrant camps or work sites where MSFWs have been placed on intrastate or interstate clearance orders;

(3) Contact local WIOA sec. 167 National Farmworker Jobs Program grantees or other farmworker organizations as part of the on-site review, and must discuss with representatives of these organizations perceived trends, and/or other relevant information concerning MSFWs in the area; and

(4) Meet with the SMA and discuss the full range of the ES services to MSFWs, including monitoring and the Complaint System.

(q) During the calendar quarter preceding the time of peak MSFW activity in each State, the RMA must meet with the SMA and must review in detail the State Workforce Agency's capability for providing the full range of services to MSFWs as required by ES regulations, during the upcoming harvest season. The RMA must offer technical assistance and recommend to the SWA and/or the Regional Administrator any changes in State policy or practice that the RMA finds necessary.

* * * * *

(s) The RMA must initiate and maintain regular and personal contacts, including informal contacts in addition to those specifically required by these regulations, with SMAs in the region. In addition, the RMA must have personal and regular contact with the NMA. The RMA also must establish routine and regular contacts with WIOA sec. 167 National Farmworker Jobs Program grantees, other farmworker organizations and agricultural employers and/or employer organizations in the RMA's region. The RMA must attend conferences or meetings of these groups wherever possible and must report to the Regional Administrator and the Regional Farm Labor Coordinated Enforcement

information.) In making a determination whether violations are "serious" or "continual," as required by paragraph (b)(1) of this section, the Assistant Secretary must consider: * * *

(c) If the Assistant Secretary denies a request for decertification, they must write a complete report documenting their findings and, if appropriate, instructing an alternate remedial action or actions be applied. Electronic copies of the report must be sent to the Regional Administrator. Notice of the Assistant Secretary's decision must be published promptly in the **Federal Register** and the report of the Assistant Secretary must be made available for public inspection and copying.

(d) If the Assistant Secretary decides decertification is appropriate, they must submit the case to the Secretary providing written explanation for their recommendation of decertification.

(e) Within 30 business days after receiving the Assistant Secretary's report, the Secretary must determine whether to decertify the SWA. The Secretary must grant the request for decertification unless they make one of the three findings set forth in paragraph (b) of this section. If the Secretary decides not to decertify, they must then instruct that remedial action be continued or that alternate actions be applied. The Secretary must write a report explaining their reasons for not decertifying the SWA and copies (hard copy and electronic) will be sent to the SWA. Notice of the Secretary's decision must be published promptly in the **Federal Register**, and the report of the Secretary must be made available for public inspection and copy.

(f) Where either the Assistant Secretary or the Secretary denies a request for decertification and orders further remedial action, the Regional Administrator must continue to monitor the SWA's compliance. If the SWA achieves compliance within the time established pursuant to paragraph (b) of this section, the Regional Administrator must terminate the remedial actions. If the SWA fails to achieve full compliance within that time period after the Secretary's decision not to decertify, the Regional Administrator must submit a report of their findings to the Assistant Secretary who must reconsider the request for decertification pursuant to the requirements of paragraph (b) of this section.

■ 43. Amend § 658.706 to read as follows:

§ 658.706 Notice of decertification.

If the Secretary decides to decertify a SWA, they must send a Notice of Decertification to the SWA stating the reasons for this action and providing a 10 business day period during which the SWA may request an administrative hearing in writing to the Secretary. The document must be published promptly in the **Federal Register**.

■ 44. Amend § 658.707 by revising paragraphs (a) and (b) to read as follows:

§ 658.707 Requests for hearings.

(a) Any SWA which received a Notice of Decertification under § 658.706 or a notice of disallowance under § 658.702(g) may request a hearing on the issue by filing a written request for hearing with the Secretary within 10 business days of receipt of the notice. Additionally, any SWA that has received a Notice of Remedial Action under § 658.704(c) may request a hearing by filing a written request with the Regional Administrator within 20 business days of the SWA's receipt of the notice. This request must state the reasons the SWA believes the basis of the decision to be wrong, and it must be signed by the State Administrator (electronic signatures may be accepted).

(b) When the Secretary or Regional Administrator receives a request for a hearing from a SWA, they must send copies of a file containing all materials and correspondence relevant to the case to the Assistant Secretary, the Regional Administrator, the Solicitor of Labor, and the Department of Labor Chief Administrative Law Judge. When the case involves violations of regulations governing services to MSFWs or the Complaint System, a copy must be sent to the NMA.

* * * * *

Angela Hanks,

Acting Assistant Secretary for Employment and Training, Labor.

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