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: Final rule.

SUMMARY: The U.S. Department of Labor (Department or DOL) is issuing a final rule that requires States to use State merit staff to provide Wagner-Peyser Act Employment Service (ES) services. In the notice of proposed rulemaking (NPRM), the Department proposed that this requirement would apply to all States. However, the Department recognizes three States that have been approved by the Department to administer ES services using alternative staffing models for decades and is allowing only these three States to continue using the alternative staffing models. The requirement to use State merit staff to provide all ES services applies to all other States, including those States that implemented staffing flexibility under the 2020 Final Rule. The Department additionally is revising the ES regulations to strengthen the provision of services to migrant or 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). States have 24 months to comply with this final rule.

DATES:

Effective Date: This final rule is effective January 23, 2024.

Compliance Date: All States will have 24 months from the effective date to comply with the requirements of this final rule. The compliance date of the final rule is January 22, 2026.

FOR FURTHER INFORMATION CONTACT: Kim Vitelli, Administrator, Office of Workforce Investment, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room C–4526, Washington, DC 20210, Telephone: (202) 693–3980 (voice) (this is not a toll-free number). For persons with a hearing or speech disability who need assistance to use the telephone system, please dial 711 to access *telecommunications relay services.*

SUPPLEMENTARY INFORMATION:

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I. Acronyms and Abbreviations

2020 Final Rule Wagner-Peyser Act Staffing Flexibility; Final Rule, 85 FR 592 (Jan. 6, 2020)
AJC(s) American Job Center(s) (also known as one-stop(s) or one-stop center(s))
AOP(s) Agricultural Outreach Plan(s)
ARS Agricultural Recruitment System
BFOQ bona fide occupational qualification
BLS U.S. Bureau of Labor Statistics
CARES Act Coronavirus Aid, Relief, and Economic Security Act
CFR Code of Federal Regulations
Complaint System Employment Service and Employment-Related Law Complaint System
COVID–19 coronavirus disease 2019
CRC DOL Civil Rights Center
CSRA Civil Service Reform Act
Department *or* DOL U.S. Department of Labor
EEOC Equal Employment Opportunity Commission
E.O. Executive Order
EO Officer(s) Equal Opportunity Officer(s)
ES Wagner-Peyser Act Employment Service
ETA Employment and Training Administration
FR **Federal Register**
FTE(s) full-time equivalent(s)
FY(s) Fiscal Year(s)
IC(s) information collection(s)
ICR(s) information collection request(s)
IPA Intergovernmental Personnel Act of 1970
IT information technology
LEP limited English proficiency
MOU(s) Memorandum/a of Understanding
MSFW(s) migrant or seasonal farmworker(s)
MSPA Migrant and Seasonal Agricultural Worker Protection Act
NAICS North American Industry Classification System
NFJP National Farmworker Jobs Program
NMA National Monitor Advocate
NPRM *or* proposed rule notice of proposed rulemaking
O*NET Occupational Information Network
OALJ Office of Administrative Law Judges
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
OWI Office of Workforce Investment
PIRL Participant Individual Record Layout
PRA Paperwork Reduction Act of 1995
Pub. L. Public Law
PY(s) Program Year(s)
QCEW Quarterly Census of Employment and Wages
RA(s) Regional Administrator(s)
RESEA Reemployment Services and Eligibility Assessment
RFA Regulatory Flexibility Act
RIN Regulation Identifier Number
RMA(s) Regional Monitor Advocate(s)
Secretary Secretary of Labor
SMA(s) State Monitor Advocate(s)
SNAP Supplemental Nutrition Assistance Program
SOC Standard Occupational Classification
SSA Social Security Act
Stat. United States Statutes at Large
SWA(s) State Workforce Agency/ies
TAA Trade Adjustment Assistance
TANF Temporary Assistance to Needy Families
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 of 1998

WIOA Workforce Innovation and Opportunity Act

II. Executive Summary

The Department is amending its regulations regarding Wagner-Peyser Act staffing to require that States use State merit staff to provide ES services, except three States—Colorado, Massachusetts, and Michigan—that have longstanding reliance interests in using alternative staffing models. The final rule requires these three States to participate in rigorous multistate evaluation activities to be conducted by the Department to determine whether such models are empirically supported. This evaluation will include review of services delivered by States that use State merit-staffing, as necessary.

In the NPRM, the Department proposed to require that all States use State merit staff to deliver ES services. The Department determined that it is vital for the ES to be administered so that States deliver services effectively and equitably to unemployment insurance (UI) beneficiaries and other ES customers, including services provided to MSFWs. In the NPRM, the Department reasoned that the demands placed on State UI systems by the economic impact of the coronavirus disease 2019 (COVID–19) pandemic highlighted the necessity of States to be able to rely on eligible ES State merit staff to be deployed to assist with UI activities that must be performed by State merit staff.[1] The Department noted that States also have experienced the benefits of deploying ES State merit staff to assist with UI activities in response to recessions, the onset of natural disasters, and mass regional layoffs. The Department also noted that requiring States to utilize State merit staff to deliver ES services would help to ensure that ES services are delivered by qualified, nonpartisan personnel. These professionals would be required to meet objective professional qualifications, trained to assure high-quality performance, and expected to maintain certain transparent standards of performance. States would be required to assure that employees are treated fairly and protected against partisan political coercion. This final rule adopts the proposal that States are required to use State merit staff to deliver ES services, with one change explained in the following paragraph.

While the Department maintains its position that aligning ES and UI promotes efficiency and uniformity in the operation of the ES, the Department also recognizes that three States—Colorado, Massachusetts, and Michigan—have been approved by the Department for decades to deliver ES services using staffing models alternative to full State merit-staffing. The Department received many comments on the NPRM regarding the longstanding reliance interests of these States and the potential disruptions to service delivery in these States specifically that could result from having to implement a complete State merit-staffing requirement. Based on these comments, the Department is permitting these three States, which were authorized to use alternative staffing models since the 1990s, to use the staffing model consistent with that previously authorized for that State. These three States may use the merit-staffing flexibility only to the same extent the Department previously authorized prior to February 5, 2020. Also, the final rule requires these three States to participate in rigorous evaluation activities to be conducted by the Department to determine whether such models are empirically supported. The Department is requiring that State Monitor Advocate (SMA) functions be performed by State merit staff in all States because SMAs monitor the State Workforce Agency (SWA), must report on SWA compliance to the State Administrator, and liaise between the SWA and external groups. Because the SMA position requires overseeing State agency functions and creating accountability for those functions, including discussing needed process improvements with State officials and ETA's Regional and National Monitor Advocates, such oversight functions are more appropriately performed through State merit-staffing.

The Department is additionally revising the ES regulations to strengthen the provision of services to MSFWs and to enhance the protections afforded by the Monitor Advocate System and the Complaint System. These changes include the following:

- Better serving MSFWs and promoting equity in the workforce system, including requiring States to use State merit staff to provide ES services to MSFWs.
- Revising several defined terms related to the provision of ES services to MSFWs to modify the criteria for designating *significant MSFW one-stop centers* and *significant MSFW States,* and to ensure that full-time students who otherwise meet the criteria set forth in the definitions will be afforded the same benefits and protections under the ES as other MSFWs.
- Strengthening the role and status of SMAs, including requirements to help to ensure that States employ highly qualified candidates, that SMAs have the appropriate authority necessary to effectively carry out their duties, and that SMAs are not assigned duties that are inconsistent with their role to provide oversight.
- Prohibiting the State Administrator or ES staff from retaliating against staff, including against the SMA, for monitoring or raising any issues or concerns regarding non-compliance with the ES regulations.
- Requiring SMAs to conduct onsite reviews of one-stop centers regardless of whether the one-stop center is designated as a significant MSFW one-stop center.
- Requiring the SMA to establish an ongoing liaison with the State-level Equal Opportunity Officer (E.O. Officer) to enhance equity and inclusion for farmworkers.
- Further specifying SWA staffing requirements for significant MSFW one-stop centers.
- Requiring SWAs to collect and report data on the number of reportable individuals who are MSFWs to help SWAs, SMAs, and ETA monitor equity in the provision of ES services to MSFWs.
- Aligning the ES regulations with the language access requirements of the Workforce Innovation and Opportunity Act (WIOA) nondiscrimination regulations at 29 CFR 38.9 to reduce duplication and to ensure States provide the broadest language access protections available for MSFWs with limited English proficiency (LEP).
- Strengthening outreach to MSFWs by, among other things, requiring SWAs to conduct outreach to MSFWs on an ongoing basis; specifying that all States must have some degree of outreach at all times and full-time outreach staff must spend 100 percent of their time on the outreach responsibilities described at § 653.107(b); requiring SWAs to employ enough outreach staff to contact a majority of MSFWs in their States annually; prohibiting SWAs from relying on National Farmworker Jobs Program (NFJP) grantee activities as a substitute to meet outreach obligations; specifying that SWAs must ensure hiring officials put a strong emphasis on hiring qualified candidates for outreach staff positions; and requiring outreach staffing levels to align with and be supported by information in the Agricultural Outreach Plan (AOP) that a State must submit pursuant to § 653.107(d).
- Changing the record retention requirement for outreach logs from 2

[1] *https://www.dol.gov/agencies/eta/advisories/unemployment-insurance-program-letter-no-12-01-change-2.*

years to 3 years to align with the Office of Management and Budget (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal awards to non-Federal Entities (Uniform Guidance) record retention requirements at 2 CFR 200.334.

- Amending the information SWAs must include in their AOP to include the number of full-time and part-time outreach staff that the State will employ and a description of how the SWA intends to staff significant MSFW one-stop centers in accordance with § 653.111.
- Removing ''random'' from the definition of field check to ensure SWAs are able to target the field checks that they conduct in response to known or suspected compliance issues.
- Revising several regulations within part 658, subpart E, 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.
- Revising requirements for how ETA regional offices process complaints to align with the revised process SWAs must follow in referring nondiscrimination complaints under § 658.411(c) and to refine other requirements applicable to regional offices.

The Department also is making technical amendments and global edits to modernize the ES regulations, to clarify and use plain language, and to further promote equity by using gender-inclusive language throughout the regulations.

In the NPRM, the Department proposed an 18-month transition period for States to comply with the requirements in this rulemaking. Based on comments received on the NPRM indicating that States would need more time to comply, the Department is providing 24 months to comply with the provisions of the final rule.

The final rule adds severability provisions in parts 652, 653, and 658.

This final rule reflects changes made in response to public comments received on the NPRM that was published on April 20, 2022, at 87 FR 23700. The Department received many comments from the public and nonprofit sectors, as well as private citizens. The Department considered these comments in determining this final rule, and the changes made to the regulatory text are detailed below in the Department's responses to related comments.

III. Background and Justification

The Wagner-Peyser Act of 1933, 29 U.S.C. 49 *et seq.,* established the ES program, which is a nationwide system of public employment offices that provide public labor-exchange services. The ES program seeks to improve the functioning of the nation's labor markets by matching job seekers with employers that are seeking workers. Section 3(a) of the Wagner-Peyser Act directs the Secretary of Labor (Secretary) to assist States by developing and prescribing minimum standards of efficiency and promoting uniformity in the operation of the system of public employment offices. *See* 29 U.S.C. 49b(a). This final rule amends regulations in 20 CFR parts 651, 652, 653, and 658. With limited exceptions, the final rule requires States to use State merit staff to provide ES services, including services and activities under parts 653 and 658. The Department also is targeting revisions to the regulations at parts 651, 653, and 658. These revisions are intended to ensure that SWAs provide MSFWs with adequate access to ES services and that the role of the SMA is effective. In addition, this final rule amends parts 651, 652, 653, and 658 to further integrate gender-inclusive language. Finally, the Department is making technical corrections to these CFR parts to improve consistency across the parts and to make them easier to understand.

Historically, the Department relied on its authority in secs. 3(a) and 5(b) of the Wagner-Peyser Act to require that ES services, including Monitor Advocate System activities for MSFWs and Complaint System intake, be provided by State merit-staff employees.[2] The Department consistently applied this requirement, with limited exceptions, until 2020. Specifically, beginning in the early 1990s, the Department authorized demonstration projects in which it allowed Colorado and Massachusetts limited flexibility to set their own staffing requirements for the provision of ES services. Colorado was authorized to use county and State merit staff to deliver ES services. The State contracts for these services with county and State sub-recipients, but has not allowed further sub-contracting by the sub-recipients. Massachusetts was approved to use non-State-merit staff to provide ES services in just four of the State's 16 local areas. In these local areas, the State has generally relied on local one-stop career center/American Job Center (AJC) staff for ES services. In 1998, the Department permitted Michigan to use State and local merit-staff employees to deliver ES services, pursuant to a settlement agreement arising out of *Michigan* v. *Herman,* 81 F. Supp. 2d 840 (W.D. Mich. 1998). Michigan was still required to use State merit staff for services to MSFWs, veterans, and individuals with disabilities. All three States continued to operate with staffing flexibility through their approved State plans,[3] though all three also used State merit staff for the SMA position. Through rulemaking effective February 5, 2020, the Department removed the requirement that ES services be provided only by State merit staff. *See* Wagner-Peyser Act Staffing Flexibility; Final Rule, 85 FR 592 (Jan. 6, 2020) (2020 Final Rule). In the preamble to the 2020 Final Rule, the Department explained that it sought to allow States maximum flexibility in staffing arrangements. *Ibid.* Accordingly, under the regulations in effect under the 2020 Final Rule, several States were approved to use a variety of staffing models to provide ES services, as described in their approved State plans.

In light of the events of the last few years, the Department has reassessed the approach adopted in the 2020 Final Rule and determined instead to reinstate the requirement that States use State merit staff to deliver ES services. State merit-staffing is a generally reliable method to ensure quality and consistency in ES delivery, and the demands placed on State UI systems by the economic impact of the COVID–19 pandemic highlighted the necessity of States to be able to rely on eligible ES State merit staff to be deployed to assist with UI activities as needed.

In adopting 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 Intergovernmental Personnel Act (IPA), 42 U.S.C. 4728, as amended. Each of these provisions, standing alone, provides the Department with the authority 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.'' 29 U.S.C. 49b(a). As the court in *Michigan* v. *Herman* concluded, ''the language in [sec. 3(a)] authorizing the Secretary to develop and prescribe 'minimum standards of efficiency' is broad enough

[2] *Workforce Innovation and Opportunity Act; Department of Labor; Final Rule,* 81 FR 56072 (Aug. 19, 2016) (WIOA DOL-only Rule) (*see* 20 CFR 652.215, 653.108, 653.111, 658.602).

[3] *See* WIOA DOL-only Rule, 81 FR at 56267 and 56341 (2016).

to permit the Secretary of Labor to require merit staffing.'' 81 F. Supp. 2d 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 [UI] claimant services.'' 29 U.S.C. 49d(b). As explained previously, the State merit-staffing requirement would align the staffing of ES services with the staffing that States are required to use in the administration of critical UI services. Therefore, it is 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.

Furthermore, 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).[4] In accordance with 5 CFR 900.605, the Department submitted the proposed rule to OPM for review and received approval prior to the publication of the NPRM.

In the 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. Requiring States to employ the professionals who deliver ES services in accordance with these principles 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. *See* 42 U.S.C. 4701. 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. *Ibid.*

The Department acknowledges that this constitutes a change in its position taken under the 2020 Final Rule and requires 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). In the NPRM, the Department acknowledged the proposed policy change and explained the reason for the change. The ES system is designed to ''promote the establishment and maintenance of a national system of public employment service offices,'' 29 U.S.C. 49, and the UI and ES systems together provide a basic level of employment support for more than 4 million job seekers per year to enter and re-enter the workforce. The Department believes that it is vital that the ES be administered so that services are delivered effectively and equitably to UI beneficiaries and other ES customers. The COVID–19 pandemic and the ensuing demand placed on the UI system demonstrated a need for centrally trained, high-quality staff to be able to step in to assist States as needed. Further, the ES is a universal access program, and it is critical that it be administered by nonpartisan personnel held to transparent, objective standards designed to assure high-quality performance. A State merit-staffing requirement is a generally reliable method to ensure quality and consistency in delivery of ES services and supports the well-established connection between ES and UI services. As explained further in this preamble, the Department believes an evaluation of the alternative staffing models, though not legally required, is prudent to determine whether use of such alternative staffing models is empirically supported.

The Department is further adjusting its position to account for the unique history of three States' administration of ES services. Colorado, Massachusetts, and Michigan have been allowed by the Department to use various forms of non-State-merit staff models to deliver ES services since the 1990s. The Department acknowledges the longstanding reliance interests of these three States. The final rule allows these States to continue to use those alternative staffing models, but the States must continue to use merit staff to the same extent they were using it prior to February 5, 2020, the effective date of the 2020 Final Rule. Those are the staffing models on which the three States have decades-long reliance. Adopting a standard that preserves the level of merit-staffing each of the three States had been implementing since the 1990s is reasonable and consistent with the final rule's overall State merit-staffing requirement.

Establishing a different standard for these three States is supported by the text of section 3(a) of the Wagner-Peyser Act, which permits the Department to establish ''standards of efficiency.'' The Department's history of allowing these States to use alternative staffing models since the 1990s has created the present reality that requiring complete State merit-staffing in these three States would have a harmful effect on the States' ES services and program participants. While the final rule explains above the benefits of requiring all the other States to use State merit staff to deliver all ES services, and the proposed rule articulated the strong preference for uniformity in staffing across all States, those interests are outweighed by the disruptive and negative effects that a complete State merit-staffing requirement would have on these States' programs that have such long reliance on alternative staffing models.

These three States have provided some initial justification and data for being able to continue using their longstanding alternative staffing models. These three States also provided information about the service disruption that would result from having to upend their longstanding service delivery models. However, the justifications and data presented do not provide clear evidence of causation. Therefore, the Department will further examine various staffing models and methods of delivering labor exchange services through a rigorous evaluation. Given the Department's clear and supported policy preference for State merit-staffing in the ES program, it logically follows that the Department believes it is prudent to evaluate whether alternative staffing models are empirically supported. The rule requires these States' participation in any evaluation activities about merit-staffing, which will likely consist of a single evaluation but may span more than one study, including any data collection associated with those evaluation activities. The Department will seek required approvals under the Paperwork Reduction Act for data collection, as necessary. This plan for evaluations is consistent with the Secretary's authority under section 3(c)(2) of the Wagner-Peyser Act, which requires the Secretary to ''assist in the development of continuous improvement models for [the nationwide system of labor exchange services] that ensure private sector satisfaction with the system and meet the demands of jobseekers relating

[4] 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).

to the system, and identify and disseminate information on best practices for such system.'' 29 U.S.C. 49b(c)(2). The Department will conduct this evaluation of the three States' provision of ES services, including review of services of other States that participate, as necessary, to determine whether such models are empirically supported.

In the section-by-section discussion, the Department further explains why it is requiring that States use State merit staff to provide ES services.

Comments Expressing Support for the Department's Legal Authority for the State Merit-Staffing Requirement

Comment: Some commenters, including unions, a State employee association, an advocacy organization, and private citizens, expressed support for the Department's authority to institute a nationwide merit-staffing requirement in the Wagner-Peyser Act regulations for ES services. In particular, a State employee association, an advocacy organization, and private citizens agreed with the Department that clear legal authority for reinstituting a nationwide ES merit-staffing requirement is found under secs. 3(a) and 5(b) of the Wagner-Peyser Act, which give the Department authority to develop and prescribe minimum standards of efficiency for ES services and to promote uniformity in their administrative procedures. A union argued that the statutory requirement to prescribe minimum standards of efficiency and promote uniformity requires that States use merit staff to administer ES programs, citing studies the commenter said show that State merit-staffed ES offices deliver services more equitably and effectively.

An advocacy organization and a State employee association argued that the proposed merit-staffing requirement is supported by the historical record and reinstates the Department's longstanding requirement that ES services be administered by State merit staff. Specifically, according to these commenters, the Wagner-Peyser Act establishes ''a national system of public employment service offices'' and, because a principal component of a public system is State government employees who are hired and promoted on a merit basis under a civil service system, the Department argued in *Michigan* v. *Herman* that merit-based staffing is required by the Wagner-Peyser Act because Congress intended merit-staffing to be a key component of ''public'' employment service.

Similarly, a private citizen argued that the Wagner-Peyser Act's use of the word ''public'' clearly falls within the word's common dictionary usage as something ''of or relating to government.'' Given that the Wagner-Peyser Act defines ''employment service office'' as ''a local office of a State agency,'' this commenter concluded that the Wagner-Peyser Act created a network of State governmental ES offices. Similarly, the commenter argued that the statutory text does not envision using local agencies to provide ES services. Referencing 1998 and 2014 amendments to the Wagner-Peyser Act, this commenter said that Congress has never altered the language providing authority for the Secretary to require merit-staffing for ES services. In conclusion, this commenter argued that ''claims of flexibility do not give the Department sufficient legal authority to permit local agencies, community colleges, local governments, or other entities to [provide] ES [services] in substitution of state agency merit-staffed employees,'' although a State is free to provide additional resources to job seekers beyond ES-staffed services.

A union commented that the Wagner-Peyser Act's creation of nationwide ES offices was intended to displace and transform the ineffectual system of employment placement services available to the jobless that existed prior to the Act's passage. The commenter described that system as a patchwork, fragmented, and inequitable system that consisted primarily of private agencies, which the commenter said were usually exploitative, predatory, and corrupt, as well as a handful of local public employment offices, which the commenter asserted were tainted by underfunding, patronage hiring, and political influence.

Asserting that Congress has reaffirmed the Wagner-Peyser Act's requirement of merit-staffing over time, an advocacy organization said that the Intergovernmental Personnel Act of 1970 (IPA) specifically named the Wagner-Peyser Act as one of two acts administered by the Department that transferred merit authority to the Civil Service Commission (succeeded by OMB). Further, according to the commenter, the Civil Service Reform Act (CSRA) in 1978 amended the IPA to make clear the intent that merit system guarantees for public employees are to remain a condition of Wagner-Peyser Act funding to States. In support of this assertion, one of the commenters cited Pub. L. 95–454 (Oct. 13, 1978), 92 Stat 1111, which the commenter stated added subsection (h) to 42 U.S.C. 4271 to exempt the Wagner-Peyser Act's merit-staffing requirement, among others, from the CSRA provision otherwise abolishing all statutory personnel requirements established as a condition of the receipt of Federal grants-in-aid by State and local governments.

Additionally, a State employee association asserted that the State merit-staffing requirement is rooted in the Wagner-Peyser Act's provisions giving the Department the authority to develop and prescribe minimum standards of efficiency for public employment services and to promote uniformity in their administrative procedure. Finally, these commenters remarked that, when the Department attempted to change its legal interpretation of the Wagner-Peyser Act in 2006, Congress reaffirmed its position by blocking the proposal by including language in the Fiscal Year (FY) 2007 and subsequent annual appropriations to prohibit the Department from taking such action. A State employee association commented that this 90-year history of the ES State merit-staffing requirement remaining in place through statutory amendments and court decisions is highly suggestive of a Congressional intent to require the delivery of ES services by merit-based employees.

An advocacy organization and a State employee association discussed additional components of the Wagner-Peyser Act historical record that they said supported the necessity of delivery of ES services by qualified, non-partisan personnel who are directly accountable to the State. For example, the commenters said the first ES director concluded that, to avert patronage and favoritism in hiring, State ES programs were legally required to adopt merit personnel systems for appointments and promotions. These commenters and a union also stated that, as States adopted companion laws to conform with the Wagner-Peyser Act in the 1930s, the Department withheld certification of nine States until they provided assurances that they would merit staff any State-administered public employment office.

A State employee association quoted the CSRA implementing regulations as describing the Wagner-Peyser Act merit-staffing requirement as ''a statutory requirement for the establishment and maintenance of personnel standards on a merit basis'' in Wagner-Peyser Act-funded programs (5 CFR part 900, subpart F, Appendix A). Further, this commenter quoted the final rule implementing the Workforce Investment Act of 1998 (WIA) in which the Department responded to inquiries asking if States may seek a waiver of the merit-staffing requirement for its ES program by stating, ''The requirement that Wagner-Peyser Act services be

provided by State merit staff employees derives from sections 3 and 5(b)(1) of the Wagner-Peyser Act. Accordingly, we do not intend to, nor do we have authority to entertain or grant waivers of the Wagner-Peyser Act merit-staffing requirement.'' 65 FR 49294, 49306 (Aug. 11, 2000).

Citing the public comment it submitted on the 2019 proposal to allow ES services to be provided under flexible staffing models, an advocacy organization said that, for more than 85 years, Congress acted many times to require merit-staffing in the ES program to guarantee workers receive unbiased and high-quality employment services.

Response: The Department generally agrees with these commenters that the Department has authority to require State merit-staffing under the Wagner-Peyser Act and the IPA. The Department also generally agrees that Congressional actions over time have affirmed the Department's authority to require State merit-staffing. The Department weighed this authority and historic precedent when it proposed uniform State merit-staffing in the NPRM. As explained above, the Department also weighed the public comments that described the detrimental effects that the uniform requirement would have on the three States with longstanding reliance on using alternative staffing models. Congress' decision not to disturb these three States' alternative staffing models when it passed both WIA and WIOA suggests Congressional acquiescence with these States' arrangements. The Department is therefore returning to the longstanding requirement of State merit-staffing for ES, with the limited exception that Colorado, Massachusetts, and Michigan may continue to use the alternative staffing models they had been using before the 2020 Final Rule became effective. This includes the requirement that these three States use merit-staffing to deliver ES services to the same extent they had been using it.

Comments Expressing Concerns About the Department's Legal Authority

Comment: Some commenters, including an association of workforce boards, a think tank, and a one-stop center employee, expressed doubts about the Department's interpretation of its legal authority to require nationwide merit-staffing for ES services. In particular, an association of workforce boards and a think tank commented that the Wagner-Peyser Act does not mandate a one-size-fits-all staffing model. Specifically, an association of workforce boards asserted that the Wagner-Peyser Act does not explicitly require that ES staff in States be merit-based, nor do existing statutes speak specifically to State merit-staffing requirements for ES offices. This commenter stated that the *Michigan* v. *Herman* court suggested that the Department may interpret section 3(a) of the Wagner-Peyser Act to permit staffing flexibility, based on the court's statements that the Wagner-Peyser Act ''does not explicitly require merit-staffing'' and that the language of section 3(a) is ''broad enough to permit [the Department] to require merit-staffing.'' Further, the commenter remarked that, since the *Michigan* v. *Herman* ruling, the Department has twice affirmed that Federal law does not require delivery of ES services by State merit staff: (1) allowing existing exemptions from ES State merit-staffing requirements to continue (2016), and (2) the 2020 Final Rule. The commenter concluded that dictating to States and local communities how to appropriately staff ES offices is a Departmental interpretation that will cause significant disruption and harm to the workforce system.

Response: The Department proposed in the NPRM to require that all States use State merit staff to provide ES services. The Department has considered the alternative viewpoints provided. As these commenters noted, the Wagner-Peyser Act does not require the use of State merit staff for ES services, but the Act does provide the Secretary with discretion to require State merit-staffing, as explained above. State merit-staffing for ES services is widely used in many States and its requirement will not create disruption for the vast majority of States. Upon consideration of the public comments that described the detrimental effects that the State merit-staffing requirement would have on the three States with longstanding reliance on alternative staffing models, the Department will allow the three States with such reliance to continue use of the models they had been using prior to February 5, 2020, the effective date of the 2020 Final Rule. Further, the Department is committed to evaluating ES programs in these States to determine whether such models are empirically supported. With respect to States that may have adopted ES staffing flexibilities as a result of the 2020 Final Rule, the Department understands there may be some additional costs associated with the transition from non-merit staff to State merit staff. In response to comments, the Department is providing a 24-month compliance period from the effective date of this final rule to minimize disruption of services in those States.

IV. General Comments on the Proposed Rule

The NPRM, published on April 20, 2022, invited written comments from the public concerning the proposed rulemaking; the comment period closed on June 21, 2022. The comments received on the NPRM may be viewed at *https://www.regulations.gov* by entering docket number ETA–2022–0003.

The Department received timely comment submissions from 1,090 commenters, of which 776 were unique. The Department identified 12 form letter campaigns, which were read and considered with the other comments received. The Department also received additional comments that were duplicates or not related to the subject of this rule. The commenters represented a range of stakeholders from the public and nonprofit sectors. Public sector commenters included State and local government agencies, local workforce development boards, and one-stop operators. Nonprofit sector commenters included public policy organizations, advocacy groups, national and local labor unions, and a trade association. Of the unique comments, nearly one-third came from SWAs. The Department also received several comments from private citizens.

These comments are addressed in the summary of general comments and the section-by-section discussion. About half of the unique comments supported aspects of the proposal but opposed others, while a smaller number conditioned their support for the proposal on the Department adopting certain changes in this final rule.

Summary of General Comments on the Proposed Rule

Comment: A State government agency expressed its support for the rule on the grounds that the State already provides ES services with State merit staff only and thus the rule would require no change in its operations.

Several commenters, mostly private citizens, expressed general support for the proposed merit-staffing requirement without providing detailed rationale or supporting data. Some arguments provided by commenters supporting the rule included:

- States are better equipped than local areas or contractors to administer ES services professionally, consistently, and with greater transparency and accountability.
- A State merit-staffing requirement would ensure the (UI) system remains effective in times of need.
- State merit staff have consistently provided job seekers with career

enhancement and reemployment services to ensure they have productive lives.

A union called the proposed rule a policy correction from the 2020 Final Rule and agreed the proposed rule is appropriate, given the environment in which that rule was developed (historically low demand for ES services and UI) and the subsequent severe labor market impacts of the COVID–19 pandemic that sent demand for ES and UI services surging. Similarly supporting the return to the pre-2020 standard for ES staffing, a farmworker advocacy organization commented that the decision to depart from a merit-based staffing model was unsupported by the Department's own findings on the efficiency of merit-based staffing. Specifically, this commenter cited a 2004 ETA study that they said compared merit-based ES staffing models with non-merit models, and it found that the States with non-merit models listed significantly fewer jobs and fewer referrals and job placement than merit-based staffing States.

Response: The Department is adopting the proposed State merit-staffing requirement as a generally reliable method to ensure quality and consistency in ES delivery and one that supports the well-established connection between ES and UI services. The Department notes that it has allowed three States to use alternative staffing models for decades, and these States have provided some justification and data for being able to keep such models. The States also provided information about the service disruption that would result from having to upend their longstanding service delivery models. However, the justifications and data presented do not provide clear evidence of causation; that is, no compelling data emerged in the public comment period or in previous research that showed that alternative staffing models are the cause of higher or more consistent employment outcomes. While the Department recognizes the decades-long practice on which three States rely, such partial and correlation-only data are not sufficient to expand these models to other States, especially not when, as explained in the NPRM, fluctuations in UI demand from a pandemic or natural disasters clearly show a need for centrally trained, high-quality staff to be able to step in to bolster State review of UI claims and appeals if needed.

Therefore, the Department is adopting the State merit-staffing requirement as proposed with a partial adjustment: the final rule is requiring all States, except Colorado, Massachusetts, and Michigan, to use State merit staff to provide ES services. The Department will further examine various staffing models and methods of delivering labor exchange services through a rigorous evaluation, as discussed above. Given the Department's clear and supported policy preference for State merit-staffing in the ES program, the Department believes it is prudent to evaluate the delivery of ES services using the experience of States operating longstanding alternative staffing models to determine whether such models are empirically supported. The three States with decades-long reliance on using alternative staffing models may use the same service-delivery models they used prior to February 5, 2020, and will be required to participate in this forthcoming evaluation activities. All other States will have 24 months to comply with the requirement to use State merit staff to provide all ES services.

Comment: Several commenters, including one-stop center staff and private citizens, opposed the proposed merit-staffing requirement. Some arguments provided by commenters against the proposed merit-staffing requirement included:

- Commenters from States operating longstanding alternative staffing models stated that they view local resource centers and the services they provide as essential.
- Commenters from States operating longstanding alternative staffing models stated that the change would ruin the one-stop service model that provides seamless, equitable services that facilitate real-time, meaningful referrals.
- Commenters stated that the Federal government has consistently demonstrated inadequacy when it comes to administration of programs that directly affect those at the local level.
- Commenters from States operating longstanding alternative staffing models stated that there is great value in staffing local offices with local staff rather than State merit employees. Each individual and business has their own unique challenges to progress, development, and success, which can only be understood and addressed at the local level.
- Commenters from States operating longstanding alternative staffing models stated that the proposed change would redirect responsibilities and funds to the State, which would be a mistake. The commenters said that the current system at the local level is working well without any issues.
- Commenters from States operating longstanding alternative staffing models stated that the proposed change would harm job seekers and businesses, resulting in lower quality and fewer services being provided, including services to veterans, immigrant and refugee navigator services, Clean Slate services for formerly incarcerated people, support navigating the UI benefits process, job training, career events, job fairs, and industry led collaboratives.
- Commenters from States operating longstanding alternative staffing models stated that the proposed rule would have a negative impact on local communities, including causing job centers to close and the loss of many jobs. The loss of centers would also impact students who rely on local offices to assist with educational support and other assistance.

Many private citizens from States operating longstanding alternative staffing models provided personal experiences asserting the value and need for services at one-stop centers, which they stated would be impacted if a State merit-staffing requirement changed the availability of services or the number of one-stop centers. Other commenters, including one-stop center staff, described their experience as local merit staff or working with the workforce development system and the positive impact on the community.

Response: The Department proposed to require that all States use State merit staff to provide ES services and has considered reasons provided by these commenters for opposing the proposed rule. The proposal to require State merit staff does not preclude the State from providing services locally, and the vast majority of States provide high quality services in one-stop centers with a mix of State merit staff delivering ES locally and other staff providing other services locally. Without evidence that alternative staffing models directly cause higher employment outcomes, balanced against widespread success in delivering services while maintaining State merit staff for ES, and further balanced by the need for ES State merit staff to be available for surges in UI claims and appeals, the Department is generally adopting the proposed requirement that States use State merit staff to provide ES services.

However, the Department recognizes that three States (Colorado, Massachusetts, and Michigan) have been allowed to administer ES services using alternative staffing models for decades. The Department understands that these States' long experience with their particular models results in an affinity and preference for their model. During the comment period, these States

provided information that the State merit-staffing requirement proposed to be applied to all States would have extremely detrimental impacts on the provision of ES services in these three States because of the facts and circumstances, particularly the decades-long reliance interests, in these States. Based on this information, the Department is adjusting the final rule from the original proposal. The final rule requires all States, except the three States with decades-long reliance on using alternative staffing models, to use State merit staff to provide ES services. The expansion of alternative staffing models to additional States occurred without study, before the landscape-altering impact of the pandemic on the UI and workforce system. The Department will require the three States to participate in a rigorous evaluation of the services provided in the three alternative States to determine if using alternative models benefit ES service delivery. All other States will have 24 months to comply with the requirement to use State merit staff to provide ES services.

Comment: Several commenters, including private citizens, presented a mixed stance or unclear position on the proposed rule. Many commenters, including private citizens, employers, and one-stop center staff, discussed Michigan's public workforce system, known as Michigan Works!, without addressing the proposed rule. Other commenters, including a trade association, career service provider, and employer, generally discussed the importance of programs or ''communities.'' A one-stop center employee commented that ES services offer job seekers help navigating the UI process.

Response: The Department agrees that one-stop centers are valuable assets in a community, often provide services to a wide range of individuals, and are instrumental in shaping a local workforce's skills as part of larger economic development. The Department also notes that one-stop centers play this role across the country, including in the vast majority of States that maintain State merit staff in delivering ES services. Changes in how a one-stop center operates can impact a local community, and thus the Department weighs such impacts very carefully in its regulations. The Department recognizes the significant challenges that a return to State merit-staffing would present for States with decades-long reliance on using alternative models. Therefore, after serious consideration of comments received from the public, the Department is requiring all States to use State merit staff to deliver ES services, except the three States that have been allowed to use alternative staffing models for decades. Due to their longstanding reliance, these States are permitted to use merit-staffing flexibility to the same extent the Department allowed them to use it before the 2020 Final Rule became effective, but the Department is not permitting them to expand their staffing flexibility any further.

Comment: An anonymous commenter asked whether State merit staff will be required to colocate in one-stop centers.

Response: WIOA requires ES offices to be colocated in AJCs, also known as one-stop centers, regardless of the staffing model used. This is unchanged under this final rule.

Comment: An anonymous commenter asked whether Federal appropriations will provide adequate resources to support the recruitment, hiring, and training of ES State merit staff or if the costs will be assumed by the States.

Response: Recruiting, hiring, and training ES staff is an allowable cost for ES grants to States. In considering this comment, the Department determined that a greater amount of Federal funding is available now compared to other years. The FY 2022 and FY 2023 appropriations each provided an increase for Wagner-Peyser Employment Service grants to States over the years prior. In FY 2023, Congress appropriated $5 million more than in FY 2022 for the ES formula grants to States, which are the grants allotted to States to operate the ES. With the increased funding, the Department expects the ES to serve approximately 20,000 more individuals nationwide in 2023 (2,913,438). The estimates are not dependent on the type of staffing model a State uses to deliver ES services. The States' latest financial reports show that many States, including those States that must make changes to come into compliance with the final rule's State merit-staffing requirement, still have previous years' ES grant funds not yet expended. One of these States has expended under half of its Program Year (PY) 2022 allotment, and all of these States had lower expenditure rates in PY 2022 than in previous years. The Department notes that many States have used general funds made available under the American Rescue Plan Act and other resources to bolster overall workforce development services. Therefore, compared to other years, this is an appropriate time for a transition back to the use of State merit staff because of the above average resources available.

Comment: An anonymous commenter asked what impact implementation of the proposed rule will have on the monitor advocate requirements.

Response: Because the Monitor Advocate System is a part of the Wagner-Peyser ES, the requirement for States to use State merit staff for ES services also applies to Monitor Advocate services described at parts 653 and 658. Aside from Colorado, Massachusetts, and Michigan, the Department is requiring States to use State merit staff to conduct outreach to MSFWs, as described at § 653.107. Colorado, Massachusetts, and Michigan must use merit-staffing for MSFW outreach to the same extent authorized in their approved longstanding alternative staffing model. This means that if the State was required to use State merit staff for MSFW outreach (as in the case of Michigan) prior to February 5, 2020, then the State must continue to use State merit staff for MSFW outreach. If the State was permitted to use a combination of local merit staff and State merit staff for MSFW outreach prior to February 5, 2020, then the State must continue using merit staff for MSFW outreach. The Department is also requiring all States to use State merit staff to fulfill their SMA responsibilities, as described at § 653.108. Colorado, Massachusetts, and Michigan all use State merit staff for the SMA position as part of their longstanding staffing model and are required to continue doing so. All States will have 24 months to comply with this final rule.

Comment: The Department received several comments that were beyond the scope of the proposed rule and included issues with the processing of UI claims, the politics of social justice campaigns, the status of pandemic unemployment assistance, and the actions of President Biden's administration generally.

Response: These are issues that cannot be resolved or implemented through this regulatory process or are not within the Department's purview.

V. Section-by-Section Discussion of Final Rule

The discussion below details the decisions the Department made in adopting the final rule text. It responds to section-specific comments and explains any changes made in response to those comments. If the Department did not receive comments regarding a particular section, that section is not discussed in detail below, and the final rule adopts that section as proposed for the reasons set forth in the NPRM. The Department also has made nonsubstantive changes to the

regulatory text to correct grammatical and typographical errors, in order to improve the readability and conform the document stylistically, that are not discussed in detail below.

A. Technical Amendments and Global Edits

In the NPRM, the Department proposed several technical amendments and global changes, as discussed in detail below. The Department did not receive substantive comments on these proposed changes, and it adopts them as proposed in the final rule.

To conform with the proposed changes to the definition of *Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES)* in § 651.10, the Department is making technical changes to replace the phrases ''employment services,'' ''Wagner-Peyser Act services,'' and ''services provided under the Wagner-Peyser Act'' with ''ES services.'' Changes also have been made to replace the phrase ''employment office'' with ''ES office,'' and ''Wagner-Peyser Act participants'' with ''ES participants.'' These changes will simplify and standardize the use of terminology. The language is also intended to improve usage of plain language within the regulations. Technical changes to articles, specifically changing ''a'' to ''an'' where necessary, have been made as well when preceding ''ES office.'' These changes have been made in § 651.10 within the definitions of *applicant holding office, Employment Service (ES) office, field visits, outreach staff, placement,* and *reportable individual,* in addition to the changes in the definition of *Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES).* Conforming changes have also been made to the subpart heading at part 652, subpart C, and within the regulatory text at §§ 652.205, 652.207, 652.215, 653.107, 653.108, 658.411, 658.502, 658.602, and 658.603.

The Department is adopting several technical edits to refine gender-inclusive language within the regulatory text while maintaining plain language principles. Throughout parts 651, 653, and 658, the term ''he/she'' was used to denote an individual of unknown gender. Using terms with a slash may not be in keeping with plain language principles and may also exclude people who are nonbinary. The Department has made three technical edits to replace ''he/she'' with more inclusive language employing plain language principles.

First, where ''he/she'' refers to an individual in their professional capacity, the Department uses their job title instead of a pronoun. These edits largely affect regulations impacting the National Monitor Advocate (NMA) or the Regional Monitor Advocate (RMA). In these cases, ''he/she'' has been replaced with ''the NMA'' or ''the RMA'' as appropriate and ''his/her'' with the possessive pronoun ''their.'' These edits are made as proposed at §§ 658.602 and 658.603.

Second, where ''he/she'' refers to an employer that is not an individual person, the Department uses the pronoun ''it.'' Where the possessive pronouns ''his/her'' were used, the Department proposed using ''its.'' This is appropriate because employers are entities, not individuals, and the proper pronoun is ''it.'' This edit is made as proposed at §§ 658.502 and 658.504.

In all other cases where ''he/she'' was used, the Department uses the pronoun ''they'' in its capacity as a gender-inclusive third-person singular pronoun but conjugated with third-person plural verbs. Where the possessive pronouns ''his/her'' were used, the Department proposed using ''their.'' These changes are designed to remove binary gender language so that the regulatory text is gender inclusive. The Department makes these changes as proposed in § 651.10 in the definition of *seasonal farmworker.* Edits are also made as proposed to §§ 653.107, 653.108, 653.111, 653.501, 653.502, 658.400, 658.410, 658.411, 658.421, 658.422, 658.602, 658.603, 658.702, 658.705, 658.706, and 658.707.

In addition, the Department replaces the words ''handle'' and ''handled'' with ''process'' and ''processed,'' as appropriate, to clarify that actions by ES staff and Federal staff must follow the processing requirements listed throughout part 658, subparts E and H, which use the word ''process.'' The word ''handle'' does not have a specific meaning in the regulatory text and may be unclear to SWAs.

In some instances, the Department also made conforming technical amendments to correct grammar in the regulations, as needed, because of these changes. In addition to such conforming technical amendments, the Department added and removed commas throughout the regulatory text to improve clarity and readability. These global changes and technical amendments described in this section are not explicitly identified later in the section-by-section discussion.

Finally, the Department is correcting the citation for its rulemaking authority for parts 651 and 652.

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

Part 651 (§ 651.10) sets forth definitions for parts 652, 653, 654, and 658. In the NPRM, the Department proposed to define several new terms in this section and to make revisions to a number of other terms that were already defined in this section. The Department received comments on some of the proposed additions and revisions. After carefully considering these comments, the Department has decided to adopt most of the additions and revisions as proposed, with exceptions, as discussed in detail below.

Apparent Violation

The Department proposed to add a definition for *apparent violation* to clarify that the term means a suspected violation of employment-related laws or ES regulations, as set forth in § 658.419.

Comment: A State government agency appreciated the Department's efforts to define apparent violation but felt that additional clarification was required to aid implementation. This commenter suggested that the Department clarify the proposed definition of *apparent violation* by adding the following language at the end: ''for which ES staff observes, has reason to believe, or is in receipt of information that a violation has occurred.''

Response: The Department agrees that the proposed definition for this term should be clarified by specifying that ES staff process apparent violations. In reviewing the commenter's suggestion, the Department further identified that it would be beneficial to include in the definition that apparent violations relate to information received about suspected employer noncompliance, as § 658.419 has historically described. Additionally, upon further review of the NPRM, the Department is further clarifying the definition of apparent violation to state explicitly that the definition does not include complaints as defined in § 651.10. This change is meant to make the distinction between complaints and apparent violations clearer. The Department is also removing the parenthetical ''as set forth in § 658.419 of this chapter'' because it is unnecessary with the changes the Department is making in § 658.419 to be more clearly consistent with this definition. Accordingly, the Department has decided to amend the definition of apparent violation adopted in this final rule to mean ''a suspected violation of employment-related laws or employment service (ES) regulations by an employer, which an ES staff member

observes, has reason to believe, or regarding which an ES staff member receives information (other than a *complaint* as defined in this part).''

Applicant Holding Office

The Department proposed to amend the definition of applicant holding office to replace ''a Wagner-Peyser Employment Service Office'' with ''an ES office,'' and did not receive any comments on this proposed change. This change is consistent with the changes proposed to the definition of *Wagner-Peyser Employment Service (ES) also known as Employment Service (ES).* The Department adopts the revision to ''applicant holding office'' as proposed.

Bona Fide Occupational Qualification (BFOQ)

As noted in the preceding section on technical amendments and global edits, the Department added commas throughout the regulatory text to improve clarity and readability, including in the first sentence of the definition of *bona fide occupational qualification (BFOQ).* The Department did not receive any comments on this proposed change. In this final rule, the Department adds a necessary cross-reference to the EEOC's regulation regarding national origin found at 29 CFR part 1606 and corrects the cross-reference to the EEOC's BFOQ regulation found at 29 CFR part 1627.

Career Services

The Department proposed to amend the definition of career services to refer to WIOA by its acronym rather than its full title because the full title is previously spelled out at the beginning of this section. The Department did not receive any comments on this proposed change and adopts it as proposed.

Clearance Order

The Department proposed to amend the definition of clearance order to add a citation to the Agricultural Recruitment System (ARS) regulations at part 653, subpart F. The purpose of this addition is to clearly identify the ARS regulations to which the term refers. The Department did not receive any comments on this proposed change and adopts it as proposed.

Complaint System Representative

The Department proposed to amend the definition of Complaint System Representative to specify that the Complaint System Representative must be trained. The addition of the word ''trained'' makes the definition consistent with the requirement in § 658.410(g) and (h) that complaints are processed by a trained Complaint System Representative. The Department also proposed to remove the words ''individual at the local or State level'' due to proposed changes to the definition of ES staff. The Department did not receive any comments on the changes proposed to the definition of *complaint system representative.* While the Department is not adopting the changes that it proposed to the definition of *ES staff,* the reference to an ''individual at the local and State level'' in the definition of *complaint system representative* is not necessary regardless of whether the Department revises the definition of *ES staff.* Accordingly, the Department adopts the proposed revisions to the definition of *complaint system representative,* including the removal of these words, without change.

Decertification

The Department proposed to amend the definition of Decertification to specify that the Secretary to which this definition refers is the Secretary of Labor. The Department did not receive any comments on this proposed change and adopts it as proposed.

Employment and Training Administration

The Department proposed 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 did not receive any comments on this proposed change and adopts it as proposed.

Employment Service (ES) Office and Employment Service (ES) Office Manager

The Department proposed to amend the definition of *Employment Service (ES) office* to replace ''Wagner-Peyser Act'' with ''ES,'' to align with other proposed changes to the regulatory text. The Department further proposed 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,'' to align with other proposed changes to the regulatory text. In the same definition, the Department also proposed to replace ''individual'' with ''ES staff person'' to clarify that the *ES Office Manager* must be *ES staff,* as defined in this section.

Comment: Several commenters, including a one-stop center employee, supported the requirement in the definition of *Employment Service (ES) office* that it be colocated in a one-stop center, saying this is part of Michigan's current practice. However, the commenters expressed concern about the term *Employment Service (ES) Office Manager,* arguing that it is misleading and implies greater authority than may be appropriate for onsite one-stop center ES staff.

Response: The Department acknowledges the comment but notes that there is no requirement for the ES Office Manager to be located onsite. ES Office Managers are responsible for all ES services provided in a one-stop center. It is possible for one ES Office Manager to manage more than one ES Office; however, each ES Office must have an assigned ES Office Manager. The Department adopts the change as proposed.

Employment Service (ES) Staff

The Department proposed to amend the definition of *Employment Service (ES) staff* in two ways: first, by replacing 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; and, second, by deleting the phrase ''to carry out activities authorized under the Wagner-Peyser Act,'' because this language is unnecessary as parts 652, 653, and 658 describe the activities and services that ES staff may or must carry out. The proposal also added that ES staff includes a SWA official.

Comment: Multiple commenters, including a trade association, a one-stop center employee, and an advocacy organization, recommended the Department expand the definition of *Employment Service (ES) staff* to include local merit staff in addition to State merit staff. The trade association reasoned that a more expansive definition is needed in light of the nationwide employment crisis and to enable the hiring of qualified local personnel. A group of Colorado local government employees also in favor of expanding the definition described the braided services they provided to a job seeker who needed extra support, arguing that the individual likely would not have received the same opportunities from State merit staff. Some commenters and a one-stop center employee asked the Department to explicitly state in the final rule that ES

staff should be a part of the local AJC, arguing that standalone ES offices undermine the WIOA one-stop concept and hinder access to comprehensive services for job seekers and employers.

A State government agency requested guidance on which classifications of ES staff would need to be cross-trained, noting that the NPRM only defines ES staff as those who are funded, in whole or in part, by Wagner-Peyser Act funds. The commenter stated that in their State, some workers may meet this definition of ES staff but only perform administrative functions.

Response: The Department has considered the comments recommending expanding the definition of ES staff to include local merit staff and requesting clarification regarding which staff are included in the definition. Because the Department is adopting the proposed State merit-staffing requirement with the limited exception that Colorado, Massachusetts, and Michigan may continue to use alternative staffing models, the Department is removing the reference to merit system principles from the definition of ES staff. The final rule defines ES staff to mean ''Individuals who are funded, in whole or in part, by Wagner-Peyser Act funds to carry out activities authorized under the Wagner-Peyser Act.'' The Department is not adopting the proposal that would have added that ES staff includes a SWA official because SWA officials may include individuals funded by programs other than Wagner-Peyser. In response to the comment stating the final rule should require that ES staff be a part of the local AJC because stand-alone ES offices undermine the WIOA one-stop concept, the Department notes that the existing regulations at 20 CFR 652.202 and 678.315 state that stand-alone ES offices are not permitted, and States must colocate ES offices with one-stop centers. In response to the comment inquiring about cross-training, the Department notes that, while there are benefits to cross-training, the NPRM did not propose requiring States to cross-train employees nor does this final rule require cross-training.

Field Checks

The Department proposed several amendments to the definition of *field checks.* First, the Department proposed 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 proposed to clarify that field checks may be conducted by non-ES State staff, in addition to ES or Federal staff, where the SWA has entered into an arrangement with a State or Federal enforcement agency (or agencies) for their enforcement agency staff to conduct field checks. Third, the Department proposed to remove the word ''random'' from the existing definition to clarify that the selection of the clearance orders on which the SWA will conduct field checks need not be random, though random field checks may still occur, and to clarify that field checks may be targeted, where necessary, to respond to known or suspected compliance issues.

Comment: A State government agency supported the revised definition of *field checks* but requested that the Department clarify in the rule or guidance either the circumstances that warrant targeted field checks or the responsibility of States to define the circumstances in policy. Another State government agency stated that the proposal to amend the definition of *field checks* to allow non-ES State staff to conduct field checks would necessitate coordination, training, and reporting to ensure that non-ES staff perform field checks properly and timely. The agency recommended that the Department remove the language allowing non-ES staff to perform field checks. A farmworker advocacy organization also supported the proposal to remove the word ''random'' from the definition of *field checks,* which it said would help improve protections for farmworkers. The organization stated that it believed the Department should go further to expand the definition of *field checks* to include locations beyond where ES placements have been made, stating that the ES placement limitation significantly reduces the number of worksites eligible for these essential compliance checks and incentivizes employers to hire H–2A workers—whose employment does not currently create the possibility of a field check—instead of hiring U.S. workers through the ES.

Response: Regarding the request for clarification on the circumstances that warrant targeted field checks, the Department clarifies that the circumstances must relate to the terms and conditions on the clearance order. Thus, where it is known or suspected that wages, hours, and working and housing conditions are not being provided as specified in the clearance order, a targeted field check may be warranted. The Department will issue guidance on this change.

Regarding the recommendation that the Department remove the language allowing non-ES staff to perform field checks, the Department notes that this proposed revision to the definition of *field checks* is not a new requirement. Rather, it is intended to align the definition with the existing regulation at § 653.503(e), 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 the SWA, as described in § 653.503(e). The Department, therefore, declines to adopt this recommendation, and maintains that non-ES staff may conduct field checks under certain circumstances.

Regarding the recommendation that the Department expand field checks to locations beyond where ES placements have been made, the Department acknowledges the concerns raised by the farmworker advocacy organization regarding the limited instances in which a SWA may conduct field checks to evaluate employer compliance but disagrees that existing field check requirements incentivize employers to hire H–2A workers over U.S. workers. The Department agrees that compliance monitoring is essential, but notes that field checks are not the sole means by which such monitoring occurs, and employers are prohibited from rejecting able, willing, and qualified U.S. workers (referred to them through the ES or otherwise) in favor of H–2A workers. The Department further notes that field checks only pertain to placement of U.S. workers via the ARS. The Department's Wage and Hour Division (WHD) conducts investigations and evaluates agricultural employers' compliance with the terms and conditions of the H–2A program (including H–2A employers' compliance with the terms and conditions that they offer in clearance orders) (*see* 29 CFR part 501). To the extent the advocacy organization is recommending field checks for H–2A employment, the operative regulations are outside the scope of this rulemaking and the Department declines to adopt this recommendation. The Department adopts the changes to this definition as proposed in the NPRM.

Field Visits

The Department proposed several amendments to the definition of *field visits.* First, the Department proposed to clarify that field visits are announced appearances by SMAs, RMAs, the NMA, or NMA team members, in addition to outreach staff, to clarify which Monitor Advocates may conduct field visits and that the appearances are announced (and not unannounced, as with the proposed definition of field checks). Second, the Department proposed 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 proposed an amendment to specify that field visits include discussions on farmworker rights and protections, to help ensure that these issues are consistently addressed.

Comment: A farmworker advocacy organization supported the proposal to amend the definition of *field visits* to include discussions on farmworker rights and protections. The organization agreed with the Department's observation that outreach staff and SMAs do not always discuss farmworker rights and protections during field visits as part of broader discussions on ES services. A State government agency requested that the Department clarify the role of monitor advocates with respect to field visits. The agency stated that the Department's intent to refocus monitor advocate responsibilities on monitoring appears to be contradicted by its expectation that monitor advocates conduct more field visits, which is not a monitoring activity. The commenter asked the Department to clarify that the monitor advocate's role in field visits is to monitor that ES staff conduct field visits in accordance with part 653.

Response: The Department appreciates the advocacy organization's support for the inclusion of discussions of farmworker rights and protections in the definition of field visits. Regarding the State agency's request for clarification on monitor advocate roles in field visits, the Department notes that the proposed revisions do not require additional field visits, but instead clarify that the monitor advocates who may conduct field visits include SMAs, RMAs, and the NMA and NMA staff. The existing regulations provide that SMAs conduct field visits in accordance with § 653.108(o) and (q), the NMA (and NMA staff) in accordance with § 658.602(n), and RMAs in accordance with § 658.603(p). As part of their monitoring duties, the NMA (and NMA staff) and RMAs accompany selected outreach workers on field visits as part of their review and assessment responsibilities in §§ 658.602 and 658.603. For SMAs, the Department proposed in § 653.108 to clarify that the purpose of a SMA field visit is to discuss the SWA's provision of ES services and obtain input on the adequacy of those services from MSFWs, crew leaders, and employers. The SMA is not responsible to provide direct employment services during field visits or other activities. Instead, the SMA's field visits are designed to gather information the SMA needs to evaluate how the SWA is currently serving MSFWs, which the SMA uses to assess SWA compliance and to advocate for improvements.

After carefully reviewing the comments, the Department has decided to update the definition of *field visits* to cross reference the citations that describe activities Monitor Advocates and outreach staff perform during field visits. To further clarify the role of monitor advocates with respect to field visits, the Department has decided to remove the proposed reference to NMA team members and instead refer to NMA staff, as identified in § 658.602(h).

During consideration of the comments, the Department noticed that the proposed definition did not specify that field visits may occur at the gathering places of MSFWs, which is necessary to align the definition with the requirement in § 653.107(b)(1) that outreach staff must explain certain information and services to MSFWs at their working, living, or gathering areas. To align the definition with § 653.107(b)(1), the Department is further revising the definition of field visits to include that field visits may occur at places where MSFWs gather, in addition to working and living locations.

Hearing Officer

The Department proposed 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 did not receive any comments on this proposed change and adopts it as proposed.

Interstate Clearance Order

The Department proposed to amend the definition 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. The Department did not receive any comments on this proposed change and adopts it as proposed.

Intrastate Clearance Order

The Department proposed to amend the definition of *intrastate clearance order* in two ways: first, by indicating that it is an agricultural ''clearance'' order for temporary employment instead of a ''job'' order, to align the definition with the definitions of *job order* and *clearance order* in this part; and, second, by clarifying that the term means an agricultural clearance order for temporary employment describing one or more hard-to-fill job openings that an ES office uses to request recruitment assistance from all other ES offices within the State, to help SWAs understand that an intrastate clearance order must be circulated to all ES offices within the State.

Comment: A State government agency said that amending the definition of *interstate clearance order* to require an ES office to request recruitment assistance from all ES offices (not just significant MSFW one-stop centers) will necessitate changes to the review tool its monitor advocate office uses to conduct annual reviews (*i.e.,* to reflect that all offices must conduct recruitment). Another State government agency asked the Department to clarify what recruitment assistance means in the definition of *intrastate clearance order.*

Response: The Department acknowledges that the changes may require some SWAs to update their review tools and notes that intrastate recruitment, not interstate recruitment, involves recruitment assistance from all other ES offices within the State. However, the Department believes that the majority of SWAs will not need to update review tools or other processes because the revised definition is consistent with their current practices. The Department has found through monitoring that the majority of SWAs place intrastate clearance orders into their web-based labor exchange systems and make them available for recruitment throughout the entire State. Most SWAs do not direct recruitment efforts to specific ES offices because their labor exchange systems are not programmed to do so. Therefore, this change will not increase burden for most SWAs.

The Department has considered the impact of updating the definition to specify that intrastate clearance orders request recruitment assistance from all other ES offices in the State and finds it to be beneficial. Specifically, requesting recruitment assistance from all other ES offices increases the likelihood that the employer will find the workers it needs. Because the definition applies to criteria and non-criteria clearance orders, the description also allows the employer and SWA to recruit as broadly as possible and assists ETA in assessing the need for interstate clearance requests, including requests connected to the H–2A visa program. The intended result is that intrastate clearance will be more likely to result in employment of U.S. workers.

The Department adopts the definition as proposed and will provide guidance and technical assistance, as needed,

including how other ES offices provide recruitment assistance.

Migrant Farmworker and Seasonal Farmworker

The Department proposed to amend the definition of *migrant farmworker* by removing the exclusion of full-time students who are traveling in organized groups, to make available to these individuals the benefits and protections of the Monitor Advocate System, including ES service requirements and safeguards built into the Complaint System. Relatedly, the Department proposed to remove the exclusion of non-migrant full-time students from the definition of *seasonal farmworker,* to allow full-time students who work in seasonal farmwork to be considered seasonal farmworkers and to make the definition of *seasonal farmworker* consistent with the definition of *migrant farmworker.* The Department adopts these definitions as proposed.

Comment: Referencing the Department's proposal to remove the exclusion of non-migrant full-time students from the definition of *seasonal farmworker,* thus making the definition of *seasonal farmworker* consistent with the definition of *migrant farmworker,* an anonymous commenter remarked that seasonal farmworkers (such as non-migrant full-time students) are not the same as migrant farmworkers (who they said are usually noncitizens admitted to the United States for specific timeframes with green card status). The commenter also mentioned an ES office in Traverse City, Michigan, with a specific division for assisting migrant farmworkers and stated that hiring extra migrant farmworkers may not suffice for fresh produce processing of their State's agriculturally diverse crops.

Response: The proposed changes maintain two separate definitions for seasonal farmworkers and migrant farmworkers and remove the exclusion of full-time students from both definitions to ensure MSFW students have access to the benefits and protections of the Monitor Advocate System.

Removal of Migrant Food Processing Worker

The Department proposed to remove the definition of *migrant food processing worker* because migrant food processing worker status has not been a separately tracked part of the MSFW definition since the ES regulations were updated in the WIOA final rule promulgated in 2016. *See* 81 FR 56071 (Oct. 18, 2016). Current ETA reporting does not require States to document migrant food processing workers as a particular type of MSFW and this definition is unnecessary because the existing MSFW definitions are inclusive of individuals who perform work as migrant food processors. The Department did not receive any comments on its proposal to remove this defined term and adopts its removal as proposed.

Occupational Information Network (O*NET)

The Department proposed to amend the definition of *Occupational Information Network (O*NET)* to remove the word ''system'' from the definition, as it is not needed to describe O*NET. The Department did not receive any comments on this proposed change. The Department adopts the change as proposed.

O*NET–SOC

The Department proposed to amend the definition of *O*NET–SOC* 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 did not receive any comments. The Department adopts the change as proposed.

Outreach Staff

The Department proposed to amend the definition of outreach staff to clarify that an SMA is not ''outreach staff'' for purposes of § 653.107. While an SMA may join outreach staff on field visits, an SMA cannot fulfill a SWA's responsibility under § 653.107(a) to provide outreach staff. This aligns with a revision in § 653.108(d) to specify that the SMA and their staff cannot assist with outreach responsibilities, which is further discussed in the section-by-section analysis for § 653.108. The Department did not receive any comments on the clarification proposed to the definition, and it adopts the revision to this definition as proposed.

Participant and Reportable Individual

To align with the proposed changes to replace references to ''employment services,'' ''Wagner-Peyser Act services,'' and ''services provided under the Wagner-Peyser Act'' with ''ES services'' and ''ES,'' the Department proposed to amend the definition of *participant* by replacing the phrase ''Wagner-Peyser Act participants'' with ''ES participants'' and to amend the definition of *reportable individual* by replacing the phrase ''Wagner-Peyser Act services'' with ''ES services.'' The Department did not propose any other changes to these definitions. The Department received one comment related to the definitions for each of these terms, which is summarized and responded to below. After consideration of this comment, the Department adopts the revisions to both of these definitions as proposed.

Comment: A State government agency suggested the Department should define *reportable individual* versus *participant* for States to accurately collect and report information on these groups.

Response: The Department appreciates the comment requesting that the Department clarify who is considered reportable individuals or participants. The Department's existing regulations in part 651 provide definitions for *reportable individual* and *participant* at § 651.10. This final rule adopts only minor revisions to each term to replace existing references to the ''Wagner-Peyser Act'' with ''ES.'' As noted in § 651.10, *participant* means a reportable individual who has received services other than the services described in § 677.150(a)(3) of this chapter, after satisfying all applicable programmatic requirements for the provision of services, such as eligibility determination (*see* 20 CFR 677.150(a)). This definition notes that individuals who use only self-services or information-only services or activities are not considered participants. As outlined in § 677.150(a)(4) of this chapter, programs must include participants in their performance calculations.

Placement

The Department proposed to amend the definition of *placement* (along with other terms) to replace the phrase ''employment office'' with ''ES office.'' The Department did not propose any other changes to this definition. The Department did not receive any comments on this proposed definition and adopts it as proposed.

Respondent

The Department proposed to revise the definition of *respondent* by removing the parenthetical language ''including a State agency official'' because the term ''State agency'' is assumed to include ''State agency officials'' and is therefore unnecessary to clarify. The Department did not receive any comments on this proposed change and adopts it as proposed.

Significant MSFW One-Stop Centers and Significant MSFW States

The Department proposed to revise the definition of *significant MSFW one-stop centers* in two ways: first, by removing the text stating these designations are made annually; and,

second, by adding to the criteria by which the Department designates significant MSFW one-stop centers, so that they will include ES offices where MSFWs account for 10 percent or more of reportable individuals in the ES annually. First, as explained in the NPRM, the Department proposed to remove the text stating that significant MSFW one-stop centers are designated annually, because in making the designation, the Department relies on multiple data sources that are published in intervals up to every 5 years. Based on the Department's analysis, the data do not change significantly on an annual basis, and therefore it is often unnecessary to change the designations. This change in the definition would allow the list of significant MSFW one-stop centers to remain the same if there is no compelling reason to make a change. Also as proposed, the designation of significant one-stop centers would include ES offices where MSFWs account for 10 percent or more of participants *or* reportable individuals who are served by that ES office annually, and any other ES offices that the Office of Workforce Investment (OWI) Administrator includes due to special circumstances such as an estimated large number of MSFWs in the service area. The Department proposed to add reportable individuals to the criteria it considers in making this designation so that the one-stop centers designated as significant MSFW one-stop centers also account for the number of MSFWs in the area who are likely to benefit from access to ES services.

The Department similarly proposed to revise the definition of *significant MSFW States* in two ways: first, by removing the text stating that these designations will be made annually; and second, to change the basis on which this designation is made from the 20 States with the highest number of MSFW participants to the 20 States with the highest estimated total number of MSFWs. The Department proposed to change the basis on which it makes this designation so that it will reflect States with the highest total estimated MSFW activity—rather than the highest numbers of MSFW ES participants—so that the designation will better reflect the 20 States with the highest numbers of MSFWs who may ultimately seek assistance from the ES, rather than just those States with the highest numbers of MSFWs who have already sought such assistance.

The Department received a few comments that address the revisions proposed to these definitions. A summary of these comments and the Department's response is below. After thoroughly considering the issues and questions that these commenters presented, the Department has decided to adopt the revisions as proposed, with a clarification to the definition of significant MSFW one-stop centers as described below.

Comment: A couple of State government agencies expressed concern that the Department planned to designate *significant MSFW one-stop centers* and *significant MSFW States* based on a blend of data from the Quarterly Census of Employment and Wages (QCEW) and Census of Agriculture, because, as they explained, the QCEW and the Census of Agriculture use disparate definitions and methodologies. Both commenters recommended that the Department use only QCEW data, from which they assert the Department could derive annual variable employment using a time series decomposition model that disaggregates covered employment by industry in States, agriculture reporting areas, and counties.

One of these State agencies noted that it did not object to the proposal to remove annual designations of *significant MSFW one-stop centers* and *significant MSFW States,* but sought confirmation that States would still be able to submit annual amendments to add or remove a designated office as warranted by data or due to ES-staffing challenges in specific offices, site closures, and/or challenges posted by the Americans with Disabilities Act. This State agency also asked whether the proposed change would affect the use of Special Circumstance MSFW one-stop centers, and expressed concern that the proposed revisions could increase the number of one-stop centers designated as significant MSFW one-stop centers, which would create a need for additional resources and State merit staff in offices so designated.

A farmworker advocacy organization supported the Department's proposal to designate *significant MSFW one-stop centers* based on the percentage of reportable individuals (not just participants) who are MSFWs, reasoning that many farmworkers who do not participate in the ES rely on other SWA services and are affected by the SWA's outreach and monitoring activities.

Response: The Department appreciates the commenters' recommendation to use QCEW data. The changes will not limit the Department's consideration to the Census of Agriculture; therefore, the Department may also consider QCEW data. The Department disagrees with the commenters that using QCEW and the Census of Agriculture data is problematic even though they use disparate definitions and methodologies. The Department often consults multiple data sources to develop planning estimates and will take differences in source methodologies while making determinations for significant MSFW one-stop centers.

In response to the commenter's question regarding whether States may submit annual updates regarding significant MSFW one-stop center activity levels, the Department confirms that States may submit such information and the Department will consider the information to determine if an update is appropriate. As mentioned in the NPRM, if annual adjustments are warranted by the data, the Department will make adjustments. This change would allow the list of significant MSFW one-stop centers to remain the same if there is no compelling reason to make a change.

The Department notes that the revised methodology will apply to all significant MSFW one-stop center designations, including those significant MSFW one-stop centers that are designated due to special circumstances and may increase the number of significant MSFW one-stop centers in some States. An increase in the number of significant MSFW one-stop centers will not create a need for additional State merit staff in offices so designated. It would, however, require the SMA to monitor additional offices onsite.

After further consideration, the Department identified a need to clarify that the administrator who determines which ES offices must be included as significant MSFW one-stop centers based on special circumstances is the OWI Administrator. Accordingly, the Department adopts the changes as proposed, except to add that the OWI Administrator makes the determinations.

Removed Definition of Significant Multilingual MSFW One-Stop Centers

The Department proposed to delete the definition of *significant multilingual MSFW one-stop centers* because proposed changes to § 653.102 would remove specific requirements for offices that meet this definition. The Department proposed to remove specific requirements for significant multilingual MSFW one-stop centers in part 653, because all one-stop centers must comply with the comprehensive language access requirements in 29 CFR 38.9, which prohibit discrimination on the basis of national origin, including LEP, and establish that language access requirements apply to services that ES

recipients provide to all individuals with LEP at all one-stop centers and are broader than the existing requirements for significant multilingual MSFW one-stop centers.

The Department received two comments that address its proposed removal of the definition of *significant multilingual MSFW one-stop centers.* Both comments and the Department's response are discussed below. After thoroughly considering these comments, the Department has decided to remove this definition as proposed.

Comment: Agreeing with the Department's proposal to remove specific requirements for significant multilingual MSFW one-stop centers (*e.g.,* removing the definition of *significant multilingual MSFW one-stop centers*) because all one-stop centers must comply with language access requirements, commenters including a one-stop center employee remarked that Michigan's one-stop centers have multilingual staff to provide their customers access to a broader set of services. In contrast, a State government agency expressed concern that the proposal would result in ES offices with no bilingual staff at present needing to hire additional staff who can assist participants with LEP.

Response: The Department notes that all ES offices must meet the language access requirements in 29 CFR 38.9, regardless of how many significant multilingual MSFW one-stop centers exist in a State. Pursuant to 29 CFR 38.9, SWAs must make services available in all needed languages. SWAs may use bilingual staff to meet this requirement, but other alternatives are available, such as in-person interpretation or telephone interpretation services.

State Workforce Agency (SWA) Official

The Department proposed 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.

Comment: Two State government agencies and an anonymous commenter warned that confusion and inconsistency could result from the Department's proposal to remove the definition of *State Workforce Agency (SWA) official* but continue using the SWA naming convention elsewhere in the regulatory text. The commenters recommended the Department keep *State Workforce Agency (SWA) official* as a defined term, similar to how title I of WIOA defines *chief elected official,* while clarifying that a SWA official is also considered ES staff.

Response: The Department appreciates the comments regarding the potential for confusion or inconsistency related to the use of SWA official. The Department agrees with these comments. Although the Department proposed to remove the definition of SWA official, the final rule maintains the definition of SWA official in existing § 651.10, which means an individual employed by the SWA or any of its subdivisions.

Wagner-Peyser Act Employment Service (ES) Also Known as Employment Service (ES)

The Department proposed to amend this definition to replace the phrase ''employment services'' with ''ES services.'' The Department also proposed to remove the words ''and are'' from the definition for greater clarity. The Department did not receive any comments on this proposed definition and adopts it as proposed.

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

1. Subpart A—Employment Service Operations

Subpart A of part 652 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 changes to this subpart focus on administrative provisions governing nondiscrimination requirements. This final rule also includes a severability provision for part 652 in subpart A.

Section 652.8 Administrative Provisions

The Department proposed to amend § 652.8(j)(2) to correct the statutory reference regarding the BFOQ exception currently listed in the regulation as 42 U.S.C. 2000(e)–2(e) to 42 U.S.C. 2000e–2(e). However, there was a typographical error in the proposed regulatory text. The final rule reflects the correct statutory reference, 42 U.S.C. 2000e–2(e). The final rule also adds a necessary cross-reference to the EEOC's regulation regarding religion found at 29 CFR part 1605.

The Department proposed 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.[5] 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).

Comment: A one-stop operator and an advocacy organization expressed concern that, in appearing to prioritize UI recipients over job seekers as a whole, the proposed rule may not strengthen nondiscrimination requirements but rather could be discriminatory toward certain classes of individuals, such as people on public assistance, immigrants and refugees, people experiencing homelessness, second-chance customers, people with disabilities, and other groups with historically lower labor market participation rates. Similarly, a private citizen stated that staffing flexibility has allowed Colorado to promote and deliver equitable access to the ES for marginalized and underserved populations (*i.e.,* priority populations under WIOA) but the proposed rule emphasizes UI above other services. Several other commenters also stated that staffing flexibility led to more localized services that better met the needs of marginalized communities.

A one-stop center employee and other commenters stated that Michigan satisfies the requirement to give priority to qualified protected veterans through a 24-hour hold on all job orders. The comments also discussed how Michigan meets its affirmative outreach obligation to ensure equal access to services and activities by coordinating with WIOA partners on outreach and accommodating individuals with LEP. The comments argued that the proposed changes would result in staffing cuts, reduced hours, and office closures that could threaten Michigan's proven record of adhering to nondiscrimination requirements and providing universal access to ES services. The commenters added that these impacts would be felt most by people in rural areas and individuals with LEP.

Response: The changes to this section were made to correct a statutory reference and to remove an outdated reference to affirmative action requests

[5] *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).

to ensure that the Department's regulations are consistent with U.S. Supreme Court jurisprudence on race-based affirmative action. The changes do not constitute a change in the Department's policies or treatment of individuals. Just as the previous longstanding State merit-staffing requirement, which was based in part on the close relationship between the ES and UI programs, did not violate the nondiscrimination obligations of the Department and States in administering the ES program, the reinstatement of the State merit-staffing requirement in this final rule for similar reasons does not run afoul of the nondiscrimination obligations of the Department and States administering the ES program. In re-aligning ES and UI, the Department is not prioritizing individuals eligible for UI benefits over individuals in historically underserved or marginalized populations. The ES is a universal access program. In the Department's view, reinstating a State merit-staffing requirement not only supports the historical alignment between ES and UI, but it also helps to maintain universal access and helps to protect the integrity of the ES program. As articulated further in discussion of § 652.215 of this preamble, a State merit-staffing requirement helps to ensure that ES services are delivered by nonpartisan personnel held to transparent, objective standards designed to assure high quality performance. In response to the NPRM, three States—Colorado, Massachusetts, and Michigan—provided initial justification and data to support use of their longstanding staffing model and provided information about significant service disruption that would result from having to upend their longstanding ES staffing model. However, the initial justifications and data presented do not provide clear evidence of causation. Without evidence that alternative staffing models directly cause higher employment outcomes, balanced against widespread success in delivering services while maintaining State merit staff for ES, and further balanced by the need for ES State merit staff to be available for surges in UI claims and appeals, the Department is generally adopting the proposed requirement that States use State merit staff to provide ES services. The three States with longstanding reliance interests are permitted to continue using the staffing model consistent with the model the Department previously authorized for that State. The Department will conduct an evaluation of the three States' provision of ES services, including review of services of other States that participate, as necessary, to determine whether such models are empirically supported and must participate in an evaluation to determine whether alternative staffing models are empirically supported. The commenters who indicated that Wagner-Peyser staffing flexibility allowed States to provide better services to marginalized communities did not include any data that demonstrates causal evidence to support this claim. Likewise, the Department has not identified such evidence to support it.

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 LEP, individuals with disabilities, and individuals in different age groups.

Section 652.10 Severability

Given the numerous and varied changes the Department proposed and is adopting, the Department intends the provisions of this rule to be severable and is including a severability provision in parts 652, 653, and 658 in this final rule. That intent was reflected in the structure of and descriptions in the proposed rule. The inclusion of severability provisions in this final rule confirms the Department's belief that the severance of any affected provision will not impair the function of the regulation as a whole and that the Department would have proposed and implemented the remaining regulatory provisions even without any others. To the extent that a court holds any provision, or any portion of any provision, of part 652 invalid, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision will be severable from this part and will not affect the remainder thereof.

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

Subpart C of part 652 discusses State agency roles and responsibilities; rules governing ES offices; the relationship between the ES and the one-stop delivery system; required and allowable ES services; provision of services for UI claimants; and State planning. Among other changes, the changes to the regulations under subpart C are tailored to require all States to use State merit staff to provide ES services, except the three States using longstanding alternative staffing models previously authorized by the Department. As was true when the regulations were changed in 2020, none of the changes in this section will impact the personnel requirements of the Vocational Rehabilitation (VR) program, one of the six core programs in the workforce development system. Title I of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended by title IV of WIOA, which authorizes the VR program, 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 Wagner-Peyser Act Governor's Reserve flow through the one-stop delivery system?

The Department proposed 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 proposed amending this section to reference professional development and career advancement of ES staff instead of SWA officials. After further consideration, the Department is not finalizing the proposed change to the section heading in order to differentiate the Wagner Peyser Act Governor's Reserve from the WIOA Governor's Reserve. Instead, the Department is making a slight revision to the current section heading. The new section heading reads, ''Must funds authorized through the Wagner-Peyser Act Governor's Reserve flow through the one-stop delivery system?'' In addition, because of the Department's change to the NPRM's proposed definition of ''ES staff'' in this final rule, the Department retains the text of the existing regulation for this section.

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

The Department proposed to amend § 652.215 to require all States to use

State merit staff to provide ES services and proposed giving States 18 months to comply with this requirement. After further consideration, the Department adopts a rule requiring all States to use State merit staff to deliver ES services, except the three States using longstanding alternative staffing models previously authorized by the Department. States authorized to use alternative staffing models will be required to participate in evaluation(s) of their delivery of ES services to be conducted by the Department. While the Department plans on conducting a single evaluation, the rule requires these States' participation if evaluation activities span more than one study, including any data collection associated with those evaluation activities. The Department will conduct this evaluation of the three States' provision of ES services, including review of services of other States that participate, as necessary, to determine whether such models are empirically supported. All States have 24 months to comply with the staffing requirements in this section.

The Department believes that a State merit-staffing requirement is a generally reliable method to ensure quality and consistency in ES services and supports the well-established connection between ES and UI services. Paragraph (a) of § 652.215 provides that except as provided in paragraph (b) of § 652.215, all States must deliver labor exchange services described in § 652.3 using State merit-staff employees employed according to the merit-system principles described in 5 CFR part 900, subpart F—Standards for a Merit System of Personnel Administration. This staffing requirement also applies to the provision of services and activities under parts 653 and 658.

The Department also recognizes the longstanding reliance interests of three States that had been authorized to use alternative staffing models in the 1990s. These States provided initial justification and data to support use of their longstanding staffing model and provided information about significant service disruption that would result from having to upend their longstanding ES staffing model. These three States have built systems, developed partnerships, and established a service delivery model that could be reversed only at significant cost to the State and with significant harm to job seekers and employers. Accordingly, in paragraph (b) the Department permits only these three States authorized to use alternative staffing models prior to February 5, 2020, the effective date of the 2020 Final Rule, to continue using the staffing model consistent with the model the Department previously authorized for that State. It is the use of a particular staffing model in each State that engendered each State's strong reliance interest. Therefore, paragraph (b) also provides that these States may use merit-staffing flexibility only to the same extent that the Department authorized it prior to February 5, 2020. This means that if any of the States covered by paragraph (b) sought to use the 2020 Final Rule to expand flexibility beyond what was previously authorized in that State, that State must return to the staffing model in use as authorized by the Department prior to February 5, 2020.

Paragraph (c) requires that the States permitted to use an alternative staffing model must participate in evaluations of their delivery of ES services to be conducted by the Department. The Department's goal will be to assess ES service delivery in several States. Requiring the three States authorized to use their longstanding alternative staffing models to participate in evaluation activities will enable the Department to determine whether alternative staffing models are empirically supported.

In response to comments, paragraph (d) lengthens the proposed transition period, requiring all States to comply with the staffing requirements in § 652.215 no later than 24 months after the effective date of this final rule. The Department recognizes that States will need time to address issues, such as obtaining any necessary State authorization, procurement, collective bargaining, hiring, and training.

The following discussion further details the Department's decision.

Potential Impacts of the Rule on the Provision of ES

Benefits of Using State Merit Staff To Deliver ES Services

Comment: Two State government agencies expressed support for the proposed merit-staffing requirement because it would promote Statewide uniformity and consistency of employment security services. In particular, one of these commenters stated the ability to have consistent hiring practices, standardization of staff onboarding and training, and continuous professional development training throughout the State merit staff's employment life cycle ensure the most consistent and best customer service possible across the State. Similarly, two anonymous commenters expressed concern about the lack of consistent ES services throughout Michigan, which one of these commenters said is a byproduct of local control. These commenters argued that a consistent service delivery model of providing ES services through State merit staff would benefit Michigan job seekers and provide greater transparency and accountability to Michigan residents.

A State employee association commented that, in passing the Wagner-Peyser Act, Congress envisioned a federally supported but State-administered merit system, subject to consistent rules and oversight, to prevent favoritism and promote equality in the delivery of employment services.

Response: The Department agrees that using State merit staff to deliver ES services helps to promote statewide stability and consistency in service delivery. The Department further agrees that using State merit staff helps ensure that employment services are delivered in an equitable manner and on a nonpartisan basis. As noted earlier in this preamble, in the IPA Congress found that the quality of public service could be improved by administering programs according to merit-based principles. Because the ES is a universal access program, it is critical that it be administered by nonpartisan personnel held to transparent, objective standards designed to assure high quality performance.

The Department acknowledges the comments regarding ES service delivery in Michigan. As noted elsewhere in this preamble, Michigan is one of three States that the Department authorized to use an alternative staffing model beginning in the 1990s. Due to the State's strong reliance interest developed from longstanding use of a particular service delivery model and the potential service disruption that would ensue if the State is required to adopt a full State merit-staffing model, the Department is permitting Michigan to continue using its longstanding alternative staffing model. The Department is requiring the State to participate in an evaluation of service delivery in the State to be conducted by the Department.

Potential Cost Increases of State Merit Staff That May Reduce the Availability of ES Staff

Comment: Numerous commenters, including an association of State elected officials, Michigan, Colorado, and Delaware State government agencies, and Michigan and Colorado local governments, expressed concern that the proposed rule could make the provision of employment services less efficient in States that use flexible staffing models and may reduce access

to critical workforce resources for job seekers and employers because the proposal would reduce the number of available ES staff. In contrast, a private citizen argued that there is little evidence that the proposed rule would reduce access to workforce resources, reasoning that in Michigan, if there is a threat of service reduction it is because the State has used ES funding as a substitute for WIOA funding, for local staff, or for overhead costs for staff not fully dedicated to providing ES services.

Many commenters, including Michigan and Colorado State elected officials, Michigan, Colorado, and Delaware State government agencies, and Michigan and Colorado local governments, argued that the rule would cause a significant reduction in ES staff in States that use flexible staffing models, as well as the closure of many one-stop employment centers, with the greatest losses occurring in rural areas.

Response: The Department acknowledged in the NPRM that there would be costs to some States to transition to using State merit staff to deliver ES services, requested feedback on the transition costs, and requested feedback on the proposed 18-month transition period. The Department notes that information that is supported with evidence and data sources is more strongly considered than information that is unsubstantiated. The States of Delaware, Michigan, and Colorado provided new information in their comments on the NPRM that are relevant to the NPRM's regulatory impact analysis. These States detailed impacts on existing contracts and procurement, recruitment, training, staffing, collective bargaining, technology costs, infrastructure changes, funding, and the extent of service disruptions that would result from imposition of a State merit-staffing requirement because these States have utilized approved alternative staffing models for many years. Some commenters provided information based on a survey stating that there will be job losses and center closures as a result of the State merit-staffing requirement. A few additional States responded to indicate that they may be utilizing staffing flexibility, although the Department was previously not aware they intended to utilize the staffing flexibility provided by the 2020 Final Rule. Those States did not estimate transition impacts as requested by the Department in the NPRM.

The Department has considered the comments opposing the reinstatement of the State merit-staffing requirement and found the comments from Colorado, Massachusetts, and Michigan the most compelling due to their longstanding reliance interests on using alternative staffing models. Based on these comments the Department has determined that States are required to use State merit staff to provide ES services, except Colorado, Massachusetts, and Michigan. The final rule is allowing these three States to use merit-staffing flexibility to the same extent previously allowed by the Department prior to February 5, 2020, the effective date of the 2020 Final Rule. As discussed above, the Department is requiring these States to participate in an evaluation of ES service delivery staffing models. All States will have 24 months to comply with the requirements in this final rule.

ES Service Delivery and Customer Impacts

Comment: Many commenters described the services made available through Wagner-Peyser Act funding and expressed concern about a disruption or outright elimination of such services due to the proposed merit-staffing requirement, as described below.

Many Michigan commenters, including private citizens and one-stop center staff, discussed the value of the supportive services they have received or provided through Michigan Works! offices, including assistance with important tasks for job seekers such as developing a resume, strengthening interviewing skills, and performing job searches; some of these commenters, including one-stop center employees, stated that local center staff help alert customers to the availability of such services. A one-stop center employee stated that local ES workers have the best understanding of community needs and are often the first point of contact to help customers navigate available programs.

Many commenters, including Michigan and Massachusetts State government agencies, Michigan and Colorado local governments, and advocacy organizations, went on to more specifically describe one-stop employment centers' role in preparing job seekers for employment and connecting them with employers who want to hire them, including services such as facilitating training programs, hosting job fairs and career awareness events, organizing industry collaboratives, helping craft resumes, and providing job searching and interviewing tips. According to some of these commenters, including Michigan local governments, a key benefit of staffing flexibility is strong local strategic relationships with businesses, higher education, nonprofits, childcare, elementary and secondary education, adult education providers and other partners, which allows for more efficient customer service to connect job seekers to in-demand jobs and training opportunities.

Furthermore, many commenters, including Michigan and Colorado State elected officials, Michigan and Colorado local governments, and advocacy organizations, claimed that the status quo staffing flexibility has helped States and localities achieve specific, positive outcomes in terms of newly employed individuals, employment rates, average worker earnings, numbers of employers served, total economic impact, increased tax revenue, and returns on investment.

Response: The Department appreciates the concerns raised by commenters and agrees that the quality of ES services is important. The commenters highlighted the benefits of the services provided to participants but did not provide evidence that the staffing model is a causal factor in the quality of those services. Though the Department agrees that local relationships are important in business services, local areas in States across the country using State merit staff for ES manage to develop such relationships. Commenters did not provide any evidence that strong local relationships are only possible with alternative staffing models, or that using a non-State-merit staffing model is a causal factor in developing strong business relationships. Without such evidence, balanced against the benefits of State merit-staffing described above, the Department will not extend the ability to use alternative staffing models to other States besides Colorado, Massachusetts, and Michigan. Therefore, the Department has determined that States are required to use State merit staff to provide ES services, except the three States that have long been allowed to use alternative staffing models.

Comment: A State workforce development board said that data shows that former demonstration States using local merit and non-merit staff to deliver ES services have been successful and argued that all States should examine strategies to further service integration. Another State workforce development board and a professional association stated that it appreciated the approach ''created by Congress'' wherein the Federal government partners with State and local workforce program, providing performance goals and broad working parameters, but leaves States to manage their operations based on the diverse needs of businesses and workers in their

communities. These commenters urged the Department to permanently codify staffing flexibility.

Response: As explained earlier in the preamble, the Act gives the Secretary discretion to require that States use a staffing model that will promote the goals of the ES program. For reasons articulated in the NPRM and this final rule, the Department has determined that that model is State merit-staffing. Three States using longstanding alternative staffing models presented arguments in support of retaining those models, but the information provided did not show a causal impact of the staffing model in these States and performance. Accordingly, the Department declines to extend staffing flexibility to all States. The Department reinstates a State merit-staffing requirement for ES services with the exception of the three States with longstanding reliance interests. These States are required to participate in evaluation of their delivery of ES services conducted by the Department, including review of services of other States that participate, as necessary, to determine whether such models are empirically supported.

Comment: Some commenters, including one-stop operators, private citizens, and others, listed several potential impacts on customer service as reported by stakeholders concerned about the proposal, including closure of ES offices (particularly in rural areas), reduced hours of operation for offices, disruption of referrals, curtailed services to immigrants, veterans, and other vulnerable populations, fewer opportunities for career awareness events or job fairs, and reduced access to technology. Many commenters, including Michigan local governments, a Michigan State elected official, and Michigan one-stop operators, also warned that the rule would cause one-stop centers to reduce or eliminate their job seeker and employer workshops, career fairs, and career awareness events, as well as their efforts to facilitate job seekers' enrollment in and funding for schools and training programs. Some commenters, including Michigan one-stop operators, Michigan one-stop center staff, and an employer, warned that with the reduced staffing flexibility under the rule, customer service in employment services would decline, with reductions in virtual services, less personal services, and with services only provided by appointment to customers who meet specific criteria. Several commenters, including a one-stop center employee, private citizens, and a Michigan State government agency, asserted that Michigan Works! staff anticipate disruptions to the ''more than 3,600 services'' provided to industry-led collaboratives, 7,500 job fairs, and other services that have been successfully delivered over a 25-year period.

Several commenters referred to the minimum services required by § 652.3 noted in the NPRM (including facilitating the connection between job seekers and employers) and questioned how their State would continue to provide these essential services with just an estimated 25 percent of their current staffing level. The commenter asked whether a certain service or customer sector would take priority in cases where staffing shortages impact service availability, and further questioned how robust services would be provided if ES staff are reassigned to UI. A few one-stop center employees and a local government remarked that the proposal would disrupt convenience or would lengthen ''turnaround time'' for service delivery to job seekers, an outcome that the commenters warned would adversely impact job seekers, employers, and the local community.

A local workforce development board described how ES staff work with job seekers to determine their unique needs, increase their marketability in the labor market, or otherwise provide ''intensive job search assistance.'' The commenter said these comprehensive services would be disrupted, causing a gap in service provision, and adversely affecting job seekers. The commenter provided figures to demonstrate the economic value of participation in the WIOA's adult and youth programs and expressed concern that these economic impacts would be reduced or lost if existing ES staff are unable to support the comprehensive set of services they currently provide. A private citizen said ES customers need career services to build a sustainable work history.

Several commenters asserted that one-stop organizations in its area take pride in providing quality customer service and argued that local control over Wagner-Peyser Act ES programs is critical to positive impacts associated with its workforce development programs, citing statistics about the numbers of individuals and businesses served, numbers of workshops and hiring events hosted, and economic figures demonstrating economic impact and an overall return on investment.

A State government agency recommended that the Department maintain staffing flexibility to avoid service disruption during emergencies. An anonymous commenter expressed concern that changing a system that works well will place ''stress'' on their State government, which is dealing with challenges related to the pandemic and unemployment.

Some commenters, including a Michigan State government agency and an employer, asserted that the proposal would result in the loss of many full-time employees and expressed concern about the ability of fewer State merit staff to handle the leftover caseload. The Michigan State agency asserted that this staffing shortfall would cause one-stop customers to experience increased delays, inefficiencies due to remote service delivery or multiple case managers, and challenges in scheduling appointments (potentially resulting in increased transportation or childcare costs).

Response: The Department appreciates the concerns raised by the commenters. Commenters' concerns appear to generally stem from an assumption that the use of State merit staff for ES services would be more expensive and thus result in the closure of one-stop centers, reduction of one-stop hours, and programming cuts. While the commenters provided no evidence that the rule change would result in these reductions or closures, the Department understands that there may be costs and disruption associated with a transition to State merit staff, particularly for the three States that have longstanding reliance on being able to use alternative staffing models, as described above. Therefore, the Department will permit alternative staffing models in the three States with long-time reliance on such models.

Service to Specific Populations or Vulnerable Populations

Comment: Many commenters, including a Colorado State government agency, Colorado local government agencies, and advocacy organizations, warned that the rule would cause reductions in ES services in States that use flexible staffing models. These commenters expressed concern that such reductions would be associated with services that are designed specifically to aid vulnerable populations, or those who otherwise have significant difficulty in finding employment, thus doing them particular harm. In this category of vulnerable populations, commenters included groups such as veterans, immigrants, refugees, youth, people living in rural areas, people with disabilities, formerly incarcerated people, and other vulnerable job seekers.

Several commenters, including private citizens, advocacy organizations, a local government, and others, stated that local Michigan Works! offices serve

the most vulnerable populations in a given community, including veterans, low-income adults, dislocated workers, individuals with intellectual disabilities, older workers, youth, and immigrants and refugees, and expressed concern that the proposal would disrupt or eliminate services to the detriment of these vulnerable populations. A one-stop center employee similarly referred to these population groups and expressed concern that the proposal would delay service delivery for these groups and would adversely impact ''follow through'' and information sharing between States and agencies. Some commenters, including a Michigan State government agency, a Colorado local government agency, and many Michigan one-stop center staff, also described the specific needs of the people generally served by one-stop centers; in general, these are vulnerable and low-income populations, in need of significant support in the job seeking process, including transportation, clothing, food, childcare, technology assistance, substance abuse counselling, and medical care.

An academic commenter described their organization's strong relationship with a local Michigan Works! office and expressed concern that the proposal would disrupt services to the most vulnerable communities in their area. The commenter said their organization benefits from employment and training services for immigrants and students and expressed particular concern about the potential elimination of the Teach Talent Thrive program that promotes lifelong learning and career readiness.

An adult education provider stated that their organization partners with the local Michigan Works! office to provide career training and education services to adults and students, including coaching for career readiness, job searching, and aligning skills with a desired career pathway. The commenter also said the proposal would ''compromise'' Governor Whitmer's Sixty by 30 plan that seeks to close socioeconomic gaps for vulnerable populations, including the economically vulnerable adults served by the commenter's organization.

Some commenters, including an employer, an advocacy organization, and a private citizen, expressed concern that the proposal would disrupt services for veterans, including programs that support employment for veterans with employment barriers, services for active-duty military members, and military spousal services.

An advocacy organization expressed concern that ''impactful'' programs such as the Clean Slate program (which provides supportive services for formerly incarcerated individuals or individuals with criminal records) and the Going Pro Talent Fund (which provides skills-based certificate training) would be adversely affected by the proposal. A local workforce development board stated that local ES staff partner with programs like the Disability Program Navigator to enhance local capacity to provide services for people with disabilities, including helping such individuals navigate available services. A private citizen described how receiving supportive services from their local Michigan Works! service center has benefited their family member with intellectual disabilities and remarked that such services are difficult to find.

A private citizen concerned about a disruption of critical services to vulnerable populations remarked that Michigan Works! has proven it is ''best in class'' as an ES provider, citing figures from 2018 and 2019 that showed Michigan was among the 10 States with the lowest costs of career services per participant served.

Response: The Department appreciates the concerns raised by commenters and agrees that the quality of ES services is important, particularly for vulnerable populations. The ES is a universal access program. The Department prioritizes the needs of vulnerable populations in this rulemaking and believes that changes in this rulemaking further the goal of universal access. Requiring States to use State merit staff to provide ES services will better protect vulnerable individuals because State merit staff are employees of the State who are subject to merit system principles and are thus directly accountable to the State and administer the ES with greater transparency and accountability than other staffing models.

The staffing requirements in part 652 apply to the delivery of services and activities under parts 653 and 658. Using State merit staff for these services is appropriate because these staff positions perform worker protection functions for MSFWs, who are particularly vulnerable to employment-related abuses. These staff require centralized training and management from the State to ensure they are equipped to assess and respond to farmworker needs, including responding to complaints and apparent violations in the field, which may include highly sensitive subject matter like human trafficking.

As stated above, the Department also recognizes the longstanding reliance interests of three States—Colorado, Massachusetts, and Michigan—and based on comments received about the negative impacts that requiring these States to change their ES service delivery models would have on service delivery, the final rule is allowing these three States to use the staffing models they have been allowed to use since the 1990s. Adjusting to avoid negative impacts to these three States' service delivery caused by the transition costs involved in changing decades-long practice is aligned with the Department's prioritization of the service delivery needs of vulnerable populations.

Business Services and Partnerships

Comment: In addition to comments focused on the rule's detrimental effects on job seekers, many commenters, including Michigan local governments, a Michigan State elected official, and Michigan one-stop operators, also expressed concern that the rule would have a significant negative effect on businesses and employers, primarily by reducing recruiting services to businesses seeking help in filling vacancies, as well as reduced job retention efforts. Numerous commenters, including an association of State elected officials, Michigan, Colorado, Massachusetts, and Delaware State government agencies, and Michigan and Colorado local governments, argued that the one-stop employment centers, operated by local merit staff, deliver high-quality, cost-effective services to job seekers, and that existing staffing flexibility enables local centers to create strategic partnerships with businesses, schools, and nonprofits, all of which help better serve job seekers and businesses. Some commenters, including Michigan local governments, a Michigan State elected official, Michigan one-stop operators, and others, also warned that the rule would force one-stop centers to cut their industry-led collaboratives. Some commenters from Massachusetts, including a State government agency, local workforce development boards, and a local government employee, argued that implementing the rule would undermine business commitments and partnerships with ES services in States that use flexible staffing models because of the appearance of political instability and unnecessary bureaucratic change.

Several commenters, including employers, one-stop center employees, and a local workforce development board, described how ES services benefit businesses, such as through job fairs, retention services, online job postings, and other programs that connect job seekers and employers. The

commenters expressed concern that the proposal would disrupt such services. Some commenters, including a private citizen and an employer, remarked that many businesses are struggling to find employees and credited local services that use Wagner-Peyser Act funding with providing critical assistance connecting employers and employees. Several commenters stated that Michigan Works! has provided ''more than 141,000 services to businesses'' and cited responses from program stakeholders who believed these services would be reduced or eliminated if reinstating merit-staffing impacted uses of Wagner-Peyser Act funding. A private citizen remarked that Michigan Works! services in their area assist employers with upskilling and retention of employees. A Colorado State government official asserted that the use of local merit staff for Wagner-Peyser Act programs has allowed Colorado to fully implement the ''primary vision'' of WIOA, effectively emphasize employer engagement, encourage work-based learning, and maximize support for local businesses based on local community and competitive needs.

Some commenters, including a Colorado local workforce development board, an employer, and a one-stop center employee, specifically claimed that one-stop centers have been particularly helpful in connecting employers with skilled employees in the manufacturing sector, as well as facilitating training; thus, the implementation of this rule would do particular harm to the struggling manufacturing sector in the States that use flexible staffing models.

Several commenters, including a Colorado State government, local governments, employers, and private citizens, asserted that the proposal would fracture relationships forged at the local level, harming both job seekers and employers. A Colorado local government and a local workforce development board said strong relationships between ES staff and local employers has resulted in a Subsidized Employment program that connects employers and entry level workers and expressed concern that this program and other comprehensive wrap around services would be lost due to the State merit-staffing requirement. An anonymous commenter remarked that local residents consider the local one-stop center to be a ''neutral third party'' for businesses and job seekers, and expressed concern that this would be disrupted due to the merit-staffing requirement.

A local workforce development board stated that their State's current one-stop delivery model works well for businesses by connecting them with job seekers as well as training resources. Some commenters asserted that as a result of the proposal, employers will lose access to support for posting job orders and connecting with job seekers.

A one-stop center employee argued that serving business requires staff ''out in the field'' and remarked that one-stop workers must seek out businesses, not the other way around. A trade association similarly remarked that the proposal would make it harder for businesses to engage with the workforce system and could result in the cancellation of contracts or other transition costs.

A private citizen remarked that their local Michigan Works! office has effectively helped businesses attract and develop their workforces, including assisting businesses in securing grants to train and invest in current employees and add new staff. Similarly praising Michigan Works! employees' support for local businesses, another private citizen expressed concern that the proposed merit-staffing requirement would negatively impact local communities at a time when labor concerns hinder businesses across the State.

Some commenters, including State and local workforce development boards from Colorado, a trade association, a commenter from academia, and an employer, discussed the value of working with local ES staff due to their expertise in the local economy and knowledge of competitive factors in a given area, arguing that the ability to provide ES services using local merit staff maximizes the level of support provided to local businesses. A local government expressed concern that the proposal would disrupt established relationships between local staff and employers and economic development organizations at the community level.

Some commenters, including an advocacy organization, a trade association, a Colorado local government, and private citizens, discussed the value of local knowledge in serving the needs of local businesses and job seekers, with some discussing the varied needs of businesses and job seekers in urban and rural areas. A Colorado local government and a Colorado one-stop operator similarly argued that employers benefit from working with staff who have a regional perspective on what businesses need. A Colorado local workforce development board similarly discussed the value of local control of ES services and the knowledge of local and regional economic conditions, including whether the economy is prosperous, whether employers are facing labor shortages or scarcity, and whether unemployment rates are high or low. The commenter said removing local control would result in slower services and a less nuanced and dynamic response to citizen and business needs.

An advocacy organization described the value of local industry-led initiatives in serving employers' unique regional needs and expressed concern about such initiatives' continued success if ES staff are reduced or reassigned. A Colorado local workforce development board described sectoral partnerships developed by local staff working in the communities they serve, including partnerships in the healthcare, information technology (IT), construction, and transportation sectors. A different Colorado local workforce development board expressed concern that the proposal would ''dismantle'' successful regional industry sector work that has developed over the past decade. A private citizen and an anonymous commenter described services provided to businesses made possible by local staff's relationships with those businesses and expressed concern that the proposal would result in the loss of ''local control.''

A Colorado employer and a few private citizens argued that county merit staff have developed expertise on the local economy and community needs, asserting that State or Federal employees are less capable of developing successful local connections with local businesses.

Several commenters, including trade associations, private citizens, a one-stop center employee, an advocacy organization, and Colorado local workforce development boards, argued that local workforce staff have the necessary local and regional understanding to establish effective partnerships with local partners and organizations. Several commenters, including a Michigan State elected official, a Michigan local elected official, Michigan local workforce development boards, one-stop operators, and Michigan local governments, similarly remarked that the ability to develop strategic partnerships with local nonprofits, businesses, educational institutions, and other organizations is a key benefit of ES staffing flexibility because these relationships facilitate connections between students, job seekers, training providers, and local employers.

A private citizen remarked that staff in their local Michigan Works! office had a knowledge of local business needs

and hiring trends that was critical in accessing the right services for the commenter to remain competitive in the local job market.

Response: The commenters highlighted the benefits of the services provided to businesses, and the Department agrees that business services and partnerships with businesses are important. However, the commenters did not explain why the ES staffing model is a causal factor in the quality of those business services and partnerships. Many other States use State merit staff to successfully provide services to businesses and job seekers. The Department recognizes the longstanding reliance interests of Colorado, Massachusetts, and Michigan, and will therefore allow these States to utilize the longstanding alternative staffing models the Department previously allowed them to use. These States may exercise merit-staffing flexibility to the same extent previously authorized by the Department for that State prior to February 5, 2020, the effective date of the 2020 Final Rule. The Department also is requiring these three States to participate in evaluations of their ES service delivery model to be conducted by the Department.

Access—Transportation and Virtual Services

Comment: Some commenters, including an anonymous commenter, a one-stop center employee, a local workforce development board, and a private citizen, stated that their local service office has offered assistance in using technologies or online services that are vital to employment and expressed concern about losing access to such support.

Some commenters, concerned about the disruption or closure of Michigan Works! offices in their area, including a local workforce development board and a one-stop center employee, worried that customers would need to travel longer distances to access needed services, with many stating that rising gas prices and other complications (such as the sparse availability of public transportation in certain areas) will make transportation particularly challenging for many one-stop center customers.

Response: The COVID–19 pandemic highlighted the need for States to have staff to serve as surge capacity for times of high demand for UI claims. The Department agrees that in-person services are valuable, even as technology makes virtual services easier to develop and deliver. States across the country, the vast majority of which use State merit staff, have successfully used a combination of comprehensive and affiliate AJCs, access points, mobile AJCs, and online and virtual services to a reach geographically distant job seekers and those without reliable transportation. Data do not show a relationship between staffing models and the number of AJCs or access points per capita in the State. The Department also recognizes the longstanding reliance interest that Colorado, Massachusetts, and Michigan have in using alternative staffing models authorized by the Department. The Department is permitting these States to continue using the longstanding staffing models the Department allowed them to use in the 1990s. These States may use merit-staffing flexibility to the extent permitted by the Department in that State prior to February 5, 2020, the effective date of the 2020 Final Rule. All other States, including those that began using the staffing flexibility provided by the 2020 Final Rule, are required to use State merit staff to provide ES services. The Department will further examine various staffing models and methods of delivering labor exchange services, including evaluation activities for which the Department will require the participation of the three alternative staffing model States. All other States will have 24 months to comply with the requirement to use State merit staff to provide ES services. No additional States are permitted to pursue adoption of an alternative staffing model during the transition period; the final rule is effective 60 days after publication in the **Federal Register**. The 24-month transition period for complying with the State merit-staffing requirement is intended only for those few States that began using staffing flexibility in response to the 2020 Final Rule and now must transition back to using State merit staff.

Training and Other Considerations for Employees Delivering Services

Comment: A think tank remarked that many State agencies face multiple challenges, including staffing shortages, funding shortfalls, and backlogs, and warned that the proposal could exacerbate these issues because contract staffing or other staffing flexibilities offer workable solutions. A local government expressed concern about forcing programs to re-structure existing staffing models, stating that the proposed rule could result in laid off staff, damage to staff morale, and a reduction of ''vital employment services'' like labor exchange services, career workshops, and services related to community engagement and service navigation.

Some commenters, including a one-stop center employee and a private citizen, warned that hiring or training new staff could lead to discrimination or bias against existing staff or entry-level staff. A private citizen remarked that local agencies may have different retirement or healthcare benefits for staff based on agreements with local or country governments, and expressed concern that changing staffing arrangements could disrupt pension or healthcare benefits for some workers. A one-stop operator acknowledged that ensuring employees receive fair wages and benefits was a motivation for the NPRM and remarked that the retirement and medical benefits available for public employees in its county are among the top plans nationwide.

An anonymous commenter argued that it would not make sense to train new individuals to replace the current staff in Workforce Centers, who have already developed relationships with customers.

A private citizen remarked that Colorado's current staffing model creates a greater level of oversight because county merit-staff employees are accountable to both the State and county government. A State government referred to the Department's rationale about State merit staff's accountability and asserted that county merit employees are already sufficiently accountable to their local county government. An advocacy organization stated that currently employee performance is assessed and measured using customer service metrics and they expressed concern that the proposal would alter and complicate performance assessments.

Response: The Department recognizes that there will be transition costs to some States, which was included in the NPRM's regulatory impact analysis. New information regarding transition costs and impacts was provided in comments to the NPRM from States utilizing alternative staffing models. The Department considered these comments in developing the final rule but, for the reasons discussed throughout, the Department has decided to require that States use State merit staff to provide ES services, with limited exception. The Department is allowing the three States with longstanding reliance interests—Colorado, Massachusetts, and Michigan—to continue to utilize their longstanding alternative staffing models for ES services and is requiring their participation in an evaluation to be conducted by the Department.

Transition Period

Comment: In addition to reduced future employment services, some commenters, including an association of State elected officials, a Colorado State government agency, Colorado local government agencies, and others, claimed that there will be significant transition costs and logistical challenges for States to transition to a model by which employment services are only provided by State merit staff.

During this transition period and for some time after, a Colorado State elected official and State government agency warned that compliance and performance standard failures will likely become more common.

While most commenters wrote about the effects the rule would have if implemented, some commenters, including a Colorado State elected official, a Colorado local government agency, and a one-stop center employee, argued that the proposed merit-staffing requirement has already had a chilling effect, with former demonstration State one-stop centers and localities unable to approve budgets, not knowing what future grant levels will be, and with one-stop center staff already seeking employment elsewhere in anticipation that their positions will be terminated soon anyway.

A State government agency discussed the challenging logistics of implementing a State merit-staffing model within 18 months, anticipating additional staffing needs as well as a challenging timeline for State legislature approval of additional funding for additional staff. The commenter requested a 3-year implementation timeframe to make requests for additional staff and funding during the State legislature's budget cycle.

Conversely, several unions who supported the proposal agreed with the proposed 18-month transition timeline and recommended that the Department provide assistance and support to any States using alternative or flexible staffing models, reasoning that such assistance would help prevent disruptions to Wagner-Peyser Act services. One union suggested that the Department ''require sufficient staffing to monitor and support'' the transition in States using flexible staffing models.

State and local workforce development boards, a Colorado State government agency, and a Colorado local government requested a 36- to 40-month transition timeline (depending on if and when the rule is finalized) allowing for full compliance by December 31, 2025. The commenters cited the State legislative process and funding needs to both maintain quality services and hire and cross-train new staff as factors that necessitate a longer transition period.

A Colorado State government agency and State and local workforce development boards said State legislation would be needed to allow Colorado to come into compliance with the Federal rule and anticipated that current staff may leave their posts as soon as the rule is finalized (which, the commenters asserted, would require time and funding to find and train their State merit-staff replacements). The commenters also stated that the funding and effort required to hire and train new State merit staff would require funding from the PY 2024 Wagner-Peyser Act allocation as the PY 2023 amount likely would not be sufficient.

A Colorado one-stop operator argued that the transition timeline is ''irrelevant'' because the proposal will cause impacts immediately. The commenter argued that the proposal has already created concerns among local employees about their job security and, thus, announcement of a finalized nationwide merit-staffing requirement would result in immediate departure of ES staff, concluding that Wagner-Peyser Act services will ''cease immediately'' if the proposal becomes final.

A Michigan State government agency requested an extension of the implementation period from 18 months to 3 years, arguing that modifications to State departments' structure, State budget processes, and public sector recruitment, hiring, and training functions will take time. The commenter anticipated that 90 new staff members would need to be hired and trained and remarked that this would require the State legislature to approve a staffing structure modification (adding that their State legislature is ''extremely resistant'' to adding new full-time employees to State departmental budgets). The commenter said the longer implementation period would be necessary to ensure there are no disruptions to service delivery and reorient the local workforce development structure. If the Department finalizes the merit-staffing requirement as proposed, this commenter also requested a 3-year reprieve from Wagner-Peyser Act and WIOA title I performance reporting and suggested that a new performance baseline would need to be negotiated and established.

Opposing the proposed merit-staffing requirement, several commenters, including a one-stop center employee, argued that 18 months was insufficient to ''revamp'' an ES delivery system that has been constructed over the past 25 years and requested that, if the proposal is finalized, more than 18 months be provided for transition and transition should align with a new program year. These commenters described the ''painful'' impacts of Michigan's 1998 transition from State merit staff to local merit staff, including lack of coordination in program delivery and diminished customer service.

A Massachusetts State government agency opposed to the proposal requested a ''significantly longer timeline'' to assess, plan for, and implement the merit-staffing requirement, asserting this would require the conversion of more than 40 local Wagner-Peyser Act staff into State merit staff. The State government listed difficulties associated with an anticipated ''major infrastructure change,'' including facilitating staff turnover and hiring new staff, negotiating with unions, approval of ''spending controls,'' and considerations of lease or other contractual agreements. The commenter also mentioned that the forthcoming WIOA reauthorization potentially complicates the overall timeline. Ultimately, the commenter requested that the implementation period should last until at least January 2025.

Describing the proposal as a major disruption to Colorado's workforce system, the commenter discussed how the staffing transition would impact program offices in Colorado, including ''mass layoffs'' of 145 county staff (and associated negative impacts on morale), fewer full time Wagner-Peyser Act staff resulting in scaled back services for vulnerable populations, lost productivity, customer service disruptions, increased errors by ''unseasoned staff,'' and potential lawsuits or other complications due to union representation of State staff.

Several commenters remarked that, based on average turnover rates, Michigan's local offices may have 18 open ES positions at any given time. A Colorado State government agency asserted that the proposal would make it difficult to hire new outreach staff. Additionally, a Delaware State government agency further warned that the process to replace Wagner-Peyser Act contractors and local staff with State merit staff will be procedurally challenging and time consuming, with no guarantee that the staff requests will be approved by the relevant State government bodies. A local workforce development board remarked that its local service center could not move forward with planning programming and strategies for the forthcoming

program year (which begins on July 1st of this year) because they are unclear as to the financial implications of the proposal. Similarly, a Colorado State government agency expressed concern about changing regulations during ''the current 2020–2023 demonstration period'' because neither former demonstration States nor the Department would have enough time to provide evaluative data on the benefits and challenges with the flexible staffing model approach.

Response: The Department proposed an 18-month transition period for States to comply with the requirement to use State merit staff to provide ES services and estimated transition costs in its regulatory impact analysis. In the proposed rule the Department specifically requested information regarding States' transition costs and the proposed 18-month transition period should this requirement be implemented for all States. The Department received comments regarding the length of the transition period, with some commenters suggesting a 2-year transition period, while others suggested a longer or unspecified period of time. The three States with longstanding reliance interests requested a 3- to 4-year transition period. As noted throughout this preamble, based on information provided by these three States in response to the NPRM, the Department is allowing these States to continue to use the alternative staffing models consistent with the models previously approved by the Department in these States. The Department is requiring these three States to participate in evaluations of their ES service delivery models. The Department recognizes that there are certain transition costs associated with shifting back to the use of State merit-staffing, which may include State legislation, budget restructuring, and hiring, and these processes, particularly those that require State legislative action, may take longer than 18 months. Therefore, the Department is requiring all other States, including States that began using alternative staffing models following the 2020 Final Rule, to comply with the requirement to use State merit staff for ES services within 24 months of the effective date of this final rule. This includes the requirement to use State merit staff to conduct outreach and provide other services to MSFWs under parts 653 and 658.

Relationship Between Employment Services and Unemployment Insurance

Consequences of Having the Same Staff Manage ES and UI in States That Are Currently Operating Flexible Staffing Models

Comment: Many commenters, including a Michigan State elected official, a Massachusetts State government agency, and Colorado local governments, articulated that local merit staff at one-stop centers in former demonstration States already provide significant resources, guidance, and other support to UI claimants, many of whom face technological and transportation barriers in making successful unemployment claims, and claimed this role was particularly important during the UI demand surge caused by the COVID–19 pandemic.

Some commenters, including one-stop center staff and a private citizen, warned that assigning ES staff to UI adjudications during UI surges would unnecessarily burden ES staff and cause the quality of employment services in the States that use flexible staffing models to degrade even further during UI surges.

An advocacy organization argued that the relatively small number of new State merit staff this rule would create in States that use flexible staffing models would not make the States significantly more prepared to handle UI surges. Similarly, a Colorado State elected official and a Colorado local workforce development board argued that States that already require Wagner-Peyser Act ES services to be provided by State merit staff did not perform any better in processing UI claims during the UI surge caused by the COVID–19 pandemic than the former demonstration States.

A one-stop center employee similarly argued that the rule could actually decrease the number of staff available to assist with UI claims during a UI surge in States that use flexible staffing models; this commenter argued that because one-stop center staff in former demonstration States are already assisting with the UI claims process, by causing an overall reduction in ES staff, such States would lose this surge capacity.

Some commenters, including one-stop center employees, trade associations, and a private citizen, expressed concern about skill misalignment and warned that the proposal would require retraining workers who provide employment services to perform tasks related to adjudicating UI claims, functions the commenters argued require different skill sets and workstyles. A one-stop center employee expressed concern about ES staff taking on the duties of UI staff and argued that ES staff will not be familiar with practices critical to the management of UI benefits (such as timely administration of the ''work test.'') A private citizen remarked that Michigan's local ES offices have been successful in providing a wide range of services to both job seekers and businesses seeking employees while, in their view, the merit-staffed State UI program has been ''a debacle.''

A Colorado State government agency expressed concern about the effort and funding required to onboard or cross-train staff and remarked that new hires may not be available to provide services throughout their first year due to the time needed to complete required trainings for both UI and Wagner-Peyser Act programs.

Response: The Department proposed to require that States use State merit staff to provide ES services, which aligns the provision of ES services with the requirement that States administer certain UI activities with State merit staff. The Department notes that the NPRM did not propose requirements on States to train or use their ES staff for UI activities. Neither is the Department requiring that States cross-train ES staff for UI activities in this final rule. However, the ability for States to cross-train would generally better equip States to be able to use ES staff for certain UI activities that require State merit staff in times of high need. While the Department encourages States to plan for increases in UI demand including through cross-training, a State can develop cross-training that it wishes to implement at its own pace. The Department recognizes the role that other staff in an AJC may play in connecting job seekers with UI services, but also notes that the ES has specific duties to assist UI claimants to become reemployed. Providing information and meaningful assistance in filing a claim for unemployment compensation is an allowable cost under the Wagner-Peyser Act. The Department also recognizes the longstanding reliance interests of Colorado, Massachusetts, and Michigan, in utilizing alternative staffing models and that a requirement to use State merit staff may impact these States differently than other States. Therefore, the Department is allowing these three States to continue to use the longstanding alternative staffing models previously approved by the Department in these States. The Department is requiring these three States to participate in evaluations of ES service delivery and alternative staffing models.

Support Ability of State Merit Staff To Provide Surge UI Claims Processing Capacity

Comment: Many commenters, including unions, advocacy organizations, think tanks, and a State government agency, expressed support for the proposed ES merit-staffing requirement because of State merit staff's ability to play roles in administering UI programs and connecting jobless workers to UI benefits. Specifically, some of these commenters remarked that, because only State merit staff can legally adjudicate UI claims, requiring ES staff to be hired on a merit basis would permit States to rely on them to process and adjudicate UI claims. Some unions, advocacy organizations, think tanks, and a State employee association commented that reinstating the merit-staffing requirement in all States and realigning ES services with the UI program will ensure that workers can continue to receive unbiased, high-quality employment services and effective, qualified help in claiming UI benefits during economic crises ''without the threat of partisan political coercion hanging over them.''

Several unions, a State government agency, and a think tank agreed with the Department's assessment that any value gained by allowing the ES to be staffed at the local level is outweighed by the benefits of aligning ES staffing with UI administration and adjudication, which would allow ES staff to provide surge capacity for UI during times of high need. As framed by one union, cross-training State merit ES staff enhances the resiliency of UI service delivery. Citing the pandemic and natural disaster emergencies (*e.g.,* Hurricane Sandy) as the best examples of the need for cross-training State merit ES staff to assist UI claimants in periods of high demand, many commenters, including unions, advocacy organizations, and think tanks, argued that, because the frequency of such extreme events is likely to increase, alignment of ES and UI staff is even more important. Several of these commenters reported that during the pandemic, Great Recession, and recent natural disasters, States have relied on State merit ES staff to support UI work, which helped to address historic UI claims surges.

According to unions, advocacy organizations, think tanks, and a State employee association, the U.S. experience with temporary privatization of UI administration permitted by Congress during the pandemic reinforces the importance of reinstating ES merit-staffing. These commenters asserted that the temporary exemption from the requirement that UI adjudicators be merit-staffed resulted in many States contracting with private companies that hired low paid, poorly trained non-State-merit staff to administer traditional and new temporary UI programs. Citing a May 2022 working paper, these commenters said that this use of non-State-merit staff led to high turnover among contracted staff; corruption in the hiring of staff and in job and training referrals and placements; and poor service and long payment delays for claimants. A State employee association and a union added that incomplete and deficient work by outsourced staff increased the workload for State merit-staff UI adjudicators, who were forced to correct vendor staff errors.

Further, unions, an advocacy organization, a think tank, and a State employee association discussed a State audit of Michigan's UI experience during the pandemic, which they asserted found that insufficient worker onboarding and offboarding practices (*e.g.,* only one-fifth of workers completed required training before starting their duties) resulted in a total of $3.8 million in UI fraud committed by vendor staff; purchase order delays; conflicts and ethics violations; and unsafe computer sanitization practices. A State employee association and an advocacy organization added that the Michigan audit also found that nearly half of the sampled vendor staff still had access to the State's automated UI system long after they no longer worked for the contractor, which the commenter said created unnecessary risk to the data and systems. Citing the Michigan audit report, an advocacy organization said that contractors also failed to comply with criminal history background checks for their workers.

Also asserting that Michigan UI claimants in particular suffered during the pandemic, an advocacy organization commented that hundreds of claimants reported to legal advocates that they received little to no help from the frontline staff who were hired to handle the surge of claims during the pandemic. Asserting that non-merit UI workers hired during the pandemic did not receive adequate training, unions and a State employee association agreed with the Department's statement in the NPRM that providing adequate training for UI adjudicators takes several months to a year. A think tank commented that State UI offices increasingly are using contractors for identity verification, which is delaying benefits and creating backlogs for unemployed workers, which is impacting individuals of color and their communities.

An advocacy organization and a private citizen commented that cross-training ES merit staff would alleviate a lot of the pressure on UI merit staff during crises. Citing a lag of increased UI administrative funding at the start of economic downturns, another advocacy organization argued that cross-training State merit ES staff allows ES staff to fill this gap before the Department is able to distribute additional funds to respond to increased administrative needs.

A think tank commented that it has heard from a wide range of legal aid and UI advocates that State UI systems are overwhelmed and fighting cyber fraud due to staffing shortages. Citing a 2020 news article about a Michigan UI agency employee committing fraud, an advocacy organization argued that cross-training ES State merit staff to provide UI services during surges—rather than relying on contractors or new hires—could limit the risk of fraud and ensure the program is run with high integrity and efficiency.

Some commenters, including unions, advocacy organizations, and think tanks, remarked that merit-based State ES employees provide professional, unbiased ES services to job seekers and employers and help UI claimants navigate the job market and comply with work search requirements to initiate and remain eligible for UI benefits. Specifically, an advocacy organization commented that ES staff are already familiar with the local worker populations and understand the conditions on the ground. Because ES staff administer the work test to ensure that UI claimants are able to work and are available for and actively seeking work, which is a federally required condition of State UI eligibility, a State employee association asserted that this gatekeeper function makes the role of ES staff ''inherently governmental.'' Citing increased mandatory UI work test duties imposed over time, a private citizen argued that additional State merit ES staff should be physically available in one-stop centers to assist the UI component in a variety of expanded work test functions.

An advocacy organization argued that, to support a unified delivery model in which job seekers can apply for UI benefits through the same agency providing reemployment services, ES and UI programs should work together to ensure that services are provided by conflict-free, public service professionals, so that workers receiving UI benefits can find suitable replacement jobs efficiently. Similarly, a private citizen commented that required

merit-staffing for ES services may promote better coordination between UI staff and ES staff, which is much needed. Commenting that the ES program performs important labor exchange functions that connect employers with qualified workers and help employees gain reemployment more rapidly, a private citizen argued that the ES must be closely involved with UI. A think tank argued that, as new technology will be deployed over the next few years to address UI modernization, it is critical that State level staff are career employees with decent pay and benefits, which ''will also help ensure a more equitable UI system for all workers and address the racial inequities.''

Asserting that allowing non-State employees in some States to operate ES and UI services was not a wise policy practice, a private citizen reasoned that deficient or hard-to-manipulate computer-based registration, job finding and placement services, and claims processing often result in frustration, leaving some jobless to abandon government assistance, which erodes overall trust in government services. This commenter concluded that the best way to reestablish the trust of job seekers and UI claimants in the delivery of public services is to improve the national standards of quality and professionalism in staffing of State workforce agencies by hiring superior individuals under merit standards.

Also expressing concern about non-State-merit ES staff causing frustration for UI claimants, an advocacy organization argued that cross-training ES State merit staff, and allowing them limited access to UI claims information, could go a long way towards rebuilding these relationships, and would provide claimants with the in-person access to information that they want. Specifically, this commenter said that most of its clients have limited access to technology and struggle to navigate the UI technology system on their phones, and one-stop center staff cannot help claimants with filing claims or navigating the online portal. Therefore, the commenter remarked that cross-training ES staff and allowing them to provide minimal UI support could help alleviate claimant frustrations, provide better access to UI, and prevent many mistakes that claimants make when filing that later lead to improper payments. Finally, this commenter argued that, because the majority of its clients who seek help at State one-stop centers are from underserved populations, allowing ES State merit staff to provide basic information about UI claim status and assist with navigating the online systems would ensure greater equity in access to benefits.

A union, a State employee association, an advocacy organization, and a private citizen argued that the history of the ES and UI programs supports the NPRM's reliance on the ES–UI relationship and the appropriateness of aligning these programs via the State merit-staffing requirement. Specifically, a union and a State employee association commented that these programs originated as intertwined prongs of the New Deal response to mass unemployment and Congress subsequently integrated the funding structure of ES and UI, tasked ES with administering the UI work test, and encouraged the colocation of ES and UI staff to support unified service delivery, all of which also bind these programs together and support alignment.

In particular, because the UI program was created in the Social Security Act (SSA) less than 2 years after passage of the Wagner-Peyser Act, a private citizen stated that Congress developed the UI program with full knowledge of the existing ES public labor exchanges. The commenter described the origins of the UI statutory merit-staffing requirement and asserted that this legislative history provides support for the Department's linkage of UI and ES. In summary, according to this commenter, the UI merit-staffing requirement was not in the original SSA of 1935, even though the President's Committee that designed the programs recommended that the selection of administrative personnel for the program be on a merit basis. In 1938, the commenter said, based on an initial UI program review by the Social Security Board, a recommendation was made to require merit-staffing in the UI program for all States, which was implemented by Congress in 1939, while leaving early Federal administrative interpretations requiring merit-staffing for the ES program in place. Therefore, this commenter concluded that the linked historical background of ES and UI demonstrates that the absence of an explicit merit-staffing requirement in the Wagner-Peyser Act does not demonstrate that merit-staffing is beyond the Secretary's authority, and the record of consistent use of merit-staffing in both ES and UI programs supports the adoption of the proposed merit-staffing requirement.

Asserting that the founders of the unemployment security system felt strongly that ES and UI services should be administered by State merit-staffed employees, a private citizen commented that, without State merit-staff ES employees, the public character of the one-stop center is ceded to private control, contrary to the intent of the Wagner-Peyser Act. This commenter urged the Department to strengthen its argument for uniform required State merit-staffing for ES services by indicating that it is based on longstanding Department policy, research findings, and relevant recent experience.

A union argued that aligning the staffing requirements of the ES and UI programs would further facilitate their integration and promote their joint aim of alleviating the deleterious effects of unemployment and foster reemployment.

Response: The Department proposed to require that all States use State merit staff to provide ES services due in part to the critical need for alignment between the ES and UI programs. The Department appreciates the comments supporting this alignment. It is vital that the ES be administered so that services are delivered effectively and equitably to UI beneficiaries and other ES customers. The Department's proposal and justification was supported by these commenters, including that States would be better equipped to handle surges in UI claims with cross-trained ES staff. As the Department noted in the NPRM, emergencies such as natural disasters are occurring with increased frequency such that a need for surge capacity and cross-trained staff is becoming increasingly necessary. The Department further noted that historical data from 1971 through 2021 indicate regular and periodic increases in the number of UI initial claims and first payments, for which having ES staff who are already cross-trained or able to be quickly cross-trained to assist UI claimants would be beneficial. Requiring States to use State merit staff also helps to support universal access to ES services and helps to ensure that services are delivered by qualified, non-partisan personnel who are directly accountable to the State. Such professionals would be required to meet objective professional qualifications, be trained to assure high-quality performance, and maintain certain standards of performance. 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.

The Department further agrees that UI and ES are two mutually reinforcing elements of the Federal government's commitment to workers and that the legislative history of the two programs

strengthens the Department's authority to require State merit ES staff. The alignment of these two programs remains a core goal of the Department, with the RESEA program's emphasis on connecting UI claimants to Wagner-Peyser and WIOA services being the latest step toward further integration.

Undue Prioritization of UI Services

Comment: Some commenters, including a Colorado State government agency, a one-stop operator, private citizens, and an anonymous commenter, critiqued the proposal over what they perceived as an undue prioritization of UI services over ES and argued that in doing so, the Department would be restricting vulnerable populations' access to needed employment assistance programs because many individuals who would benefit from ES are not eligible for UI. Several commenters, including a Colorado local government employee and an anonymous commenter, argued that the proposal presented ''discrimination and civil rights issues'' in shifting focus from ES to UI services because the latter does not provide a comprehensive set of services to enable job seekers to find and secure a job. Several commenters, including a Colorado State government agency and a trade association, similarly discussed inequity and civil rights concerns associated with the proposal ''prioritizing the delivery of UI services'' over ES, arguing that this places increased importance on customers eligible for UI and diminishes the availability of services for vulnerable populations (such as communities of color, people with disabilities, people experiencing homelessness, and self-employed or gig workers) who need employment assistance but may be ineligible for UI.

A trade association remarked that shifting ES staff to UI services would promote benefit payments over assisting customers with employment and would cause the community to perceive AJCs as ''the unemployment office'' rather than a site to receive employment services.

A one-stop center argued that prioritizing UI services over ES would be harmful to employers. A private citizen stated that the staffing status quo in Colorado enables an equitable delivery of UI and ES services and cited data from 2021 about the numbers of people who accessed such services in their area in asserting that 9,000 people would receive ''subpar'' ES due to the proposal's undue prioritization of UI.

A State government discussed challenges associated with a rapidly changing labor market and encouraged the Department to keep flexible staffing models in place, arguing that States need flexibility to effectively deliver UI and reemployment services, in part due to the decrease in Federal Wagner-Peyser Act funding ''over the past decades.'' The commenter said reemployment services require a wide range of ''tools, sites, and strategies'' and argued that staffing flexibility helps some States deliver such services effectively. A group of local government employees remarked that many of the individuals served in their local area are not eligible for UI benefits but need access to ES services. The commenter said such individuals feel comfortable coming into a local office and expressed concern about a disruption of the equitable and ''seamless'' delivery of services to marginalized populations, citing an anecdotal example.

Many commenters asserted that it would be counterproductive to require States to use State merit staff to provide ES services and cross-train these employees to process UI claims.

Several commenters, including a Colorado State agency, a trade association, and an advocacy organization, argued that shifting ES staff to perform UI services would repurpose staff to perform duties outside their scope of work, therefore hampering staff ability to perform their main function. These commenters reasoned that ES staff are hired for job coaching, customer support, and relationship building while UI staff focus on short-term problem solving, further stating that the misalignment of these skill sets will create more accessibility problems for all.

Many commenters, including State agencies and an advocacy organization, expressed concern that the proposed rule does not consider the need for surging ES services during UI surges, further questioning who will provide ES services when ES staff are re-assigned to UI adjudication and claim processing. Some commenters, including an association of State elected officials, a one-stop operator, and others, agreed that the lack of staff performing ES services during UI surges will lead to slower service overall. Relatedly, a few commenters, including a one-stop center employee, a think tank, and an anonymous commenter, argued that it is unrealistic to have ES staff turn away from their job duties to handle UI claims as they already have full workloads that can be difficult to keep up with. Several commenters questioned whether ES staff would be relocated to UI offices for training and for the provision of UI services during surges.

Some commenters, including a Colorado State government agency and a trade association, argued that the pandemic created a rare economic crisis, and that requiring nationwide State merit-staffing for ES services is not the most efficient way to fix the UI surge issues brought about by these extraordinary circumstances. Many other commenters, including a Colorado State workforce development board and a Colorado employer, expressed similar sentiments, agreeing that the pandemic is a temporary outlier event, and that implementing these changes will be less effective in supporting job seekers and UI claimants at all other times. A local workforce development board stated there was no compelling need nor sufficient rationale to require State merit staff and asserted the proposal would ''void'' the ability to innovate in its State.

A Colorado State agency, a Colorado workforce development board, and a private citizen stated that the proposed rule would negatively impact the quality of services to businesses. These commenters reasoned that current local ES staff have experience serving businesses and knowledge of the local economy, while any State merit staff that replace them will not have these advantages or incentive to support employers across multiple programs. The commenters further stated that businesses will suffer during economic hardships because ES staff will be diverted to focus on UI claims.

Two State government agencies recommended that the Department provide more guidance to States about cross-training ES staff with UI services to prepare for the next UI surge. These commenters expressed concern that this responsibility will fall on the States without direction from the agency on how to meet the Department's objective.

A State workforce development board and others expressed concern that the proposed rule would have a disproportionate impact on rural areas, as many States report centralized ES staff in urban areas. The commenters anticipated the required change in staffing would bring about an overall reduction in services, especially during UI surges.

Framing the proposed merit-staffing requirement as prioritizing UI benefits recipients over all other populations, a one-stop operator commented that, because data shows UI recipients do not represent underserved populations, requiring nationwide merit-staffing for ES services would supersede community and business needs to provide backup for UI programs in times of need.

A few associations of workforce boards, a State workforce development board, and a professional association stated that by mandating the use of State merit staff for ES services, the proposed rule would significantly limit the types of technology and tools available to States in times of surging UI demand.

Also arguing that a uniform merit-staffing requirement would harm, rather than assist, Colorado's workforce, a private citizen suggested that the Department instead change the requirement that UI claims must be processed by State merit staff. A think tank similarly argued that the Department should support legislative efforts to create permanent staffing flexibilities in both the ES and UI programs.

Many commenters from Michigan, Colorado, and Massachusetts discussed how the local resource centers in their State were able to pivot to UI surge support amid the pandemic to demonstrate the high efficiency of their current systems. For example, several commenters from Colorado, including a local government, a local workforce development board, a trade association, and others, described how their local staff successfully responded to the spike in phone calls related to UI issues by creating a virtual call center that exclusively answered UI questions, proving that they are able to handle these services at a local level, particularly when unemployment agencies are overwhelmed. Several commenters from Michigan, including one-stop operators, one-stop center staff, and private citizens, stated that local workforce development offices across the State were able to leverage hundreds of staff to assist the unemployment agency in responding to the UI claims they could not keep up with during the pandemic, further requesting that Michigan be allowed to continue utilizing non-State-merit staff to provide ES services. A few commenters from Massachusetts, including a State government agency, a local workforce development board, and a local elected official, stated that the one-stop center staff in their State are trained on the fundamental knowledge of unemployment, along with more in-depth training for designated staff, all of which allows them to assist customers with questions about their UI claims. These commenters further discussed how their ES staff seamlessly transitioned to assisting UI claimants during the pandemic without any disruption of services.

Expressing concern that the proposed rule would result in reduced services at local offices, some private citizens and an employer expressed appreciation for ES staff helping them with job search and UI claims process issues during periods of unemployment. Similarly, an employer commented that they do not know what they would do without Michigan Works! because they assist them and their employees with UI benefits in their off season. Michigan one-stop center staff also said that they help unemployed customers to navigate the UI system, with some asserting that many UI claimants have challenges using a computer and eliminating local services could escalate customer frustrations.

Response: The Department appreciates the concerns raised by commenters, and agrees with the comments describing the importance of assistance with UI, the ability to access that support, and the close relationship between ES and UI. Similarly, in most of the States across the country, ES State merit staff operate in AJCs and provide assistance with job search, applying for UI benefits, and pivot during surges. The Department proposed to require that States use State merit staff to provide ES services due to the need for critical alignment between the ES and UI programs and to help ensure that services are delivered by qualified, non-partisan professionals accountable to the State. While the Department believes it is vital for ES and UI to be aligned, this final rule does not impose requirements on States to cross-train or utilize ES staff for UI services. Many States already cross-train and utilize ES staff for UI activities, and States with prior issues within their UI program may benefit from having cross-trained ES staff available when there are surges in demand for UI claims. Aligning these programs should not negatively impact or prioritize one program over the other. Rather, aligning the two programs serves to increase consistency of service, as well as capacity, for each. Further, a State merit-staffing requirement helps to promote consistent training and accountability throughout the State from one locality to another. The Department will provide technical assistance to States that are interested in more closely aligning the respective programs.

The Department additionally recognizes the reliance interests of Colorado, Massachusetts, and Michigan, all of which were permitted by the Department to use alternative staffing models beginning in the 1990s. Accordingly, this rule requires all States to use State merit staff to deliver ES services, except for these three States using longstanding alternative staffing models previously authorized by the Department. These three States are permitted to continue using their longstanding staffing models and must participate in any evaluation of their delivery of ES services conducted by the Department.

The Department recognizes that there will be certain transition costs to some States, which was included in the NPRM's regulatory impact analysis. All States have 24 months to comply with the staffing requirements.

Alignment With Other Programs

Comment: Several commenters, including a one-stop center employee and an advocacy organization, expressed concern that the proposal would disrupt the ''integrated service delivery model'' in their area and would result in a siloed service delivery model to the detriment of program beneficiaries.

Several commenters, including Michigan local governments, a Michigan local elected official, State and local workforce development boards, and a private citizen, encouraged alignment and integration among programs including the Wagner-Peyser Act ES program, WIOA, the Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), and Trade Adjustment Assistance (TAA) and expressed concern that the proposal would disrupt a ''streamlined'' service delivery model. A trade association remarked that Wagner-Peyser Act funding allows Michigan Works! to leverage funds from other State, Federal, and non-governmental programs to improve services for individuals and businesses.

Many commenters, including Michigan and Colorado State elected officials, Michigan and Delaware State government agencies, and Michigan and Colorado local governments, argued that the rule would eliminate States' ability to integrate the provision of Wagner-Peyser Act-funded services with other workforce development and social support services, such as WIOA and TANF, which would reduce efficiencies and increase administrative costs in States that use flexible staffing models. A one-stop operator requested that the Department reconsider the proposal, arguing that the current flexibility afforded to States has resulted in a more ''responsive'' workforce development system.

Some commenters, including a training provider, a commenter from academia, and a one-stop center employee, warned that the rule would jeopardize former demonstration States' other grant funding agreements with the Department. Several commenters asserted that the proposal would ''de-

couple'' services, funding, and practices that have been integrated as a result of their State's demonstration status. The commenters described the rule as ''outdated, inefficient, unnecessary, and overly burdensome.''

Many commenters, including Michigan and Massachusetts State government agencies, advocacy organizations, and trade associations, argued that one significant benefit of the status quo flexibility in staffing and use of funds in States operating flexible staffing models is the ability of local ES staff to braid funds and integrate the provision of Wagner-Peyser Act-funded services with other local workforce development programs and social services, including WIOA and TANF, which makes the services more efficient and reduces administrative costs. An employer commented that flexible ES staffing models like the Michigan Works! system are able to provide the most cost-efficient results because they can leverage Federal, State, and local resources; costs to operate job centers are shared with all partners and programs; and because, at the local level, many organizations provide ''in kind'' contributions of administrative support, which reduces overall program costs.

Several commenters provided performance data from the Department's website that demonstrates the success of Michigan's performance against the national average and argued that the integrated workforce development system in their State is ''transformational'' for both employers and job seekers. Other commenters, including a trade association, one-stop center staff, and private citizens, made similar arguments that Michigan and Colorado are outpacing the national median on performance metrics and has a low cost per participant. Also asserting that Michigan has been a top performer in nearly every ES-relevant metric, a private citizen questioned the need for the rule and the proposal's ''streamlining or improving services'' assertion, commenting that replacing 220 local workforce staff with 80 to 90 State merit staff will hurt rural communities.

Several commenters stated that, in Michigan, alignment with local workforce systems is critical in connecting job seekers with a range of programs that support their ability to remain employed and minimize the need for UI benefits.

An anonymous commenter said the integrated model in their area allows offices to leverage resources, which in turn promotes higher quality of services. A private citizen remarked that current staffing model in Colorado has encouraged innovation and has led to the creation of an integrated model of program administration, oversight, and delivery. Several commenters, including a one-stop center employee, faulted the proposal for favoring ''alignment of ES and UI staffing'' over the efficiencies associated with flexible staffing arrangements and expressed concern that the proposal would result in the closure of AJCs (ES offices) and reduced services for employers.

Some commenters, including a one-stop center employee, described their experiences working for or with local service centers and expressed concern about offering Wagner-Peyser Act and WIOA services in different offices or sites and the disruption of access to a more all-encompassing set of services. Some commenters, including a State Workforce Development Board, a trade association, and private citizens, remarked that the proposal could disrupt the WIOA one-stop service delivery model because Employment Service (ES) and WIOA staff would not be housed together. These commenters and others, including an employer and a one-stop center employee, said this divided or siloed environment was contrary to the ''vision and intent'' of WIOA.

A State employee association that supported the proposal argued that ''restoring'' State merit-staffing requirements would be beneficial for other programs unrelated to the UI system, such as the employment infrastructure for veterans and the delivery of TAA services for workers impacted by trade. The commenter referred to removal of the merit-staffing requirement for delivering TAA services in the ''Trade Adjustment Assistance for Workers'' final rule, 85 FR 51896 (Aug. 21, 2020), and urged the Department to also repeal that rule to ensure State merit-staffing is the ''standard'' in States that may have used staffing flexibility for TAA. A Colorado State government agency similarly remarked that TAA services, which are staffed by county merit staff in Colorado, would be adversely impacted by the proposal, remarking that in 2021, TAA ''provided approximately $956,761 to local areas'' to assist with staffing 15 full-time employees.

Conversely, a State workforce development board argued that WIOA's title programs, and other programs under TANF and SNAP, are aligned to work together in meeting diverse customers' needs and encouraged the Department to maintain staffing flexibility for the Wagner-Peyser Act ES program, RESEA, TAA, and other programs that benefit from alignment with local workforce systems. A local workforce development board stated that Colorado's ability to employ a flexible staffing model has improved integration between WIOA and Wagner-Peyser Act ES services and led to several positive outcomes, including successful employment of customers, services rendered to many unique employers, significant numbers of workshops and hiring events, and a strong overall return on investment. A State government and other commenters similarly remarked that the local merit-staffing model used in Colorado allows for ''seamless'' service integration and braiding of funding across federally funded programs.

A State Workforce Development Board argued that the Department's approach in the proposal undermines the ''key principle'' of State and local flexibility for WIOA services and the Federal workforce system more broadly. The commenter said the proposal would disrupt efficiencies, discourage innovation, and undermine ''balance'' among the Federal, State, and local partnerships that deliver WIOA and ES services.

Response: The Department proposed to require that all States use State merit staff to provide ES services due to the critical need for alignment between the ES and UI programs. Aligning these programs should not negatively impact or prioritize one program over the other. It simply allows the State, in times of high need to be able to use ES staff for certain UI activities should the State choose to do so. The Department is not imposing additional requirements on the State for how it uses the ES staff, but having cross-trained staff would better equip the States to be able to shift resources in certain situations. The ES and UI are already closely linked as they are both required partners under WIOA, the UI program makes referrals to the ES for reemployment services, and the ES program administers the work test for UI. WIOA also requires the colocation of the ES with WIOA programs (20 CFR 652.202, 678.315) so the concerns regarding certain individuals no longer having access to services is not supported by the information provided. WIOA emphasizes integrated and streamlined service delivery. The nature of ES services is such that ES staff provide basic and individualized career services and make referrals to other programs, no matter the staffing model used. The Department further believes the keys to program success are the intensity of the integration of WIOA and Wagner-Peyser services. Other States that use State merit staff have been able

to innovate and implement the vision of WIOA. Several States have made progress cross-training ES staff and UI staff. Additionally, States have trained all AJC partners including ES staff to perform common intake and make seamless referrals using a ''no wrong door'' approach to case management irrespective of the Wagner-Peyser ES staffing model. Three States using longstanding alternative staffing models presented arguments in support of retaining those models, but the information provided did not show a causal impact of the staffing model in these States and performance. Accordingly, the Department declines to extend staffing flexibility to all States. The Department reinstates a State merit-staffing requirement for ES services with the exception of the three States with longstanding reliance interests. These States are required to participate in evaluation of their delivery of ES services conducted by the Department, including review of services of other States that participate, as necessary, to determine whether such models are empirically supported.

Other Objections From States With Longstanding Reliance Interests

Comment: Many commenters, including a Michigan State elected official, Colorado local governments, and an advocacy organization, expressed opposition to the rule on the grounds that it would reduce both State and local control over the provision of ES services in the States that use flexible staffing models, and that in many cases this will make the services less personal and less responsive to local needs.

One anonymous commenter argued that as contractors and local government employees, ES staff in States that use flexible staffing models are currently insulated from State partisan politics; this commenter reasoned that by transitioning ES staff to being entirely State employees, they will be more subject to fluctuating partisan demands.

Some commenters, including a Colorado State elected official, a commenter from academia, and a Colorado local workforce development board, warned that implementation of the proposed rule could trigger lawsuits from affected counties and unions in States that use flexible staffing models.

Response: The Department received new information in comments on the NPRM from States with longstanding reliance interests and determined that these States may continue to utilize their longstanding alternative staffing models.

Reliance Interests of Other States

Comment: An association of State elected officials and a State government agency stated that Missouri had been approved by the Department as recently as summer 2021 to begin using non-State-merit staff to provide Wagner-Peyser Act ES services, and that the State had submitted its WIOA State Plan and that the State's local workforce development boards have already budgeted and planned for Wagner-Peyser Act funding based on this recent approval. As such, the commenters asserted that rescinding the State's staffing flexibility would create an unnecessary burden.

A State government agency commented that existing ES rules and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) allowed for a degree of staffing flexibility during the COVID–19 pandemic, which enabled quicker and more cost-effective services for client needs during the extraordinary economic circumstances of the pandemic.

A State government agency similarly stated that the current staffing flexibility under the status quo allows for the more efficient provision of ES services; the commenter asserted that rescinding this flexibility will cause services to become less efficient.

Response: While the Department recognizes that any shift in staffing requires transition, the transition for the three States with decades of reliance would experience higher transition costs in contracts, supervision adjustments, bargaining agreements, and IT systems than those that have used alternative staffing for 2 years. As demonstrated in the comments received, these three States have built systems, developed partnerships, and established a service delivery model that could be reversed only at significant cost to the State and with significant harm to job seekers and employers. The expansion of alternative staffing models to additional States occurred without study, before the landscape-altering impact of the pandemic on the UI and workforce system. The Department will evaluate ES services and their staffing models before taking additional actions regarding the use of alternative staffing for other States. Recognizing that some States adopted a different staffing model under the 2020 Final Rule, as discussed above, the Department is further providing 24 months of transition time for any State that needs to adjust its staffing model to adhere to the regulations.

Recommendations To Continue Demonstration State Status

Comment: Based on their objections to the proposal, including an anticipated reduction in the quality and availability of ES in States that would have to make major staffing changes to comply with the State merit-staffing requirement, numerous commenters, including Colorado and Michigan State elected officials, a Michigan State government agency, and Colorado and Michigan local governments, urged the Department to allow the former demonstration States to retain their current status and the flexibility to provide ES services with local merit staff or to otherwise entirely abandon the proposed rule change.

Another State government agency echoed this recommendation, suggesting that the Department grant continuing exemptions to the proposed rule to the former demonstration States, but not to any other States.

Alternatively, a think tank suggested that, at a minimum, the former demonstration States should be allowed to maintain their current status until the end of the established performance period, and that results from these States should be evaluated when considering if their staffing flexibility model should be extended.

Several commenters, including one-stop operators, State and local workforce development boards, a trade association, a Colorado local government, and a Colorado State elected official, requested that the Department permit their State to continue utilizing flexible staffing models to deliver for Wagner-Peyser Act-funded ES services. A Michigan one-stop operator and one-stop center employee argued that staffing flexibility allows programs to provide ES services to customers, including businesses and vulnerable populations such as youth, refugees, and veterans, in the most efficient and effective manner possible.

A Colorado State elected official asserted the loss of its ability to provide ES services using a flexible staffing model would cause costly disruptions to businesses and citizens. The commenter remarked that its workforce development staffing model had bipartisan support in the State Congress and that statewide stakeholders remain committed to this ''nimble and agile'' workforce service delivery model. The commenter further asserted that national organizations like the National Association of State Workforce Agencies, the National Association of Workforce Boards, and the National Association of Counties support the

State's request to continue operating this model.

A Massachusetts local workforce development board did not challenge the Department's ability to roll back the 2020 Final Rule providing widespread staffing flexibility but opposed using the proposal to void ''waivers'' previously granted to the former demonstration States.

A Michigan training provider asserted the proposal would jeopardize successful programs in States providing ES services using a flexible staffing model, such as Michigan, if they are not ''exempted'' from the State merit-staffing requirement. The commenter provided attachments that, in their view, provide evidence that the workforce development structure employed in the former demonstration States should instead be the national standard.

A think tank suggested that the Department ''grandfather'' the flexible staffing models for the former demonstration States because they have been operating successfully for more than two decades, and further suggested that the Department extend waivers for similar staffing flexibility to other States.

Response: For reasons explained throughout this section, the Department is allowing Colorado, Massachusetts, and Michigan to use the same longstanding alternative staffing models that the Department has allowed them to use since the 1990s. The Department is requiring these three States to participate in in an evaluation to be conducted by the Department. All other States are required to use State merit staff to provide ES services.

Other Arguments Against Requiring State Merit Staff

Comment: A think tank argued that flexibility was more beneficial for States than ''rigid rules'' and described how certain restrictions hamper State workforce programs. The commenter cited the National Association of Medicaid Directors' 2022 request for flexibility to hire non-merit staff for processing Medicaid and SNAP renewals to ''handle increased workloads from the fallout of COVID–19'' as an example of the personnel challenges facing workforce and welfare agencies. Citing WIOA provisions concerning the one-stop delivery system, the commenter said that the issue of flexibility in workforce programs ''extends beyond staffing models.'' The commenter stated that current law places ''handcuffs'' on SWAs, hampering how they can spend WIOA funds. For example, the commenter stated that under WIOA, ''states' ability to design pay-for-performance contracts based on job placement is limited to non-federal funds and youth workforce services'' and that WIOA restricts States' ability to use Federal funds related to work requirements in welfare to solely Employment and Training programs (arguing that WIOA funds should be able to be used to administer more meaningful work requirements like the able-bodied adult-without-dependent work requirements for SNAP). The commenter concluded that the ES should be designed to move as many individuals as possible into self-sufficiency by increasing their marketability in the labor market and argued that staffing flexibility allows States to design ES programs that accomplish these goals.

A one-stop operator in Texas remarked that while State merit-staff employees are performing well, ''funding limitations have hampered the ability to provide salary increases for many years.'' The commenter stated that ''[w]hile employees are able to receive one-time, merit-based pay, being in a merit-based system has, in fact, negatively impacted retention and attraction of employees, which are key elements in maintaining a quality staff.'' A one-stop center employee stated that the proposal would cause Michigan to be non-compliant with a State ''One-Stop Operator statute.'' A Michigan one-stop center employee asked how the proposed merit-staffing requirement will save the State money, time, or resources.

A local government stated that the proposal would create an unnecessary layer of bureaucracy and would disrupt an integrated service model that meets the local community's needs. A one-stop operator argued that the proposal would result in too few employees to service job seekers and employers through Wagner-Peyser Act programs in their State and expressed confusion as to how ''a few organizations'' in its State could express support for the proposal. The commenter suspected that the proposal is meant to favor employers that provide for union representation of employees and faulted a local union for ceasing representation for a group of employees last year.

Some commenters, including a private citizen, a one-stop center employee, a trade association, and an advocacy organization, remarked that the former demonstration States successfully developed locally based staffing models that work across budgetary and programmatic silos to create a more integrated system providing higher quality services. A professional association said Colorado's use of a flexible staffing model to provide ES services has proven effective because staffing flexibility allows local areas to react more quickly to local market conditions. An employer remarked that delivering ES at the local level produces optimally cost-efficient and effective results, and a Colorado local government similarly argued that the proposal would lead to inefficiencies and would disrupt a streamlined service delivery model. An anonymous commenter similarly argued that separating local merit WIOA staff and ES State merit staff would jeopardize the effectiveness of the one-stop delivery model.

A Colorado local government asserted that increasing State control over local ES offices would lose county workers' regional understanding of local needs around ES, arguing that county input is essential to avoid the ''disconnect'' that occurs in larger bureaucracies because counties have unique needs and characteristics. A Michigan private citizen remarked that State agencies, including the State UI agency, come across as ''bureaucratic and impersonal'' and argued that State agency leaders may not listen to local concerns due to their limited local knowledge. Another Michigan private citizen preferred to continue dealing with local ES staff and expressed concern about ''centralizing'' ES in their State's capitol. A State government agency argued that ES staffing flexibility allows local workforce development boards to staff offices appropriately based on the needs of individual communities. The commenter said some communities would not need a ''full accompaniment'' of local and State merit staff and also expressed concern about clients needing to engage with either local or State staff based on the type of service they need, reasoning that such an approach could make clients feel as though they are being ''ferried around'' rather than establishing a relationship with a single point of contact.

A Colorado one-stop operator remarked that providing ES services at the local level allows for better integration of Federal, State, and local programs and rejected the Department's assertion that local government employees are treated less fairly or are more susceptible to political influence, arguing that this argument was ''naïve'' and unsupported by evidence. A Colorado State government agency similarly remarked that the Department's argument that ES services provided by State merit staff would be ''quantitatively or qualitatively better''

than services delivered by county merit staff was not supported by evidence and asserted that county merit staff are hired using objective and transparent standards. The commenter stated that local merit staff are accountable to their local county government to best position such staff to provide services in their communities. A think tank agreed and disputed the Department's argument that the adherence of non-State entities to State policies is unobservable, reasoning that contracts contain performance goals and metrics, and sometimes include financial penalties for underperformance. The commenter also asserted that these standards do not exist for ''merit'' staff.

Some commenters, including anonymous commenters and a Colorado local government, remarked that the proposal would transfer duties from local workers to a smaller group of State staff; the commenters asserted this would result in considerable and challenging workloads and diminished services for participants. A private citizen who preferred local staffing for ES suggested that a possible compromise could be to increase funding and add a State merit-staff employee to each local office who would serve as a liaison for State programs and services.

Several commenters stated that Colorado's current staffing model allows for effective partnerships with community-based organizations because local staff have developed strong relationships with such organizations. The commenters expressed concern that the proposal would disrupt or reduce services for community-based organizations. A private citizen remarked that State merit staff would find it more difficult to establish partnerships and navigate local resource networks, arguing that local staff successfully participate in such networks through community engagement.

Expressing opposition to the proposed merit-staffing requirement, a private citizen and a few one-stop center staff quoted the proposed § 652.215(a) language (''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.''), arguing that this change would have a detrimental impact on the provision of ES services.

A Michigan one-stop center employee listed the minimum services required by § 652.3, including connecting job seekers with employment opportunities and assisting employers with filling jobs, and questioned how States would provide these ''robust'' services if they face a major staffing reduction.

Response: The Department maintains that using State merit staff helps to provide for high-quality, consistent, and politically neutral ES services. State merit staff are held accountable for their work through State-managed performance management plans and must meet certain service benchmarks and milestones.

With respect to comments about local partnerships, the Department notes that the vast majority of ES services nationwide are provided by State merit staff who are able to establish working relationships with community-based organizations. Additionally, the Department notes that State WIOA funds can be used for an extremely broad set of activities, including career and training services for individuals receiving public benefits like SNAP. In multiple States with ES State merit staff, local service delivery in AJCs provides services to a range of job seekers, including those receiving public benefits.

Three States using longstanding alternative staffing models, including local merit staff, presented arguments in support of retaining those models, but the information provided did not show a causal impact of the staffing model in these States and performance. The Department acknowledges the strong reliance interests of these three States—Colorado, Massachusetts, and Michigan—that the Department has allowed to use alternative staffing models to administer ES services since the 1990s. The Department recognizes the adverse impacts a complete State merit-staffing requirement would have on these three States relative to other States that began using alternative staffing models following the 2020 Final Rule. Therefore, the Department is allowing Colorado, Massachusetts, and Michigan to continue using their longstanding alternative staffing models while requiring their participation in an evaluation to be conducted by the Department to determine whether alternative staffing models are empirically supported.

The Department acknowledges comments regarding funding limitations in the context of merit-staffing models. The Department has detailed the cost burden associated with this final rule in Section VI. Wagner-Peyser ES grant funding is provided annually to deliver employment services. For reasons stated throughout this preamble, the Department has determined that reinstating the requirement to provide ES services using State merit staff will help to allow the States to provide quality and consistent ES services in an accountable and transparent manner as the Department undertakes an evaluation to determine whether alternative staffing models are empirically supported.

The comments regarding WIOA pay-for-performance and work requirements are out of scope and not addressed by this final rule.

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

Part 653 sets forth services of the Wagner-Peyser Act ES system related to MSFWs. Subpart B provides the principal regulations of the ES concerning the provision of services to MSFWs consistent with the requirement that all services of the workforce development system be available to all job seekers in an equitable fashion. This includes ensuring MSFWs have access to these services in a way that meets their unique needs. MSFWs must receive services on a basis that is qualitatively equivalent and quantitatively proportionate to services provided to non-MSFWs. The regulations in this subpart 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. Subpart F sets forth regulations governing the ARS. It provides requirements for SWA acceptance of intrastate and interstate job clearance orders that seek U.S. workers to perform farmwork on a temporary, less than year-round basis.

The Department proposed to revise various sections of the regulatory text in both subparts and received comments about some of its proposed revisions. In the discussion that follows, the Department responds to these comments, grouping them by the provision that they address and the order in which that provision appears within this part.

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

Subpart B provides the principal regulations of the ES concerning the provision of services to MSFWs. The Department proposed a number of revisions to the regulatory text in this subpart to clarify and enhance the outreach that SWAs provide to MSFWs and to strengthen the monitoring that SMAs conduct pursuant to this part. The Department received a number of comments that generally supported the proposed revisions and its efforts to

strengthen the services that SWAs provide to MSFWs. Although the feedback was primarily positive, several State and local agencies felt the revised provisions were too prescriptive and urged the Department to adopt a more flexible approach. The Department values and appreciates the participation and input from these commenters and the perspectives they have to offer. In the section-by-section discussion below, the Department summarizes and responds to comments that address the revisions it proposed to a particular section in this subpart. After careful consideration of these comments, the Department generally adopts the revisions it proposed to the regulatory text without change, with exceptions as discussed below.

Section 653.100 Purpose and Scope of Subpart

The Department proposed to amend § 653.100(a) to clarify that the provision of services for MSFWs must be consistent with the requirement that all services of the workforce development system be available to all job seekers in an equitable *and* nondiscriminatory fashion. The existing regulation states only that such services must be made available in an equitable fashion. The Department proposed, and this final rule adopts, an amendment to § 653.100 to state such services must be made available in both 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 section 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 ES is a required one-stop partner, and the requirements of section 188 of WIOA apply to one-stop partners pursuant to 29 CFR 38.2. The Department did not receive any comments on the proposed addition of this language and adopts the revision as proposed.

Section 653.101 Provision of Services to Migrant and Seasonal Farmworkers

The Department proposed 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. As the Department explained in the NPRM, it is ultimately incumbent upon the SWA, as the Wagner-Peyser Act grantee, to ensure ES staff at one-stop centers are offering and providing ES services to MSFWs in an appropriate manner. The Department also proposed to replace the requirement for one-stop centers 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 ES staff at one-stop centers tailor the provision of ES services to MSFWs in a way that accounts for their preferences, needs, skills, and the availability of job and training opportunities. The Department proposed this revision to ensure MSFWs are able to participate in the ES and, similar to the revision in the first sentence, to clarify that the SWA is responsible for ensuring compliance with this requirement. The Department received a few comments on the proposed revisions in this section. As discussed below, the Department has not made any changes to the regulatory text in response to these comments and adopts the revisions as proposed.

Comment: The Department received numerous comments from individuals and entities in Michigan explaining that under Michigan's current service delivery model, local ES staff provide MSFWs the full range of career and supportive services, benefits and protections, and job and training referral services that they provide to non-MSFWs. Some of these commenters noted that under Michigan's current model, the SWA ensures Wagner-Peyser funded staff provide the full range of career services to MSFWs by providing staff training and conducting one-stop center reviews to ensure compliance. These commenters asserted that while Michigan has historically made ES services available to all job seekers (including MSFWs) in an equitable and nondiscriminatory fashion, the proposed rule would have a chilling effect on their access to services by making fewer offices and staff available to help them. Similarly, a local government agency in Colorado, which opposed the proposed State merit-staffing requirement, discussed its use of local staff to provide MSFWs with equitable ES services that it stated are innovative, personal, and available in multiple languages, and to offer their State's highest level of outreach to MSFWs.

Response: As discussed in section III above, the Department has decided not to apply the proposed State merit-staffing requirement to several States, including Michigan and Colorado, that have developed strong reliance interests in providing ES services through longstanding alternative staffing models. Because this final rule will permit Michigan and Colorado to continue to provide ES services in accordance with each State's longstanding alternative staffing model, it should not result in the ''chilling effect'' that commenters from Michigan feared or impact the services that local staff in Colorado are currently providing to MSFWs.

Moreover, the Department notes that SWAs, as required one-stop partners, must ensure individual customers are served based on individual needs, including MSFWs. *See* 20 CFR 678.425(b). The final rule would, consistent with this requirement, clarify that SWAs are responsible for ensuring that ES staff at one-stop centers tailor services to meet the particular needs of MSFWs. While some States may already meet this requirement, as asserted in the comments described above, others may not. The revision makes it clear that Wagner-Peyser Act funded staff must serve MSFWs based on their individual needs. In addition, this revision will complement the MSFW-specific staffing requirements in §§ 653.107(a)(3) and 653.111.

It is particularly important to consider the particular needs of MSFWs, because MSFW job seekers may face multiple barriers to employment for which individualized career services are warranted. In implementing this requirement, SWAs must take care to ensure MSFWs are offered appropriate services based on their particular workforce interests (*e.g.,* referral to jobs they may want or need to meet their employment-related goals and not only positions involving farmwork).

Section 653.102 Job Information

The Department proposed several revisions to the text of existing § 653.102. First, the Department proposed to revise the third sentence of § 653.102 to clarify that the SWA is the entity responsible for ensuring that ES staff assist MSFWs to access job order information, for the same rationale as similar changes the Department is making to § 653.101, as described above. Second, the Department proposed to remove the word ''adequate'' as a modifier to the phrase ''assistance to MSFWs,'' in order to remove any perceived subjectivity and clarify that a SWA meets its obligation to assist MSFWs by complying with the requirements in parts 653 and 658. Finally, the Department proposed 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. As the Department explained in the NPRM, this would align language access requirements in the ES regulations with those required by WIOA sec. 188 and its implementing regulations at 29 CFR part 38, because language access requirements apply to individuals with LEP regardless of through which office they seek ES services. The Department received one comment on this provision. For the reasons discussed below, the Department has not made any changes to the proposed regulatory text and adopts it as proposed.

Comment: The Department received a comment from a farmworker advocacy organization that generally supported the Department's proposal to clarify language access requirements throughout part 653, but with some reservations. As relevant here, this commenter opposed the Department's proposal to remove the requirement for MSFW multilingual offices to provide MSFWs access to job order information in their native language whenever requested or necessary. The commenter suggested that the Department take additional steps to ensure individuals with LEP are able to access and engage with ES services and asserted that SWAs should ensure clearance orders are translated to Spanish and other major languages in the area so that all workers are aware of their rights and able to access and review clearance orders in their native language. According to these organizations, such a requirement would align with the practices of certain SWAs that already translate or require submission of translated clearance orders and help to fulfill the Department's language access obligations under Executive Order (E.O.) 13166, in addition to bolstering compliance with the existing regulatory requirement at 20 CFR 655.122(q) that all H–2A workers and workers in corresponding employment receive a copy of the work contract ''in a language understood by the worker.'' Finally, they noted that English-only clearance orders have presented particular barriers for U.S. farmworkers in Puerto Rico, where some local SWA officials have limited English ability and, without translations, are unable to refer workers to available positions elsewhere in the United States.

Response: The Department acknowledges the comment that suggested the regulation should specify that clearance orders should be translated into Spanish and other major languages in the area. However, the Department reiterates that 29 CFR 38.9 spells out the applicable language access requirements more comprehensively, including the obligations to translate vital information (as defined at 29 CFR 28.4(ttt)) that appears in written materials into languages spoken by a significant number or portion of the population eligible to be served, or likely to be encountered, and to make the translations readily available in hard copy or electronically. The regulation at 29 CFR 38.9 also imposes an obligation to take reasonable steps to ensure meaningful access to each individual with LEP served or encountered, including providing oral interpretation or written translation of materials, in the appropriate non-English languages, so that individuals with LEP are effectively informed about and able to participate in the program or activity. Furthermore, once ES staff becomes aware of the non-English preferred language of an individual with LEP, the ES staff must convey vital information to that individual in their preferred language.

The Department adopts the language as proposed in the NPRM and will provide guidance and technical assistance as needed.

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

The Department proposed to make several revisions to § 653.103. First, the Department proposed to revise the requirement in paragraph (a) for one-stop centers to determine whether *participants,* as defined at § 651.10, are MSFWs. As revised, this section would replace ''one-stop center'' with ''ES office,'' and it would require ES offices to also determine whether *reportable individuals,* as defined at § 651.10, are MSFWs.

Second, in § 653.103(b), the Department proposed to replace the existing provision requiring all SWAs to ensure that MSFWs who are English-language learners receive, free of charge, the language assistance necessary to afford them meaningful access to the programs, services, and information offered by the one-stop centers with a new provision clarifying that all SWAs are required to comply with the language access and assistance requirements at 29 CFR 38.9 with regard to all individuals with LEP, including MSFWs who are LEP individuals, as defined at 29 CFR 38.4(hh). This compliance includes ensuring ES staff comply with these language access and assistance requirements. In the NPRM, the Department explained that this would align the language access requirements for MSFWs with language access requirements for all individuals with LEP pursuant to 29 CFR 38.9, and it would help to ensure all individuals with LEP, including MSFWs, are provided meaningful access to ES services.

Lastly, the Department proposed to remove the specific requirement in § 653.103(c) for one-stop centers to provide MSFWs a list of available career and supportive services ''in their native language.'' This, too, would align with the proposed revisions to replace the various specific language access requirements in this part with reference to the comprehensive requirements applicable to all individuals with LEP in 29 CFR 38.9.

The Department received comments concerning each of these proposed revisions. For the reasons discussed below, the Department has not made any changes to the proposed regulatory text and adopts it as proposed.

Comment: The Department received several comments from individuals and entities in Michigan that reported Michigan's ES offices are prepared to implement the new requirement to determine whether reportable individuals are MSFWs. Another State agency opposed the proposed requirement for States to determine whether reportable individuals are MSFWs, as defined at § 651.10. The State agency disputed the value of collecting this information, asserting it had previously collected information from reportable individuals to determine whether they were MSFWs and found it was inaccurate, because it was based on self-service registrations that were not reviewed by staff for accuracy unless the self-registrant sought participant-level services. This State agency estimated that, if the proposed requirement is adopted, it would cost $30,000 to $50,000 to update its IT systems to track the MSFW-status of reportable individuals, and it asked the Department to provide additional funding to cover these costs.

Response: The Department appreciates the commenter's concern regarding the accuracy of self-reported data. While the Department acknowledges that there may be errors in classification determinations based on self-reported information that are made without assistance from staff in the one-stop center, it believes this risk could largely be addressed if SWAs carefully tailor the questions that they pose to self-registrants so that the answers self-registrants provide are more likely to elicit accurate classification determinations. The Department expects that some States may need to revise their current

information collection (IC) practices and/or make changes to existing IT systems to collect this information from reportable individuals. These costs are allowable under a State's Wagner-Peyser ES grant, and the Department has accounted for them in the regulatory impact and IC analyses provided in sections VI.A and VI.C, respectively, below. The Department does not take lightly the changes that States must make to processes and systems to collect information about participants or reportable individuals, but believes that the value of collecting this data outweighs the estimated burden that SWAs may incur to collect it. Collecting data about participant and reportable individual characteristics, particularly related to populations that have been historically underserved, is an important tool for measuring progress in providing equal opportunity. In this case, collecting MSFW status will help the ES to identify all MSFWs who engage in the ES and the degree of their engagement. To ensure data on the MSFW status of reportable individuals is accurate and used appropriately, § 653.109(e) will require SWAs to periodically verify data collected under this section, take necessary steps to ensure its validity, and submit the data for verification to the Department, as directed by the Department.

Comment: The Department received comments from numerous entities and individuals in Michigan that asserted the costs their State incurs to comply with language access and assistance requirements would increase if the final rule requires Michigan to change its longstanding staffing model to comply with a State merit-staffing requirement, because if the Department were to adopt this requirement, one-stop centers in Michigan could no longer rely on multilingual local staff across an array of workforce programs to provide ES services.

Response: As discussed in section V.C.2 above, this final rule will allow several States, including Michigan, to continue to provide ES services in accordance with their longstanding alternative staffing arrangements. Because this change resolves the circumstances about which the commenters were concerned, this final rule should not impact Michigan's cost of compliance with language access requirements for the reasons that these commenters feared.

Comment: A farmworker advocacy organization largely supported the Department's proposed revisions to align the language access requirements in part 653 with the requirements in 29 CFR 38.9 that apply to all individuals with LEP, but with some reservations. This commenter expressed concern that removing the phrase ''in their native language'' from § 653.103(c) could create confusion about a SWA's language access obligations and recommended retaining this language in the regulation for clarity, rather than simply relying on the new provision in § 653.103(b), which clarifies that SWAs must comply with the language access requirements in 29 CFR 38.9.

Response: The Department recognizes that language access is crucial for individuals with LEP and is revising § 653.103 to clarify that SWAs must comply with the language access requirements in 29 CFR 38.9 when providing Wagner-Peyser ES services to MSFWs. The Department disagrees with the commenter's assertion that it is necessary to retain a specific requirement in this section for one-stop centers to provide MSFWs a list of available career and supportive services ''in their native language.'' As explained above, 29 CFR 38.9 spells out the language access requirements that apply comprehensively, including the obligations to translate vital information in written materials and to convey vital information to individuals with LEP in their preferred languages once the one-stop center becomes aware of the individuals' non-English preferred languages.

The Department therefore adopts the changes to this section as proposed and will provide guidance and technical assistance as needed.

Section 653.107 Outreach Responsibilities and Agricultural Outreach Plan

Section 653.107 governs the outreach that SWAs must conduct to ensure that MSFWs receive ES services that are qualitatively equivalent and quantitatively proportionate to the services that the SWA offers and provides to other job seekers. The migrant and seasonal nature of the farmwork that MSFWs perform presents numerous challenges to the effective provision of services to this subpopulation. Accordingly, the Department has historically required SWAs to conduct outreach to MSFWs to ensure that the services they receive are qualitatively equivalent and quantitatively proportionate to the services offered to other job seekers. The Department proposed revisions to the regulatory text throughout § 653.107 to further prescribe the outreach that SWAs must conduct under this section. These revisions and the comments the Department received about them, as well as the Department's responses, are discussed below in accordance with the paragraph in which they appear in the regulatory text.

Section 653.107(a)

The Department proposed to strengthen SWA outreach by making a number of revisions to the regulatory text in § 653.107(a). Among other things, the proposed revisions emphasize the year-round nature of outreach work; specify that full-time outreach staff may not be assigned to duties other than the outreach responsibilities described in § 653.107(b); provide a standard by which to determine whether a SWA employs an adequate number of outreach staff; and place additional emphasis on the background and training that outreach staff must have in order to successfully perform their duties. A detailed description of the revisions proposed in each subordinate paragraph follows.

First, the Department proposed to amend § 653.107(a)(1) in several ways to emphasize that outreach work must be performed only by outreach staff and that outreach staff in all States must conduct outreach year-round. Specifically, the Department proposed to replace the first sentence of paragraph (a)(1) in the existing regulation—which required each SWA to provide an adequate number of outreach staff to conduct MSFW outreach in their service areas—with a requirement for each SWA to ensure that outreach staff conduct the outreach responsibilities described in paragraph (b) of this section on an ongoing basis. The Department proposed this change to clarify that outreach staff in all States must be employed year-round and perform the outreach activities described in § 653.107(b) on an ongoing basis. The Department did not propose to remove the requirement for a SWA to provide an adequate number of outreach staff, but rather, proposed to relocate this requirement to paragraph (a)(4), and to revise this requirement so that it specifies a means to measure whether a SWA employs an adequate number of outreach staff (discussed further below with the proposed changes to paragraph (a)(4)). The Department further proposed to prohibit a SWA from relying on the outreach activities conducted by NFJP grant recipients (*i.e.,* recipients of grants awarded under WIOA title I sec. 167) to substitute for the outreach responsibilities that outreach staff must conduct under this section. In particular, the Department proposed to revise the second sentence of paragraph (a)(1)—which required SMAs and outreach staff to coordinate their *outreach efforts* with WIOA title I

sec. 167 grantees—to instead require that SMAs and outreach staff coordinate their *activities* with WIOA title I sec. 167 grantees. The Department additionally proposed to include a new sentence at the end of this paragraph to make clear that a SWA cannot rely on the activities of NFJP grantees as a substitute for SWA outreach responsibilities. Taken together, these revisions would require a SWA to coordinate their outreach activities with the activities of NFJP grantees in their State (*i.e.,* SWAs and NFJP grantees would have to work together to strengthen their respective services) but prohibit the SWA from relying on activities of NFJP grantees as a substitute for the outreach responsibilities that outreach staff must conduct under this section.

Second, the Department proposed to revise § 653.107(a)(2)(ii) so that SWAs in all States will be required to conduct thorough outreach efforts with extensive follow-up activities. In particular, the Department proposed to amend the existing regulation—which required SWAs in supply States to conduct thorough outreach efforts with extensive follow-up—to instead require that SWAs in *all* States conduct thorough outreach efforts with extensive follow-up, and to add language specifying that extensive follow-up consists of the activities identified in paragraph (b)(5) of this section.

Third, the Department proposed revisions to § 653.107(a)(3) to operationalize the proposed merit State merit-staffing requirement for outreach staff and strengthen the process by which SWAs hire and assign outreach staff. In particular, the Department proposed to amend the language and structure of this paragraph to make clear that the SWA is responsible for directly hiring outreach staff and to specify the actions that a SWA must take when hiring or assigning outreach staff. The proposed revisions would require a SWA to not only ''seek'' qualified candidates with certain characteristics when hiring or assigning outreach staff, but to also ''place a strong emphasis on hiring and assigning'' such candidates. To increase the likelihood that SWAs will employ candidates who meet the required criteria, the Department further proposed to add a new paragraph at § 653.107(a)(3)(ii) that would require a SWA to inform farmworker organizations and other organizations with expertise concerning MSFWs of outreach staff job openings and encourage such organizations to refer qualified applicants to apply for the opening.

Fourth and finally, the Department proposed to make several changes in § 653.107(a)(4) that would bolster outreach staffing requirements. In particular, the Department proposed to move the first sentence in paragraph (a)(1) of the existing regulation—which required each SWA to provide an adequate number of outreach staff—to the beginning of paragraph (a)(4) and to amend this sentence so that it would require each SWA to employ (as opposed to provide) an adequate number of outreach staff to conduct MSFW outreach in each area of the State to contact a majority of MSFWs in all of the SWA's service areas annually. The revisions to this sentence would make clear each SWA must employ outreach staff to perform the outreach required by this section and provide a measurable means of determining whether the number of outreach staff a SWA employs is adequate. They would also ensure that each SWA conducts outreach in all areas of the State, and not only certain service areas (*e.g.,* only those service areas with significant MSFW one-stop centers). In addition, the Department proposed to add a sentence in paragraph (a)(4) that specifies full-time outreach staff must devote 100 percent of their time to the outreach responsibilities described in § 653.107(b). Finally, the Department proposed adding another sentence to require that SWA outreach staffing levels align with and be supported by the estimated number of MSFWs in the State and the MSFW activity in the State, as demonstrated in the State's Agricultural Outreach Plan (AOP).

The Department received numerous comments about the changes it proposed, as discussed in detail below. After careful consideration of these comments, the Department largely adopts the proposed regulatory text with minor revisions.

First, this final rule modifies the proposed revisions to § 653.107(a)(1) to replace the phrase ''SWA Administrators'' with the phrase ''State Administrators'' in the second sentence of that paragraph. The Department is making this change because § 651.10 defines the term *State Administrator* for purposes of the Wagner-Peyser regulations and does not define the term SWA Administrator.

Second, this final rule modifies the proposed revisions to § 653.107(a)(3) and (4) to account for changes to the proposed State merit-staffing requirement adopted in this final rule. Specifically, as adopted in this final rule, § 652.215 will generally require States to deliver the services and activities under this part using State merit-staff employees, but § 652.215(b) will allow the three States authorized to use alternative staffing models prior to February 5, 2020, to use an alternative staffing model to the extent the Department authorized that State to use an alternative staffing model prior to February 5, 2020. To account for the fact that in these three States, the SWA may not be the entity directly hiring outreach staff, the Department modified the proposed regulatory text for § 653.107(a)(3). The Department is adopting text in this paragraph that clearly requires a SWA to ensure that outreach staff are sought and hired or assigned in the manner that this regulation requires. The Department made similar revisions to the proposed regulatory text for § 653.107(a)(4). Instead of stating that the SWA must employ an adequate number of outreach staff, as proposed, this final rule requires a SWA to ensure an adequate number of outreach staff are employed in accordance with the requirements in this paragraph.

Notably, these revisions are intended to accommodate only those rare instances in which a State may use an alternative staffing model under § 652.215(b). Because the State merit-staffing requirement adopted in § 652.215(a) applies to the services and activities performed by outreach staff under § 653.107, this final rule requires SWAs to directly hire or assign State merit staff to outreach staff positions in all but a very limited number of situations.

Third, as explained in further detail below, the Department is modifying the proposed regulatory text for § 653.107(a)(4) to clarify the manner in which SWAs must determine whether the number of outreach staff employed in their State is adequate. As adopted in this final rule, § 653.107(a)(4) requires each SWA to ensure that there are an adequate number of outreach staff employed in the State to conduct MSFW outreach in each service area of the State and to contact a majority of MSFWs in the State annually.

General Comments

Many commenters expressed general support for the Department's proposal. For example, a farmworker advocacy organization stated the proposed changes would ensure that SWAs once again provide adequate outreach services to MSFWs. Another farmworker advocacy organization noted MSFW outreach would be improved by underscoring that outreach is a full-time job that deserves priority and which should not be combined with other functions. A number of other

commenters, including several unions, likewise supported the proposed rule's focus on improving outreach to MSFWs. The Department also received comments from several State government agencies that expressed about the impact of the proposed revisions and urged the Department to adopt a more flexible approach. The Department values the input and perspectives that commenters shared and has thoroughly considered their concerns and recommendations. A summary of the specific issues and concerns raised, and the Department's response, follows.

NFJP Activities

Comment: A farmworker advocacy organization supported the Department's approach to improve outreach by strengthening staffing requirements, including the proposal to amend § 653.107(a)(1) to specify that NFJP grantee activities do not fulfill the SWA's outreach obligations under § 653.107. This commenter asserted that the proposed revisions represented an important improvement, and noted its staff had witnessed failed outreach and ineffective services provided by part-time and contract staff in many of the States where the organization serves farmworkers. Another commenter, a State government agency, reported that it has procedures in place to collaborate with its NFJP partner to conduct joint outreach. However, it was not clear whether the joint outreach this commenter referenced would be conducted alongside outreach staff employed by the SWA, as required by this final rule, or in lieu of outreach conducted by ES staff. In addition to joint outreach with the NFJP, the commenter said its staff make other contacts.

Response: The Department appreciates the views that commenters shared about this proposal. The Department agrees that MSFW outreach will be more effective if it is performed by outreach staff who are not expected to perform other functions. This is partly achieved by ensuring there is dedicated outreach staff to perform the outreach activities required by § 653.107 and informing SWAs that they may not rely on outreach activities of NFJP grantees to substitute for the outreach that these regulations require. It was not clear whether the State government agency that reported it has procedures in place to conduct joint outreach with its NFJP partner has been conducting this joint outreach in a manner that would comply with this final rule. Under this final rule, § 653.107(a)(1) will require a SWA to coordinate outreach with the activities of NFJP grantees, and it will permit a SWA to conduct joint outreach with NFJP grantees. But it will not permit a SWA to rely on the activities of an NFJP grantee to satisfy the MSFW outreach requirements set forth in § 653.107. The Department has decided to adopt this rule because a SWA's responsibility to conduct outreach to MSFWs under § 653.107 differs in purpose and scope from the recruitment activities of NFJP grantees. The activities of NFJP grantees differ from the responsibilities of outreach staff under this section, because § 653.107(b) requires outreach staff to perform a number of specific tasks, such as provide MSFWs certain information (*e.g.,* a basic summary of farmworker rights, information about services available at the local one-stop center, the ES and Employment-Related Law Complaint System, and organizations that serve MSFWs in the area) and offer to directly provide access to certain ES services onsite. Accordingly, the final rule adopts the revisions to § 653.501(a)(1) as proposed.

Hiring and Assignment of Outreach Staff

Comment: A Delaware State government agency discussed its use of a contractor to provide outreach to MSFWs, arguing that this approach enabled it to significantly increase its outreach to MSFWs. Stating that privatizing the role allowed it to offer competitive pay, attract qualified candidates, and fill the job quickly, the commenter asked the Department for an exemption from the merit-staffing requirement for this outreach position so that a contractor can continue to hold it.

Response: The Department appreciates this commenter's feedback regarding outreach staffing. However, the Department addressed the benefits of State merit staff, including using State merit staff for MSFW outreach, in earlier sections of this preamble, specifically stating that the Department is adopting the proposed State merit-staffing requirement as a generally reliable method to ensure quality and consistency in ES delivery. Aside from allowing the three States to use their alternative staffing models in place as of February 5, 2020, the Department is not permitting further exceptions to the merit-staffing requirement discussed above.

Comment: The Department received several comments related to its proposal to revise the requirements governing the hiring or assignment of outreach staff in § 653.107(a)(3). A farmworker advocacy organization supported the Department's proposal to strengthen the hiring process for outreach staff, particularly the proposed requirement for SWAs to inform farmworker organizations in their States about job openings, noting such a requirement would help SWAs identify candidates who possess cultural competence and develop broad networks within farmworker communities.

Several commenters from Colorado, including a Colorado State government agency, a State workforce development board, and a trade association, expressed concern that if the Department adopted the proposed rule, it would require Colorado to employ new outreach staff and cross-train them to perform UI services. These commenters argued that it would be more difficult to backfill outreach positions currently held by county merit staff, as the proposed rule would require, if the Department also adopted revisions that raised the qualifications for hiring or assigning ES staff to outreach staff positions. As discussed below, this concern appeared to be based on these commenters' mistaken understanding that the proposed revisions would raise the qualifications for outreach staff positions.

Another State government agency opposed the proposed changes to the outreach staffing requirements in § 653.107(a)(3) based on a similar misunderstanding that the proposed revisions would increase the qualifications required of MSFW outreach staff. This State agency maintained that there was no need to expand current requirements, which it asserted allow the State to meet the needs of the program while maintaining flexibility in a tight labor market. According to this State agency, it is increasingly difficult to find applicants who are from MSFW backgrounds or who have substantial work experience in farmworker activities in a tight labor market, and many individuals already employed in outreach, compliance, and monitoring positions outside of MSFW or farmwork possess the necessary skillset and transferable skills.

A different State government agency agreed with the Department that SWAs should employ outreach staff who meet relevant criteria, but it noted the difficulty that its program managers at significant MSFW one-stop centers have faced when trying to hire qualified outreach staff who meet all requirements, which it said has resulted in program managers hiring outreach staff who are bilingual but do not necessarily have experience working with farmworkers.

Response: The Department appreciates the feedback it received from these commenters. As discussed in section V.C.2 above, this final rule will permit three States, including Colorado, to provide ES services in accordance with their longstanding alternative staffing arrangements. This revision to the proposed State merit-staffing requirement should resolve any concerns raised by commenters from Colorado regarding the impact that such a requirement would have on their State's ability to serve MSFWs. As relevant here, this final rule will not require Colorado to replace its county merit staff with State merit staff. Moreover, neither the proposed rule nor this rule require any State to cross-train ES staff to provide UI services.

Several commenters mistakenly believed that the proposed revisions would increase the qualifications of the individuals who SWAs must seek when hiring or assigning outreach staff. The Department did not propose to change the type of characteristics that SWAs must seek among qualified candidates when hiring or assigning outreach staff. The existing regulation at § 653.107(a)(3) already requires SWAs to seek qualified candidates who speak the language of a significant proportion of the MSFW population in the State and who are from MSFW backgrounds or who have substantial work experience in farmworker activities. Rather, the Department proposed to require SWAs not only seek individuals with these characteristics, but also place a strong emphasis on hiring and assigning such individuals. The Department has long required SWAs to seek out individuals who possess similar characteristics when hiring or assigning ES staff to outreach duties. Nevertheless, 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 and who are from MSFW backgrounds or have substantial work experience in farmworker activities. The Department is concerned that assigning individuals who do not possess these characteristics to outreach staff positions may contribute to low MSFW engagement in the ES program. Individuals who do not meet these characteristics may not have the language skills or experience necessary to effectively explain services to MSFWs or to successfully tailor those services to meet the particular needs of MSFWs. It is important for outreach staff to be able to effectively communicate with the MSFWs whom they serve, particularly because outreach staff often interact with MSFWs with LEP in remote places, such as rural working and living locations, where interpretation services and aids may not be as widely available. If outreach staff speak the same language as the majority of MSFWs in the State and come from an MSFW background or have substantial work experience in farmworker activities, then they are more likely to be able to effectively communicate with the MSFWs whom they encounter. In sum, the Department has determined SWAs must make a greater effort to employ outreach workers with the characteristics required by § 653.107(a)(3), because such individuals are more likely to have the knowledge and skills to help them effectively communicate and engage with MSFWs. In the Department's view, the benefit of identifying qualified candidates with these characteristics outweighs the burden it places on SWAs to comply with the requirement.

In order to receive applicants from farmworker organizations and other organizations with expertise concerning MSFWs, SWAs must make the job opening available to external candidates. SWAs may recruit internally for outreach staff job openings but they must also recruit externally. SWAs may hire or assign qualified candidates from their internal or external recruitment efforts, provided that they put a strong emphasis on hiring or assigning candidates who meet the characteristics described at § 653.107(a)(3)(i). If a SWA ensures hiring officials properly inform appropriate organizations and recruit externally for outreach staff positions, but these recruitment efforts do not produce qualified candidates who meet the required criteria, then hiring officials may assign existing staff to perform outreach staff responsibilities. In such cases, hiring officials must still put a strong emphasis on assigning candidates who meet at least some of the characteristics described at § 653.107(a)(3)(i). To demonstrate a strong emphasis on hiring or assigning candidates who meet these characteristics, job postings should describe the desired characteristics. This proposed change will also allow the Department to assess whether a SWA has policies and procedures in place to ensure hiring officials place an appropriate emphasis on seeking and hiring or assigning qualified candidates who meet the characteristics described at § 653.107(a)(3)(i). In cases where a SWA has more than one qualified applicant, the Department would expect hiring officials to select the applicant who meets the required criteria over the one who does not.

The Department appreciates that some SWAs may face difficulties in identifying qualified candidates who meet these characteristics and understands it may not always be possible to identify such candidates when hiring or assigning ES staff to outreach staff positions. Accordingly, this final rule will require SWAs to ensure hiring officials seek and put a strong emphasis on identifying qualified candidates with these characteristics. If hiring officials are not able to find qualified candidates who possess these characteristics, the SWA may proceed to hire or assign the most qualified candidate.

Appropriate Outreach Staffing Levels and Duties

Comment: The Department received comments both in support and opposition to its proposal to revise § 653.107(a)(1) and (4) to clarify and strengthen requirements governing the outreach staff whom SWAs employ to fulfill the requirements set forth in § 653.107. For example, a union organization supported the Department's proposed changes to ensure SWAs employ an adequate number of outreach staff sufficient to reach a majority of MSFWs in all States. A farmworker advocacy organization similarly remarked that the proposed changes would improve MSFW outreach by underscoring that outreach is a full-time job that deserves priority and should not be combined with other functions. This commenter thought the proposed changes would help ensure that outreach staff are available and qualified to provide the outreach and follow-up services required by the regulations. A State employee association supported the proposed rule's focus on outreach services to MSFWs. Similarly, a State government agency agreed with the proposed requirement for outreach staff in significant MSFW States to devote all of their time to outreach rather than merely including outreach among other responsibilities, noting it would further clarify the role and expectations of outreach staff. However, this State agency sought further clarification about how it should determine whether it employs an ''adequate'' number of outreach staff and inquired whether this determination would involve using a DOL-provided formula to accurately assess the need and determine what is considered a majority of the population.

Several other State government agencies opposed the proposed revisions and urged the Department to

consider alternative approaches that allow for more flexibility. For example, one State government agency expressed concern that the proposed requirement for a SWA to employ a sufficient number of outreach staff to conduct MSFW outreach ''in each area of the State'' would increase the Department's expectations for MSFW outreach staffing. Because this State agency did not think the effect of this proposed revision was clear, it asked the Department to clarify what the addition of ''in each area of the State'' would require and how it would impact the State's current practice for employing outreach staff. In particular, the State agency was concerned that the proposed requirement to employ an adequate number of outreach staff to conduct MSFW outreach ''in each area of the State'' might require each workforce development area or one-stop (depending how ''each area'' is defined) to devote more resources to MSFW outreach based on unknown parameters set by the Department. The State agency noted that it currently employed full-time, year-round outreach staff who serve three of its 12 workforce development areas, and that those workforce development areas covered around 90 percent of the State's agricultural employment population. The State agency expressed concern that the proposed revisions might require it to employ additional dedicated MSFW outreach staff to serve the nine other workforce development areas (or the other 30 non-significant MSFW one-stops), even though those areas and one-stop centers collectively served only around 10 percent of the State's MSFW population. The State agency noted that if the Department were to adopt such a requirement, it would decrease the State's capacity to conduct outreach to other key populations (*e.g.,* different groups statutorily identified as having barriers to employment) and to otherwise serve customers that directly access ES services via one-stops or virtually. The commenter requested that the Department allow States to meet regulatory goals through operational flexibility rather than rigid staffing requirements. Citing annual reports from the SMA to the Department showing frequent turnover among outreach staff, the commenter said a flexible approach was important to avoid gaps in outreach services when attrition occurs.

Another State agency explained that it employed several part-time outreach specialists throughout the State, and asserted that, as a non-significant MSFW State, there would not be enough outreach work for this staff to perform during peak season if their duties are limited to performing only those activities identified in § 653.107(b). According to this State agency, limiting the job duties that outreach staff can undertake during peak season is neither practical nor cost-effective given the number of MSFWs in the State. The State agency explained this limitation would pose several problems for the State's ES staff and the services they are able to provide. Specifically, the State agency noted that § 653.107(b) does not include duties like providing services in one-stop centers, attending meetings, and contributing to the one-stop ES services team. This was problematic, according to the State agency, because outreach staff are tasked with encouraging MSFWs to obtain services at one-stop centers, and in order to effectively serve MSFWs in the field or at one-stop centers, outreach staff must be able to devote some time to serving non-MSFWs, so that they stay up to date on the latest services, best practices, employers, and hiring events in their area.

A different State government agency asserted that the proposed requirement for year-round, part-time outreach staff in non-significant MSFW States is untenable because Wagner-Peyser Act funding is not designated for this function and its current staffing level has proven sufficient. Specifically, the commenter reported that its MSFW outreach staff collaborate with the State's NFJP partner on joint outreach, distribute pamphlets and speak to workers during housing inspections, and reach MSFWs at outreach clinic events hosted by a State public university.

Another State government agency objected to the proposed revision that would require outreach staff in significant MSFW States to spend 100 percent of their time on the outreach responsibilities listed in § 653.107(b), arguing that it would restrict staffing flexibility by prohibiting the assignment of additional duties and limit its staff's ability to assist MSFWs and their families who are seeking assistance in a one-stop center.

Response: The Department appreciates the feedback it received from State government agencies regarding the revisions it proposed to the outreach staffing requirements in § 653.107(a). The Department proposed these revisions to strengthen the requirements governing outreach staffing levels to ensure that outreach staff are dedicating sufficient time to performing the duties set forth at § 653.107(b) for outreach staff. As noted above, the Department has carefully considered the concerns these commenters raised and will adopt the proposed revisions to § 653.107(a) with minor revisions.

Some of the requirements about which commenters expressed concern are not new proposals. For example, the existing regulation at § 653.107(a)(4) already required significant MSFW States (*i.e.,* the 20 States with the highest estimated year-round MSFW activity) to provide full-time, year-round outreach staff to conduct outreach duties. It also required the remainder of States to provide at least part-time outreach staff on a year-round basis and full-time outreach staff during periods of the highest MSFW activity.

At the same time, the Department recognizes that some of the revisions to this section introduce new requirements, and that compliance with these requirements will require some SWAs to change the manner in which they have been conducting MSFW outreach or employing outreach staff. For example, if a SWA currently employs outreach staff only in those areas where significant MSFW one-stop centers are located, it will need to ensure that those outreach staff are also able to conduct outreach in all areas of the State (not just those service areas in which the significant MSFW one-stop centers are located) and make enough contacts to reach the majority of MSFWs in the State annually. If a SWA's existing outreach staff cannot adequately meet these requirements, then the SWA will need to ensure additional outreach staff are hired or assigned to meet these requirements.

While compliance with these requirements will require some SWAs to change the manner in which they currently conduct MSFW outreach, the Department does not anticipate that implementing these changes will impose a heavy burden. States will continue to retain some flexibility in determining how to structure their MSFW outreach in a manner that meets regulatory requirements. For example, a SWA may assign outreach staff to cover more than one service area, provided that the number of outreach staff in the State is adequate to conduct outreach in every service area in the State and to contact at least a majority of MSFWs in the State overall on an annual basis.

It is important that SWAs conduct MSFW outreach in all service areas in the State to ensure MSFWs throughout the State are able to access ES and receive information on farmworker rights from outreach staff. While there may be fewer MSFWs in certain areas, it is important to ensure MSFWs in all

areas have access to ES on an equitable basis. Additionally, when SWAs do not conduct outreach in particular areas of the State, MSFWs in those areas may not be aware of their employment-related rights and the availability of the ES and Employment-Related Law Complaint System. These conditions could make MSFWs in those areas more susceptible to employment-related abuses, including wage theft, exploitation, and trafficking.

As noted above, the Department acknowledges that the changes adopted in this final rule will require some States to change the manner in which they have been employing or assigning outreach staff. The Department has determined any burden this will impose is outweighed by the benefits likely to result from adopting these changes, because compliance with the updated requirements will better ensure that SWAs serve MSFWs in a manner that is qualitatively equivalent and quantitatively proportionate to other job seekers. The Department is concerned that the number of outreach staff in some States is not adequate to provide ES services in accordance with this standard, and that outreach staff are too often assigned other duties that detract from their ability to focus full time on the outreach responsibilities set forth in § 653.107(b).

SWAs contacted only approximately 21 percent of MSFWs in PY 2018 and approximately 19 percent of MSFWs in PY 2020.[6] The Department believes this level of outreach is not adequate. As described in the NMA Annual Report for PY 2020, the NMA has received information from farmworker organizations that most farmworkers have never experienced outreach contacts from SWAs.[7] This information aligns with the data described above, which shows SWAs are not contacting the majority of MSFWs. Farmworkers and advocates report that farmworkers are often not aware of their employment-related rights, that they fear retaliation for reporting violations, and that they experience violations of employment-related law and ES regulations. Farmworker advocates also report that farmworkers and advocates do not trust that SWAs will provide help. Section 653.107 requires ES staff to educate farmworkers about their rights, to be alert to observe working conditions, and to document and process apparent violations and complaints observed during outreach. Through the changes adopted in this final rule, the Department is seeking to increase the outreach provided by SWAs to reach a larger percentage of MSFWs, improve the presence and credibility of SWAs in the farmworker community, and increase the number and percentage of MSFWs who are aware of the ES services, rights, and protections available to them.

In the Department's view, the benefit of having an adequate number of outreach staff to contact a majority of MSFWs in the State annually outweighs the burden it places on SWAs to comply with the requirement. Compliance with this requirement will help to ensure outreach staff in significant MSFW States are able to focus their full attention on performing the outreach activities specified in § 653.107(b) on a year-round basis, and that outreach staff in the remaining States are able to focus on these outreach activities full time during peak seasons. This is important because outreach is an essential service delivery component to effectively serve vulnerable populations and individuals who live in rural communities like MSFWs. MSFWs often experience transportation challenges, work long hours, and are afraid to seek services for numerous factors and they may not be able to go into an AJC in person. It is therefore imperative that SWAs have an adequate number of outreach staff to bridge this service gap and improve accessibility for MSFWs. Outreach staff who devote full time to their outreach responsibilities are better positioned to provide direct services to MSFWs and help connect them to other services. The Department measures the provision of services to MSFWs through its equity ratio indicators and minimum service level indicators. Data suggests that increased outreach staffing would help to improve the provision of ES services in many States. Specifically, while national-level data for PY 2020 and prior years reflects that SWAs are cumulatively meeting equity ratio indicators, State-level data shows that many SWAs are not meeting several measures.[8]

Accordingly, the revisions adopted in this final rule make clear that full-time outreach staff must focus 100 percent of their time on the outreach responsibilities set forth in § 653.107(b). Under this final rule, full-time outreach staff may not provide services to MSFWs who enter or otherwise contact the one-stop for ES services, or provide any other services, including services related to the ARS in subpart F of this part, such as field checks or housing inspections. MSFWs who make contact with the one-stop outside of the outreach process must instead be assisted by other available ES staff. The role of outreach staff is to locate and contact MSFWs who are not being reached by the normal intake activities conducted by the ES offices. Consistent with § 653.107(b)(5), if an MSFW enters the ES office as a result of a prior outreach contact, the MSFW may be assisted by the outreach staff, provided that the services fall under the description of follow-up contacts necessary and appropriate to provide the assistance specified in § 653.107(b)(1) through (4). If outreach staff are not available, other ES staff must assist the MSFW.

The Department acknowledges there is less need for outreach in States with lower populations of MSFWs. Accordingly, § 653.107(a)(4) requires only those States with the highest estimated year-round MSFW activity to employ full-time, year-round outreach staff. The remainder of States need only employ full-time outreach during periods of the highest MSFW activity and may employ part-time outreach staff the remainder of the year. Under this final rule, SWAs will continue to provide an assessment of need that is particular to their State's service area(s) in the AOP, including information about when peak season in their State occurs and an estimate of the number of MSFWs in the State during peak season. The final rule will require all SWAs to use this data to determine the number of outreach staff that are adequate to conduct MSFW outreach in each service area of the State and to contact a majority of the MSFWs in the State annually.

The Department disagrees with the commenters that allege it is untenable for States with lower populations of MSFWs to employ outreach staff who may perform only those duties described at § 653.107(b) during peak season. The outreach responsibilities described in paragraph (b) include time-consuming services like preparation of applications for ES services, making referrals to employment, providing assistance with filing complaints, referrals to supportive services, assistance in making appointments and arranging transportation to and from local one-stop centers or other appropriate agencies, and follow-up activities necessary to provide the

[6] See NMA Concern 1 in the PY 2020 NMA Annual Report on Service to MSFWs, available on the Department's website at *https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance.*

[7] NMA Annual Report for PY 2020, available at: *https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance.*

[8] See NMA Concern 1 in the PY 2020 NMA Annual Report on Service to MSFWs, available on the Department's website at *https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance.*

assistance described in § 653.107(b)(1) through (4). Outreach staff may, therefore, devote time to providing the direct services identified in § 653.107(b)(4) to the MSFWs they contact through outreach and may work to ensure the MSFWs they enroll as participants receive services the Department measures through its equity ratio indicators and minimum service level indicators. This work is particularly important because, while national-level data for PY 2020 and prior years reflects that SWAs are cumulatively meeting equity ratio indicators, State-level data shows that many SWAs are not meeting several measures.[9] The condition appears to exist because data from a few larger States that are compliant with these measures compensates for many other States that are not meeting the measures, including States that are not significant MSFW States. These low-performing States often do not have full-time or any outreach staff in peak season, and the Department is concerned that the lack of staffing negatively impacts the ability of MSFWs in these States to receive equitable access to the ES. Accordingly, the Department continues to believe it is necessary for SWAs in all States to employ outreach staff on a year-round basis, and that outreach staff in non-significant MSFW States must devote full-time to outreach work during the periods of highest MSFW activity in the State.

The Department disagrees with the commenter that asserted outreach staff must serve non-MSFWs and perform other duties within a one-stop center in order to learn how to effectively serve MSFWs. In the Department's view, the training that outreach staff receive pursuant to § 653.107(b)(7), which includes training on one-stop center procedures and on the services, benefits, and protections afforded MSFWs by the ES, should sufficiently prepare them to successfully serve MSFWs. Outreach staff may also attend staff meetings and trainings that relate to improving the quality of their outreach and which do not detract from their ability to meet outreach requirements described in this section. Such trainings might include information on one-stop partners, supportive services, and other information or resources available to MSFWs, which may also be available to non-MSFWs. Serving other job seekers is not necessary to obtain the skills or knowledge necessary to effectively conduct outreach to MSFWs.

In response to the commenter that sought clarification about how a SWA should determine if it employs an ''adequate'' number of outreach staff, the Department notes that, per the revision to § 653.107(a)(4) adopted in this final rule, the number of outreach staff in a State is ''adequate'' if the outreach staff in the State are able to (1) conduct MSFW outreach in each service area of the State and (2) contact a majority of MSFWs in the State annually. Section 653.107(a)(4) additionally specifies that outreach staffing levels must align with and be supported by the estimated number of farmworkers in the State and the farmworker activity in the State, as demonstrated by the SWA in the State's AOP.

In response to the commenter seeking clarification about the areas where States must conduct outreach, the Department is modifying the revision it proposed to make in § 653.107(a)(4) so that it explicitly specifies that each SWA must ensure there is an adequate number of outreach staff in the State to conduct MSFW outreach in each service area of the State and to contact a majority of MSFWs in all of the State annually. The final rule will require SWAs to conduct outreach in all of the State's service areas so that MSFWs in all service areas are able to access the full range of ES. The SWA's service areas consist of each local area where the SWA provides labor exchange services under the Wagner-Peyser Act, as described in the Memorandum of Understanding (MOU) that is explained in 20 CFR 678.500. This requirement does not mean that outreach staff must be placed in each local area, only that the State must ensure that there is an adequate number of outreach staff in the State to meet the requirements of this section.

The Department acknowledges the concern raised by some commenters that the revisions to § 653.107(a)(3) will make it more difficult to hire and retain outreach staff, which could impede a SWA's ability to hire an adequate number of outreach staff. However, the Department does not anticipate that compliance with § 653.107(a)(3) will pose the obstacle that these commenters fear. While the revised regulation will require a SWA to ensure hiring officials seek and put a strong emphasis on hiring and assigning qualified candidates who meet the characteristics described in § 653.107(a)(3) (*i.e.,* qualified candidates who speak the language of a significant proportion of the State MSFW population and who are from MSFW backgrounds or who have substantial work experience in farmworker activities), if a State seeks but does not find qualified candidates who meet the characteristics described in § 653.107(a)(3), the State must still employ an adequate number of outreach staff by hiring or assigning the most qualified among available candidates.

For these reasons, the Department adopts the proposed changes, with the revisions to § 653.107(a)(3) and (4) described above, and will provide technical assistance and guidance to help SWAs meet the requirements, as appropriate.

Section 653.107(b)

Paragraph (b) of § 653.107 describes outreach staff responsibilities. The Department proposed to make several revisions to this section.

In particular, the Department proposed to amend the introductory sentence of paragraph (b) to specify that outreach staff responsibilities include the activities identified in paragraphs (b)(1) through (11) of this section. This revision would reinforce the Department's proposal to add a sentence in § 653.107(a)(4) to specify that full-time outreach means each individual outreach staff person must spend 100 percent of their time performing the outreach responsibilities described in § 653.107(b). Because this revision would remove the colon in the existing regulatory text, the Department proposed to make a conforming amendment to the beginning of the sentence in paragraph (b)(1) so that it begins by stating ''outreach staff must'' instead of ''explaining.''

The Department additionally proposed to make several revisions to § 653.107(b)(7) to update the topics about which outreach staff must receive training. In particular, the Department proposed to replace the reference to outreach staff being trained in ''local office'' procedures with a requirement to train outreach staff in ''one-stop center'' procedures, which would align with the revised definition of *ES office* that the Department proposed at § 651.10. The Department additionally proposed to require training on sexual coercion, assault, and human trafficking, in addition to the existing requirement to provide outreach staff training on sexual harassment (training on the former topics is suggested but not mandatory in the existing regulations). The Department also proposed to replace the existing requirement for SWAs to train outreach staff in the procedure for informal resolution of complaints with a requirement for

[9] See NMA Concern 1 in the PY 2020 NMA Annual Report on Service to MSFWs, available on the Department's website at *https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance.*

SWAs to train outreach staff on the Complaint System procedures at part 658, subpart E, and to require that outreach staff be aware of the local, State, regional, and national enforcement agencies that would be appropriate to receive referrals.

Finally, the Department proposed several non-substantive revisions in paragraph (b) to replace ''outreach workers'' with ''outreach staff'' and ''employment services'' with ''ES services.''

The Department received several comments concerning the revisions it proposed to paragraph (b), which it describes and responds to below. Comments regarding the proposal to limit full-time outreach workers to the outreach responsibilities set forth in this paragraph are discussed above in connection with the proposed revision to § 653.107(a)(4).

For the reasons discussed below, the Department has not made any changes to the revisions it proposed to this paragraph and adopts the revisions to § 653.107(b) as proposed. In addition, although the Department did not propose to revise § 653.107(b)(6) in the NPRM, as discussed in the comment responses for § 658.419, the Department received comments requesting additional clarification to the proposed definition of *apparent violation,* which resulted in further revisions to that definition. As a result, the Department has identified that it is necessary to revise § 653.107(b)(6) to remove the reference to suspected violations and to clarify the procedure outreach staff must follow to document and refer apparent violations. Therefore, through this final rule, the Department revises § 653.107(b)(6) to state that outreach staff must be alert to observe the working and living conditions of MSFWs and if an outreach staff member observes or receives information about apparent violations, the outreach staff member must document and refer the information to the appropriate ES Office Manager (as described in § 658.419 of this chapter).

Comment: A farmworker advocacy organization commended the Department's proposals that emphasize outreach work is a full-time job that deserves priority and should not be combined with other functions. This commenter went on to suggest that the Department add an additional role to outreach responsibilities: collect data to be used for prevailing wage surveys. In particular, this commenter recommended that the Department allow SWAs to leverage outreach staff to collect wage data while conducting outreach work. The commenter asserted that doing so would help the Department fulfill its duty to determine the prevailing wages for agricultural work and better protect farmworker wages by increasing the frequency of surveys, including worker input in the determination, and addressing instances of insufficient employer data.

Response: The Department declines to adopt the commenter's suggestion to add an additional role to outreach responsibilities for outreach staff to collect data to be used for prevailing wage surveys. The Department believes that outreach staff must focus their efforts on providing services to MSFWs. Prevailing wage surveys would cause outreach staff to devote time away from providing services to MSFWs.

Comment: The Department received several comments concerning its proposal to revise the training requirements in § 653.107(b)(7). A farmworker advocacy organization endorsed the proposal to amend this paragraph to require that outreach staff receive training on additional topics (*i.e.,* protecting MSFWs against sexual coercion, assault, and human trafficking, as well Complaint System procedures). To support the requirement, this commenter cited news coverage and research findings about human trafficking and asserted that, in order for the ES Complaint System to be effective, outreach workers will first need to make farmworkers aware of its existence.

A State government agency similarly agreed that outreach staff should receive training on protecting MSFWs against sexual coercion, assault, and human trafficking, but it urged the Department to provide appropriate training rather than requiring States to find or develop appropriate trainings locally. This commenter felt the Department (not SWAs) should bear responsibility for providing this training, because the Department identified these topics as issues that are particularly relevant to H–2A workers, and the Department is tasked with administering the H–2A visa program. The commenter further reasoned that if the Department provides training on these topics, it could target the unique challenges facing outreach staff and provide States an opportunity to share lessons learned and best practices.

Other commenters raised more general questions about when and by whom the training required by § 653.107(b)(7) is to be provided. These commenters questioned what training MSFW outreach staff housed at one-stop centers would need regarding one-stop center procedures and how the training requirement could be met when the proposed rule emphasizes that MSFW outreach staff should be in the field during peak growing season to ensure MSFWs are protected while they work. In contrast, a State government agency asserted that outreach staff must be able to dedicate time to providing services to non-MSFWs so they can remain up to date on the latest services, best practices, employers, hiring events, etc. in their area.

Response: The Department continues to believe that it is critical for outreach staff to receive training on protecting MSFWs against sexual coercion, assault, and human trafficking, as well as training in Complaint System procedures. In response to comments asking who will provide this training (as well as training on the other topics set forth in § 653.107(b)(7)), the Department notes that the existing regulation tasks the State Administrator with the responsibility to develop the training required by this regulation, pursuant to uniform guidelines developed by ETA. The Department did not propose any revisions to this requirement in § 653.107(b)(7). The Department continues to believe the State Administrator is in the best position to develop these trainings, because conditions, resources, and relevant service providers are State-specific. While the Department often provides guidance on protecting MSFWs from employment-related abuses and the Department's overall regulations for the Complaint System, each State is best positioned to train their outreach staff on the specific resources and procedures in their State. Specifically, the State Administrator can ensure staff receive training on the specific conditions affecting MSFWs in the State and the SWA's own procedures, including Complaint System procedures. For example, each State has different State-level enforcement agencies about which staff should be informed to make appropriate referrals. Additionally, many States have anti-trafficking taskforces that are specific to the State or to local areas. RMAs are available to provide technical assistance regarding these resources, including sharing contact information for potential training partners.

In response to questions from commenters asking why outreach staff need to be trained on one-stop center procedures and when outreach staff would be available to receive such training if they are working in the field, the Department notes that § 653.107(b) requires outreach staff to spend a majority— but not all— of their time in the field. Outreach staff may use the time when they are not in the field to

attend training, provide follow-up services, or engage in any of the other activities described in § 653.107(b). Because outreach staff are tasked with providing ES services to the MSFWs they contact through their outreach work—either directly in the field or subsequently in a one-stop center—they must be trained on how to provide those services in both the field and at the one-stop center. The Department disagrees that outreach staff must also serve non-MSFWs at the local one-stop in order to effectively serve MSFWs and receive this training. Outreach staff do not need to provide other services in the one-stop to receive this training and provide competent services to MSFWs.

Section 653.107(d)

Paragraph (d) of § 653.107 requires a SWA to develop an Agricultural Outreach Plan (AOP) to include in the Unified or Combined State Plan that its State submits pursuant to sec. 102 or 103 of WIOA. The Department proposed to amend this paragraph to make several changes to the content that SWAs must include in their AOP.

First, the Department proposed to revise § 653.107(d)(2)(ii) to require the AOP to explain the materials, tools, and resources that the SWA will use for outreach.

Second, the Department proposed to revise § 653.107(d)(2)(iii) so that it would require a SWA to describe their proposed activities to contact MSFWs who are not being reached by the normal intake activities conducted by the one-stop centers and to include within this description: (1) the number of full-time and part-time outreach staff in the State; and (2) an explanation demonstrating that there is a sufficient number of outreach staff to contact a majority of MSFWs in all the State's service areas annually. The Department proposed this change to align the information that SWAs provide in the AOP with the proposed requirement in § 653.107(a)(4) for a SWA to employ an adequate number of outreach staff to conduct MSFW outreach in each area of the State to contact a majority of the MSFWs in all of the SWA's service areas annually. As noted below, the Department has modified the proposed regulatory text for this provision to conform with the revisions that it made to the regulatory text in § 653.107(a)(4).

Third, the Department proposed to revise § 653.107(d)(2)(v) to replace the requirement for a SWA in a State with significant MSFW one-stop centers to provide an assurance that it is complying with the requirements in § 653.111 to instead require that SWAs in such States provide a description of how they how they intend to comply with the staffing requirements for MSFW one-stop centers in accordance with § 653.111.

Fourth, the Department proposed to amend § 653.107(d)(4) to clarify that the AOP must be submitted in accordance with paragraph (d)(1) of this section instead of paragraph (d), as currently written. Paragraph (d)(1) is the accurate reference that explains the SWA's responsibility to develop the AOP as a part of the Unified or Combined State Plan.

Finally, the Department proposed two revisions at § 653.107(d)(5). First, the Department proposed a technical edit to change the reference from § 653.108(s) to § 653.108(u) due to restructuring paragraphs at § 653.108. Second, the Department proposed to replace ''its goals'' with ''the objectives.'' Referring to ''the objectives'' is more accurate because the Department does not ask SWAs to provide specific goals in the AOP, rather SWAs identify various objectives.

The Department largely adopts the proposed changes with only minor revisions. Specifically, the Department modified the regulatory text it proposed for § 653.107(d)(2)(iii) to clarify the information that this provision requires States to include in the AOP and to align with the revisions that this final rule adopts at § 653.107(a)(4). The Department adopts all other proposed revisions to § 653.107(d) without change.

Comment: A farmworker advocacy group supported the Department's proposed changes to the content that SWAs must include in an Agricultural Outreach Plan, noting the revisions would require considerably greater detail about how the SWA intended to reach farmworkers who do not normally visit the SWA's one-stop centers.

Response: The Department appreciates the views that this commenter shared. As this commenter noted, the revisions adopted in this rule will require SWAs to provide more detail in their AOPs about the outreach they plan to conduct. They will also require SWAs to provide more detail about how they plan to comply with the staffing requirements for significant one-stop centers in § 653.111. This level of detail is essential to aid SMAs, RMAs, and the NMA in assessing whether SWAs have the appropriate staffing structure to meet the unique needs of farmworkers.

Section 653.108 State Workforce Agency and State Monitor Advocate Responsibilities

Section 653.108 governs the monitoring obligations of the SWA and the SMA. The NPRM proposed numerous revisions to this section intended to strengthen the role of the SMA and enhance the monitoring activities that SMAs perform. The Department received a number of comments addressing these proposals. After careful consideration of the comments received, the Department has decided to adopt the revisions as originally proposed, except as noted in the discussions below. Paragraphs (k), (p), (r), (s), and (t) in this section are redesignated paragraphs because of revisions made elsewhere in this section. The Department did not propose any other changes to these paragraphs, and they are not discussed below.

Section 653.108(a) State Workforce Agency Responsibilities for Service Delivery to Migrant and Seasonal Farmworkers

Paragraph (a) of § 653.108 establishes the SWA's responsibility to monitor the SWA's own compliance with ES regulations in serving MSFWs. The Department proposed to revise this paragraph to explicitly prohibit the State Administrator or ES staff from retaliating against an SMA for performing the monitoring activities required by this section.

Comment: A State government agency and a farmworker advocacy organization commended the Department for proposing to explicitly prohibit the SWA from retaliating against SMAs and their staff for monitoring activities or for raising concerns about noncompliance with ES regulations.

Response: The Department appreciates the commenters' feedback supporting the proposed change prohibiting retaliation. The Department adopts this change as proposed for the reasons set forth in the NPRM.

Section 653.108(b) State Monitor Advocate Requirement and Qualifications

Paragraph (b) of § 653.108 requires SWAs to appoint an SMA who must be a SWA official to monitor SWA compliance with ES regulations in serving MSFWs and sets forth qualifications for the SMA position. The Department proposed to revise this paragraph to remove the requirement that the SMA be a SWA official because the Department proposed to remove the definition of SWA official in § 651.10.

However, as described in the comment responses for § 651.10, the final rule will maintain the current definition of SWA official in existing § 651.10, and therefore, the Department will also maintain the requirement that the SMA be a SWA official in this paragraph.

The Department also proposed to revise § 658.108 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). The Department adopts the change as proposed.

Comment: A farmworker advocacy organization supported proposed changes to ensure that States prioritize hiring SMAs with experience in the farmworker community, inform farmworker organizations about vacancies in the SMA position, and encourage these organizations to refer qualified applicants. However, the commenter warned that States do not always honor their obligation to work with farmworker organizations when hiring for the SMA position. The commenter expressed hope that the proposed rule's renewed emphasis on the importance of hiring SMAs with relevant experience and connections would alleviate this problem going forward.

A State government agency disagreed with the proposal to establish additional hiring requirements for the SMA role, arguing that putting ''a strong emphasis on hiring'' qualified candidates who meet the criteria is not needed because SWAs already must ''seek'' such candidates. The commenter added that it uses detailed job descriptions, screening evaluations, and interviewing benchmarks to hire strong candidates.

Response: The Department acknowledges that some SWAs already have practices in place to hire strong candidates for the SMA position, but some do not. The changes in this paragraph are intended to better ensure that SWAs not only seek qualified candidates by complying with the requirements to contact certain organizations about job openings, but also hire qualified candidates. The Department acknowledges that SWAs may not always be able to attract candidates who meet 100 percent of the criteria outlined in the regulations and therefore mandating that SWAs hire candidates meeting all of the criteria is not practicable. Instead, the Department determined that requiring that SWAs seek *and* place a strong emphasis on hiring SMAs meeting the criteria in the regulations gives SWAs the flexibility needed to fill SMA positions and also better ensures that SWAs hire qualified individuals to perform the critical duties of the SMA position.

The proposed change to put a strong emphasis on hiring qualified candidates is important to increase the likelihood that all SWAs will hire SMAs who meet one or more of the criteria, and not simply seek such individuals. This proposed change will allow the Department to assess whether a SWA has policies and procedures in place to ensure it hires qualified candidates. In cases where a SWA has more than one applicant, the Department would expect SWAs to hire the applicant with the listed qualifications, over those that did not meet the qualifications. The Department adopts the change as proposed to better ensure SWAs hire qualified candidates for the SMA position.

Section 653.108(c) State Monitor Advocate Status

Paragraph (c) of § 653.108(c) establishes the status of the SMA within the SWA. The Department proposed several revisions to this paragraph 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. Specifically, the Department proposed at § 653.108(c) to create new paragraphs (c)(1) through (3). First, proposed paragraph (c)(1) required that the SMA be a senior-level ES staff employee. Second, proposed paragraph (c)(2) required 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. Third, proposed paragraph (c)(3) required that the SMA have the knowledge, skills, and abilities necessary to fulfill the responsibilities as described in this subpart. The Department adopts the changes as proposed.

Comment: Several State government agencies, both those in support of and opposed to the requirements in this paragraph, noted that the requirements will require restructuring or reclassifying the SMA position.

A farmworker advocacy organization agreed with the proposed requirement that SMAs must be senior-level officials within the SWA. A private citizen also supported requiring the SMA to be a senior-level ES staff employee who reports to the State Administrator, remarking that the SMA currently does not have sufficient status within the SWA and reports to a lower level supervisor without decision-making authority, which they said causes delays or denials of requests by the SMA and even the disregarding of corrective actions. Similarly, some State government agencies and anonymous commenters agreed with proposed changes that would enable SMAs to conduct their role more effectively, such as strengthening their status and giving them more autonomy, but asked the Department to provide SWAs with more guidance on the revised role (*e.g.,* better define ''senior-level'' and ''their designee''). One of the anonymous commenters recommended the Department communicate the changes in the SMA's status directly to SWAs, such as through a webinar, rather than having them learn it from their SMAs. The other anonymous commenter also urged the Department to ensure that when the State Administrator uses a designee, the SMA still has direct, personal access to the State Administrator and the designee is knowledgeable and experienced in the ES and Monitor Advocate System to better assist the SMA and make decisions on behalf of the SWA.

A State government agency remarked that not allowing the State Administrator's designee to be the individual who has direct program oversight of the ES is practical because it ensures compliance standards are met without biases. However, the commenter asked the Department to clarify how it defines ''direct program oversight,'' to ensure that the SMA is reporting to the correct administrator.

A State government agency opposed the proposed requirement that the SMA be a senior-level position reporting directly to the State Administrator, arguing that its approved part-time SMA ensures SWA adherence to all requirements, has access to the State Administrator through the chain of command, and would not have any greater efficacy in oversight at a different level. Another State government agency similarly opposed a requirement for the SMA to be positioned at the senior staff level and expressed its preference to retain flexibility on where the SMA is placed within the agency, arguing it has demonstrated that its SMA can effectively perform their role from their current placement within the agency. This State agency additionally asserted that changing the SMA's current placement within the agency would likely require reclassification of the position and necessitate a strategic recruitment process to identify a candidate with the requisite skills and experience at a senior level. Noting these processes require time, this State agency asked the Department to enlarge

the proposed deadline to comply with this requirement if the Department decided to adopt it, and provide States 2 years from the effective date of any final rule to come into compliance with the requirement. Another State government agency commented that the proposed change would require reorganization of the State's MSFW program office in order to elevate the SMA position to report directly to the State Administrator and to comply with other changes proposed in paragraph (d). This agency stated the proposed changes could adversely impact the level of funding that the agency provides to local ES offices to support MSFW activities.

Some commenters remarked that the proposed changes appear to be a duplicative effort by aligning the status of the SMA and the E.O. Officer. In contrast, a State government agency said there are direct correlations between the SMA and the E.O. Officer and reasoned that improved alignment and partnership of the two positions would better address the statewide need.

Referencing the Department's statement that the proposed change would require the SMA to be ''not only a State employee, but a State merit-staff employee,'' a State government agency asked the Department to clarify or define the terms ''State employee'' and ''State merit-system employee.''

Response: While many commenters, including some SWAs, SMAs, and advocacy organizations, supported a requirement to enhance the status of the SMA, the Department recognizes that some SWAs did not. The Department believes these changes are critical to ensure that SMAs can more effectively carry out their duties; having ''direct access'' to the State Administrator ''as needed'' as previously required was not enough. The Department recognizes that SWAs will need a reasonable amount of time to implement these changes. The Department requested comment on the appropriate length of time to come into compliance. States requested a range of 2 years to 3 years. The Department is providing 24 months from the effective date of this final rule for SWAs to implement these changes. This is the same amount of time SWAs will have to comply with the State merit-staffing requirements in this final rule. Having one transition period enables SWAs to take the necessary steps to implement all of the changes required under this final rule at one time. These steps include, among others, obtaining any required State authorization, addressing collective bargaining issues and contracts, and conducting recruiting and training. During the transition period, the Department will provide technical assistance and guidance to help SWAs comply with the new requirements. The Department has detailed the cost burden associated with this final rule in section VI. Wagner-Peyser Employment Service grant funding is provided annually to deliver employment services, and such grant funding is available to cover the cost of implementing this final rule.

The Department noted in the NPRM that many SMAs have reported difficulty in their ability to carry out their duties due to insufficient status within the SWA. The proposed changes strengthen the status of SMA. SMAs are charged with ensuring compliance with ES regulations put in place to ensure that MSFWs have meaningful access to services and equal opportunities. To enhance the SMA's ability to effectively carry out their role, SMAs need to hold a senior-level position that will grant them more direct access to top management. A senior-level position is one having a title and resources commensurate with the level of responsibility for a senior official who reports directly to the State Administrator or the State Administrator's designee having the authority to make decisions on behalf of the State Administrator.

Allowing the State Administrator to select a designee to whom the SMA reports gives States flexibility in how to implement this requirement. If a State Administrator chooses to have the SMA report directly to a designee, the designee must be a position within the State Administrator's office with authority to act on behalf of the State Administrator. However, the designee may not be the individual with direct oversight of the ES, such as the ES director. This restriction is necessary to avoid challenges that may result from having the SMA monitor compliance with decisions made by their direct supervisor or for which their direct supervisor may be responsible.

The Department notes that § 653.108(e) provides States with the ability to have part-time SMAs with prior approval from the Regional Administrator (RA). The Department believes the requirements under paragraph (c) are compatible with the part-time SMA staffing provision in paragraph (e).

The NPRM referenced the E.O. Officer simply as a comparable position to an SMA, having a similar level of responsibility and complexity, that is required to be a senior-level position within a State. The Department did not propose, nor do these final regulations require, any changes to the SMA position that either duplicate the work of the E.O. Officer or require the SMA to have the exact same position or level as the E.O. Officer. SMAs are responsible for monitoring SWA and ES office compliance with ES regulations in serving MSFWs. The change in this final rule requires the SMA to report to the State Administrator (or designee). E.O. Officers perform a different function in the State.

The Department notes that ''State employee'' means an individual employed by the State. ''State merit staff'' means 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). Requiring the SMA to be State merit staff, not just a State employee, conforms with the merit-staffing requirement in § 652.215.

The Department adopts the changes as proposed to ensure SMAs have the status and authority to monitor SWA compliance with ES regulations.

Section 653.108(d) State Monitor Advocate Staff Responsibilities

Paragraph (d) of § 653.108 describes requirements for staff and other resources to support the SMA in carrying out monitoring functions. The Department proposed to revise § 653.108(d) to require that the SMA have sufficient authority, staff, resources, and access to top management to monitor compliance with the ES regulations. In addition, the Department proposed to prohibit SMA staff from performing outreach responsibilities, ARS processing, and complaint processing to conform with proposed changes to the SMA's role in these activities.

Comment: A farmworker advocacy organization remarked that the proposed revisions ensure SMAs have the authority, tools, and resources they need to monitor SWA compliance with ES regulations. A few State government agencies noted the proposed requirements in paragraphs (c) and (d) together could require restructuring their SMA office (*e.g.,* creating a senior-level staff position and hiring additional analyst staff) and relocating it for direct access to the State Administrator or their designee. One of those State government agencies requested a transition period of 3 years to comply with the requirements. A different State government agency supported the proposed requirement, saying it would amplify the SMA's monitoring capabilities and allow the SMA to maintain program standards. However, referencing the Department's statement that ES staff assigned to help the SMA

carry out its duties may not be assigned conflicting roles, the commenter asked the Department to clarify the functions and responsibilities that ES staff would be assigned under the SMA, which it said would provide it guidance to determine if any conflict exists.

A State government agency requested that the Department require coordination between the SMA and SWA officials responsible for monitoring to help ensure efficient and non-duplicative efforts given the requirement that the SWA also conduct monitoring.

A farmworker advocacy organization agreed with the proposed requirement that SMAs must not serve jointly as outreach staff, reasoning that prohibiting the SMA from serving part-time in an outreach role would eliminate conflict of interest concerns that arise from the SMA's responsibility for monitoring outreach efforts. Citing an article about an investigation of human trafficking by an SMA's relative, the commenter urged the Department to go further to address other significant conflicts of interest that can arise with SMAs, such as by adopting conflict of interest standards for SMAs to ensure that they are not involved in approving clearance orders or handling complaints related to family members or close associates.

Response: The Department recognizes that SWAs will need a reasonable amount of time to implement these changes. The Department will provide 24 months from the effective date of this final rule for SWAs to implement these changes. This is the same amount of time SWAs will have to comply with the State merit-staffing requirements in this final rule. Having one transition period enables SWAs to take the necessary steps to implement all of the changes required under this final rule at one time. These steps include, among others, obtaining any required State authorization, addressing collective bargaining issues and contracts, and conducting recruiting and training. During the transition period, the Department will provide technical assistance and guidance to help SWAs comply with the new requirements.

In the NPRM, the Department proposed changes to prohibit the SMA's staff from being assigned conflicting roles to perform any outreach responsibilities, ARS processing, or complaint processing. The Department proposed regulatory text to prohibit SMA staff from performing work that conflicts with the ''monitoring'' duties of the SMA. The final regulatory text does not include the word ''monitoring'' before duties to make clear that SMA staff must not perform any work that conflicts with any of the SMA's duties, not just the SMA's monitoring duties. The Department notes the recommendation to go further to address other significant conflicts of interest that can arise with SMAs, such as by adopting conflict of interest standards for SMAs in this final rule. The Department is adding in paragraph (e) regulatory text to explicitly prohibit the SMA from performing any work that conflicts with any of the SMA's duties in § 653.108. The Department will further address conflicts of interest and internal controls in technical assistance and guidance.

Section 653.108(e) State Monitor Advocate Full-Time Staffing Requirement and Prohibited Duties

Paragraph (e) of § 653.108 is a new paragraph that was proposed, specifying that no State may dedicate less than full-time staffing for the SMA position unless the RA, with input from the RMA, provides written approval. The Department is also making one change in this section that was not proposed in the NPRM to explicitly state that the SMA must not perform work that conflicts with any of the SMA's duties, such as outreach, ARS processing, and complaint processing.

Comment: Citing reports of issues such as discrimination arising when SMAs split their time between monitoring activities and other duties, a farmworker advocacy organization agreed with the proposed requirement that SMAs must serve in the role full-time.

Response: The Department acknowledges the commenter's support for a full-time SMA staffing requirement. The Department sought to strengthen the regulation permitting part-time SMA staffing (previously described in § 653.108(d)) by (1) including the RMA in the RA's process for determining whether a State has demonstrated that the SMA function can be effectively performed with part-time staffing; and (2) requiring express written approval by the RA. After consideration of comments regarding SMA conflicts, the Department is also revising this paragraph to explicitly state that the SMA must not perform any work that conflicts with any of the SMA's duties described in § 653.108. This change was not proposed in the NPRM, but the Department did propose and has adopted in the definition of ''outreach staff'' in § 651.10, regulatory text explaining that SMAs are not considered outreach staff. In part 658, the Department proposed and adopted regulatory text prohibiting the SMA from participating in the complaint process. And in paragraph (d) of this section, the Department proposed an explicit prohibition on the SMA's staff from performing any work that conflicts with the SMA's duties, such as outreach, ARS processing, and complaint processing. It follows that the SMA must not perform work that conflicts with the SMA's duties either. Therefore, the Department is expressly prohibiting the SMA from performing any work that conflicts with the SMA's duties described in this section.

Section 653.108(f) State Monitor Advocate Training

Redesignated paragraph (f) of § 653.108 sets forth required trainings for SMAs and SMA staff to maintain competency. The Department proposed to remove the requirement that SMAs attend a training by the RMA within the first 3 months of the SMA's tenure. Instead, the Department proposed to require all SMAs and their staff to attend trainings offered by the RMA, the NMA, and their team, as well as those trainings necessary to maintain competency and enhance the SMA's understanding of the unique needs of farmworkers. This includes trainings offered by an enumerated list of Federal agencies as well as trainings offering farmworker-related information.

Comment: Numerous commenters, including several labor unions, a couple of think tanks, and an advocacy organization, commended the Department for its commitment to improving the effectiveness of SMAs and ensuring that their staff receive the training necessary to provide MSFWs adequate services. A farmworker advocacy organization agreed it is important that SWA staff receive proper training on key tasks like assessing agricultural jobs and connecting workers with necessary services.

Response: The Department appreciates the comments provided in these areas supporting the proposed changes. After further consideration, the Department identified a need to clarify which staff may require SMAs to attend training. The Department has decided to remove the proposed reference to NMA team members and instead refer to NMA staff, as identified in § 658.602(h). The Department adopts the proposed revisions, with the exception of updating the reference to NMA staff, for the reasons outlined in the NPRM.

Section 653.108(h) State Monitor Advocate Review of State Workforce Agencies and Employment Service Offices

Paragraph (h) of § 653.108 outlines elements of the SMA's review of SWA and ES office service delivery to MSFWs. These requirements were previously described in § 653.108(g). The Department proposed in § 653.108(h)(1)) to specify important elements of the ongoing review that the SMA must conduct under this paragraph. In particular, new proposed paragraphs (h)(1)(i) through (iii) would require the SMA to conduct an ongoing review of the delivery of services and protections afforded by the ES regulations to MSFWs by the SWA and ES offices, including: (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 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. The Department proposed in § 653.108(h)(3) and to clarify that SMAs must conduct onsite reviews of one-stop centers regardless of whether the one-stop center is designated as a significant MSFW one-stop center. Proposed § 653.108(h)(6) maintained an existing requirement for SMAs to review outreach workers' daily logs and other reports, including those showing or reflecting the workers' activities, but proposed that this review be done on a ''regular'' rather than a ''random'' basis. The Department adopts the changes as proposed.

Comment: Some commenters disagreed with the proposed requirement that SMAs must conduct onsite reviews of one-stop centers regardless of whether the one-stop center is designated as a significant MSFW one-stop center, arguing that this is an overreach, that it is duplicative of existing monitoring reviews, and that monitoring of one-stop centers can be accomplished without dismantling the current Michigan model. Quoting the Secretary describing the Industry-Recognized Apprenticeship Program as ''a disconnected, duplicative program that does nothing but create confusion,'' the commenters asserted the same could be said of the proposed requirement, which they warned would slow customer service response time, increase all workforce system costs, and reduce flexibility in meeting the needs of local communities. In contrast, a farmworker advocacy organization supported the proposed requirement but cautioned that SMAs will need adequate resources to effectively implement this change. A few State government agencies also stated that the proposed revision will require an increase in staffing resources.

A State government agency opposed the proposed requirement that SMAs must monitor whether the ES services provided to MSFWs are qualitatively equivalent and quantitatively proportionate to the services provided to non-MSFWs. The commenter argued that State performance indicators already serve this purpose and are gathered to determine whether services are quantitatively proportionate. The commenter stated that States would need additional guidance from the Department on how the SMA should determine whether services are qualitatively equivalent to ensure all States follow the same standards for such monitoring.

Referencing the Department's proposed clarification that SMAs must review outreach workers' daily logs and other reports, including those showing or reflecting the workers' activities, on a ''regular'' rather than ''random'' basis, a State government agency agreed with the proposal, which they said could help identify potential errors or irregular reporting in daily outreach logs and monthly manager reports as well as prevent significant MSFW one-stop offices from receiving a finding during annual reviews.

Response: The Department adopts the changes as proposed.

The monitoring requirements in redesignated paragraphs (h)(1)(i) and (iii) are derived from requirements that previously existed at § 653.108(g)(1). The minor revisions to these requirements are intended only to clarify existing requirements. Specifically, paragraph (h)(1)(i) requires an SMA's ongoing review to include monitoring compliance with § 653.111 to highlight the importance of staffing significant MSFW one-stop centers appropriately to meet the unique needs of farmworkers. This change is necessary to help ensure significant MSFW States meet the minimum service level indicators, some of which measure qualitative outcomes like median earnings in unsubsidized employment and individuals placed in long-term non-agricultural jobs.

All States are required to meet equity indicators that address provision of ES services, including individuals referred to a job, receiving job development, and referred to supportive or career development. To meet the equity performance standards, the percentage of services provided to MSFWs must be equal to or greater than the percentage of services offered to non-MSFWs. Significant MSFW States must also meet minimum levels of service, which 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.

As mentioned in the PY 2020 NMA Annual Report, data SWAs submit through Form ETA–5148 show that the majority of SWAs are not meeting several equity ratio indicators.[10] The data shows that most SWAs are providing MSFWs with equitable access to basic career services but are not providing MSFWs equitable access to higher-level staff assisted services. This condition is particularly concerning because it may impact the ability of MSFWs to access training and employment opportunities necessary to attain and maintain gainful and secure employment. Additionally, between PY 2015 and PY 2019, equity levels trended down in four equity ratio indicators (referred to jobs, received staff assisted services, referred to support service, and job development contact).[11] Most notably, there was a 7-percentage-point decrease in States that referred MSFWs to jobs on a quantitatively proportionate basis in PY 2019 compared to PY 2015. The COVID–19 pandemic likely had some impact on the outcomes in PY 2019 but because equity trended down for the last 5 years preceding the pandemic, the pandemic cannot be the only cause.

SWA performance reports also show that significant MSFW States performed considerably below required levels for five of the seven Minimum Service Level Indicators in PY 2019 and PY 2020.[12] Between PY 2015 and PY 2019, performance decreased in six of the seven indicators. While minimum service level indicators improved in PY 2020, all Significant MSFW States still did not meet each indicator. The most significant decrease in PY 2019 was in reviews of Significant MSFW ES Offices. The Department is particularly concerned that the majority of

[10] NMA Annual Report for PY 2020, available at: *https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance.*

[11] NMA Annual Report for PY 2019, available at: *https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance.*

[12] See performance data available at *https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance.*

Significant MSFW States and all States have not been meeting the indicator for reviews of Significant MSFW Offices. If properly completed, SMA onsite reviews should identify the same downward trends that the Department identified and should result in corrective action plans to resolve findings of noncompliance. The low rates of Significant MSFW Office reviews completed, therefore, may directly relate to the low rates of compliance with equity ratio indicators and minimum service levels. In § 653.108(h)(1)(ii), the Department clarifies that SMAs are required to monitor whether the ES services provided to MSFWs are qualitatively equivalent and quantitatively proportionate to the services provided to non-MSFWs.

Additionally, as described at § 653.108(h)(3)(ii), the SMA must ensure that the onsite review format, developed by ETA, is used as a guideline for onsite reviews. The Department's Core Monitoring Guide provides the Department's onsite review format and includes guidance on how the SMA may monitor the quality of the program and services.[13] The existing regulations explain that in addition to ensuring all significant MSFW one-stop centers are reviewed at least once per year by a SWA official, the SMA must ensure ES offices in which significant problems are revealed by required reports, management information, the Complaint System, or other means are reviewed as soon as possible. The existing regulations therefore prescribe that SMAs must review one-stop centers that are not designated as significant MSFW one-stop centers, as appropriate. Revised § 653.108(h)(3) is important to strengthen the SMA's monitoring requirements because it will clearly state that the SMA must participate in onsite reviews of one-stop centers on a regular basis (regardless of whether or not they are designated significant MSFW one-stop centers).

To specifically address the comment that opposed the proposed requirement that SMAs must monitor whether the ES services provided to MSFWs are qualitatively equivalent and quantitatively proportionate to the services provided to non-MSFWs and that State performance indicators already serve the purpose of monitoring ES services, the Department believes the SMA's monitoring is necessary in addition to the monitoring that the Department conducts. The SMA's ongoing and onsite reviews are necessary to ensure compliance issues are resolved in a more timely manner than the quarterly basis on which States report Equity Ratio Indicators and Minimum Service Level Indicators to ETA. This more timely review helps ensure MSFWs receive equitable services when the MSFWs are still available to benefit from the services before they may become unavailable due to the transient nature of their work.

The Department agrees with the comment that requiring the SMA to review outreach logs on a regular basis could help identify potential errors or irregular reporting in daily outreach logs and monthly manager reports as well as prevent significant MSFW one-stop offices from receiving a finding during annual reviews.

The Department adopts the changes as proposed and will provide technical assistance and guidance to help SWAs comply with the requirements.

Section 653.108(i) SMA Participation in Federal Reviews

In redesignated paragraph (i), the Department proposed to add ''as requested by the Regional or National Monitor Advocate,'' after ''The SMA must participate in Federal reviews conducted pursuant to part 658, subpart G, of this chapter.'' The Department did not receive any comments on this change and adopts the change as proposed for the reasons set forth in the NPRM.

Section 653.108(j) State Monitor Advocate Role in Complaint System

Paragraph (j) of § 653.108 outlines the role of the SMA in the Complaint System. The SMA's role in the Complaint System was previously described in § 653.108(i). In paragraph (j), the Department proposed to require that the SMA perform solely a monitoring role in the Complaint System, consistent with changes made in part 658 of this final rule. The changes removed the ability of the State Administrator to assign the SMA responsibility as the Complaint Service Representative and the requirement that the SMA participate in the Complaint System as described under part 658. The Department made parallel revisions in § 658.410(h). Some commenters, including a farmworker advocacy organization and a State government agency, opposed the change. In part, these commenters stated that the SMA should still have a participant role in the Complaint System due to the SMA's expertise with MSFWs. Some State government agencies supported the change, stating the change will help ensure that the SMA is objective and not biased. For full discussion of the prohibition on the SMA's acting as the Complaint System Representative and participation in the Complaint System, see the discussion for § 658.410(h). The Department adopts the change in paragraph (j) as proposed to more clearly delineate the SMA's role in monitoring the Complaint System and to avoid conflicts of interest in the SMA role by ensuring separation of duties between SMAs and other ES staff roles.

Sections 653.108(l), 653.108(m), and 653.108(n) State Monitor Advocate Liaison Requirements

Paragraphs (l), (m), and (n) of § 653.108 establish SMA liaison requirements. Proposed paragraph (l) sets forth requirements that previously existed at § 653.108(k) requiring the SMA to liaise with WIOA section 167 NFJP grantees and other organizations serving farmworkers, employers, and employer organizations in the State. In § 653.108(m), the Department proposed to require that the SMA establish an ongoing liaison with the State-level E.O. Officer. In § 653.108(n), the Department proposed a conforming revision to the cross-references so that the representatives with whom the SMA must meet reflect the organizations described in paragraph (l) and the State-level E.O. Officer referenced in paragraph (m).

Comment: A farmworker advocacy organization supported the proposed requirements that SMAs regularly engage with representatives of NFJP grantees, the State Equal Employment Officer, and other organizations serving farmworkers, employers, and employer organizations in the State. The commenter recommended that this engagement should include working with unions, worker organizations, legal service providers, and farmworker attorneys in the State because these are often some of the first groups to hear complaints from workers. A State government agency agreed with the new requirement that the SMA must establish an ongoing liaison with the State-level E.O. Officer, reasoning that it would present States with the opportunity to enhance collaboration between SMAs and E.O. Officers.

Response: The Department appreciates the comments in support of the proposed revisions. The Department will continue to address in guidance or technical assistance which organizations are important for SMA liaison for purposes of paragraph (l). The Department adopts the changes as

[13] United States Department of Labor, Employment and Training Administration Core Monitoring Guide (Aug. 2018), available at: *https://www.dol.gov/sites/dolgov/files/ETA/grants/pdfs/2%20CMG%20CoreMonitoringGuide_FINAL_20180816(R).pdf.*

proposed, for the reasons set forth in the NPRM.

Section 653.108(o) State Monitor Advocate Field Visits

Paragraph (o) of § 653.108 describes requirements for field visits conducted by the SMA. These requirements were previously described in § 653.108(m). The Department proposed that during field visits, the SMA must discuss the SWA's provision of ES services and obtain input on the adequacy of those services from MSFWs, crew leaders, and employers, rather than providing direct employment services and access to other employment-related programs. The Department adopts the proposed change.

Comment: A State government agency requested the Department clarify that SMAs do not conduct field visits, which it said have a specific purpose in regulation, but rather monitor the adequacy of information and services provided to MSFWs by ES staff during field visits. The commenter argued that this clarity is important because treating SMA activity as a field visit is imprecise and detracts from its monitoring purpose.

Another State government agency opposed the proposal that during field visits SMA must discuss the SWA's provision of ES services and obtain input on the adequacy of those services from MSFWs, crew leaders, and employers, asserting that this would not be a useful way to gauge how well the State is providing ES services to MSFWs because few MSFWs reach out for services and even fewer receive them. The commenter suggested that this purpose would be better served by asking MSFWs, crew leaders, and employers if they learned about ES services, worker rights, employment rights, and employer/contractor responsibilities and if they were able to reach out and felt comfortable reaching out to outreach workers or visiting an ES office to seek assistance.

Response: Consistent with the definition of field visits, SMAs do conduct field visits, but they differ from field visits conducted by outreach staff. During SMA field visits, SMAs do not conduct the outreach activities outlined in § 653.107. Instead, as this paragraph requires and consistent with the SMA's monitoring role, SMAs must discuss the SWA's provision of ES services and employment-related activities with MSFWs, crew leaders, and employers. SMAs are still expected to discuss farmworker protection and rights when conducting field visits.

The Department agrees that it is relevant and permissible for SMAs to ask MSFWs, crew leaders, and employers if they learned about ES services, worker rights, employment rights, and employer/contractor responsibilities and if they were able to reach out and felt comfortable reaching out to outreach workers or visiting an ES office to seek assistance during the SMA's field visits. Asking these questions is one way the SMA may discuss the SWA's provision of ES services and obtain input on the adequacy of those services from MSFWs, crew leaders, and employers. The commenter's statement that few MSFWs reach out for services and even fewer receive them demonstrates that SWAs may not be conducting adequate outreach or making services available to MSFWs, taking into consideration their particular needs. For this reason, it is particularly important that SMAs conduct field visits to identify adequacy of services and to receive input on how to improve services, which informs the SMA's monitoring, reporting, and technical assistance. The Department adopts these changes as proposed, to clarify the role of the SMA and the purpose of field visits.

Section 653.108(u) State Monitor Advocate Annual Summary

Paragraph (u) of § 653.108 outlines requirements for the SMA to prepare an Annual Summary describing how the State provided ES services to MSFWs within the State based on statistical data, reviews, and other activities. These requirements were previously described in § 653.108(s). Subordinate paragraphs (u)(1) through (11) identify the various required components of the Annual Summary. In § 653.108(u)(5), the Department proposed 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. Aside from a technical edit, the Department adopts the proposed change for the reasons discussed below. The Department did not receive substantive comments on other revisions proposed in paragraph (u) and adopts those changes for the reasons set forth in the NPRM.

Comment: A Colorado State government agency and other commenters expressed concern about the proposed rule's inclusion of non-significant MSFW offices in the requirement that an SMA submit an Annual Summary report to the Department describing its provision of services to MSFWs. Explaining that Colorado's few significant MSFW offices are so designated based on the presence of hand labor crops in their geographic area rather than having a high proportion of MSFWs served, the commenters asserted that the proposed requirement implies the need to divert ES staff from assisting job seekers, UI claimants, and businesses to focusing on MSFW outreach in offices with very small numbers of MSFWs.

A State government agency disagreed with the proposed requirement that when the SMA summarizes the outreach efforts undertaken by all significant and nonsignificant 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. The commenter's objections were that outreach activities already have required reporting and—unless the Department clearly defines in the regulations what States must do to meet adequate outreach levels and results outside of the performance measure—SMAs would have to make their own subjective determinations about what is adequate.

Response: Regarding the concerns about the proposed rule's inclusion of non-significant MSFW offices in the SMA's Annual Summary report requirement, the Department acknowledges that there may be less MSFW activity in service areas for ES offices that are not designated as significant MSFW one-stop centers. The Department notes that the SMA was already required to include information about outreach levels in both significant and non-significant MSFW ES offices. It is not the Department's intent to encourage nor does the Department require that non-significant MSFW offices unnecessarily divert local office resources to MSFW outreach where there is no need to do so. However, the SMA is required to review the SWA's overall provision of services to MSFWs throughout the entire State. Doing so allows the SMA to evaluate if the SWA is in compliance with regulatory requirements. Further, existing regulations explain that in addition to ensuring that all significant MSFW one-stop centers are reviewed at least once per year by a SWA official, the SMA must ensure ES offices in which significant problems are revealed by required reports, management information, the Complaint System, or other means are reviewed as soon as possible. Therefore, it is relevant for the SMA to include information about all offices in their Annual Summary.

Additionally, regarding the concern that the SMA must include in their Annual Summary the results of outreach efforts in the State and analyze whether

the outreach levels and results were adequate, the Department believes this is relevant and necessary. As explained in the NPRM, the Department believes this analysis will help the Department understand whether the SMA believes that 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 SMA's analysis and opinion on outreach throughout the entire State is central to the SMA's monitoring and reporting functions. Specifically, the Annual Summary described in § 653.108(u) must be prepared by the SMA and is intended to include the SMA's independent assessment of the quantity and quality of ES services provided to MSFWs. The SMA's assessments must be based on quantitative standards, including minimum service level indicators and equity ratio indicators, as well as information the SMA gathers through their monitoring, field visits, and liaison with employers, MSFWs, and farmworker organizations, which inform the SMA's opinions regarding the quality of services.

The SMA's analysis of the SWA's outreach is distinct from the required reporting of the minimum service level indicators that significant MSFW States must meet. The minimum service level indicator regarding number of outreach contacts per quarter measures the quantity of MSFW outreach contacts significant MSFW States make per quarter. This indicator is relevant to significant MSFW States to ensure significant MSFW States conduct minimum levels of outreach year-round because those States must have full-time outreach staff year-round. This indicator does not apply to the remainder of the States because States that are not designated as significant MSFW States may have part-time outreach staff in non-peak season. In all States, outreach staff must contact the majority of MSFWs in the State on an annual basis.

Under this final rule, SWAs will continue to provide an assessment of need that is particular to their State's service area(s) in the AOP, including information about when peak season in their State occurs and an estimate of the number of MSFWs in the State during peak season. The final rule will require all SWAs to use this data to determine the number of outreach staff that are adequate to conduct MSFW outreach in each area of the State and to contact a majority of the MSFWs in the State annually.

MSFWs constitute a critical population of workers with unique needs and challenges who are vulnerable to exploitation, abuse, and mistreatment. Therefore, the Department wants all States to allocate the necessary resources to reach the majority of MSFWs in the State. The SMA's analysis of the SWA's outreach levels and results in the State will better enable the Department to analyze whether additional State (or Federal) resources may be necessary.

After further review, the Department identified a need to update § 653.108(u)(5) to use the term *significant MSFW one-stop center,* instead of significant MSFW ES office. This change is necessary to align the requirement with the defined term in § 651.10. Aside from this technical edit, the Department adopts the changes to § 653.108(u) as proposed and will provide technical assistance and guidance to help SWAs comply with the requirements.

Section 653.109 Data Collection and Performance Accountability Measures

Section 653.109 sets forth MSFW-specific data collection requirements and performance accountability measures. The Department proposed to amend this section to make two notable changes. First, the Department proposed to add a new data collection requirement at § 653.109(b)(10), which would require SWAs to collect the number of reportable individuals and participants who are MSFWs. This would align the data collection requirements in this section with the new requirement in § 653.103(a) for ES offices to determine whether reportable individuals are MSFWs, as defined at § 651.10 of this chapter. The Department received one comment from a State government agency on this proposal, which is summarized and addressed in the discussion of § 653.103 above. For the reasons explained there, the Department has determined the benefits of collecting this information outweigh the costs, and it adopts the proposed data collection requirement in § 653.109(b)(10) as proposed.

Second, the Department proposed to amend § 653.109(h), which sets forth the minimum levels of service that significant MSFW States must meet, by replacing the requirement for a significant MSFW State to measure the number of outreach contacts per ''week'' with a requirement that such States measure the number of outreach contacts per ''quarter.'' The Department proposed this change to align with the other quarterly data submissions that SWAs provide to the Department.

A State government agency submitted a comment opposing the Department's proposal to change the frequency with which outreach contacts are measured. As discussed below, the Department considered these concerns and determined that they do not necessitate any changes to the proposed regulatory text. Accordingly, the Department adopts this revision as proposed.

Comment: Commenters from a State government agency opposed changing the requirement for significant MSFW States to measure the number of outreach contacts from per week to per quarter, reasoning that the change could lead outreach staff to limit outreach contacts to the end of the quarter instead of making outreach contacts throughout the quarter. As an alternative, the commenter recommended the requirement could be changed to once per month to allow some flexibility for outreach staff to meet the requirement even during non-peak seasons.

Response: The Department acknowledges the State agency's concern that the reduction in reporting frequency could lead outreach staff to limit outreach contacts to short periods at the end of the quarter, instead of conducting outreach consistently throughout the quarter. However, the Department does not anticipate that such an outcome is likely to occur, because this final rule retains the requirement for outreach staff to spend a majority of their time in the field, and it will additionally require a State to employ an adequate number of outreach staff to contact a majority of MSFWs in the State annually. It would therefore be difficult for a significant MSFW State to effectively comply with other regulatory requirements governing outreach if the outreach staff in the State limit the outreach they conduct to only a short period at the end of the quarter. Moreover, this change will impact only the frequency with which significant MSFW States must report outreach contacts to the Department. If a SWA or ES office is concerned that outreach staff are not making outreach contacts consistently throughout a quarter, then that SWA or ES office may independently require its outreach staff to report the number of outreach contacts they make on a more frequent basis or to comply with other interim goals that would allow it to monitor the performance of its outreach staff throughout the quarter. Ineffective or noncompliant outreach may be addressed through monitoring and corrective actions by the SWA, ES offices, and SMA.

The Department notes that there will not be a change in the frequency of reporting outreach contacts to the

Department. SWAs report performance data to ETA on a quarterly basis through Form ETA–5148. The revision will align the measure with the existing quarterly reporting timelines for SWA grantees. Additionally, as mentioned in the NPRM, SMAs have provided feedback to the Department that measuring contacts per week is difficult and not an effective measurement of outreach, and they believe it would be a better measure to report contacts per quarter.

After further review, the Department identified a need to update § 653.109(h) to use the term *significant MSFW one-stop centers,* instead of significant MSFW ES office. This change is necessary to align the requirement with the defined term in § 651.10. The Department adopts the changes to § 653.109 as proposed, with the additional reference to *significant MSFW one-stop centers,* for the reasons described above.

Section 653.110 Disclosure of Data

The Department proposed to revise § 653.110(b) by removing the word ''the'' before ''ETA.'' No comments were received on this proposed revision, and the Department finalizes this technical edit as proposed.

Section 653.111 State Workforce Agency Staffing Requirements for Significant MSFW One-Stop Centers

Section 653.111 sets forth staffing requirements for significant MSFW one-stop centers. The Department proposed to revise paragraph (a)—which currently requires SWAs to implement and maintain a program for staffing significant MSFW one-stop centers by providing ES staff in a manner facilitating the delivery of employment services tailored to the special needs of MSFWs, including by seeking ES staff that meet the criteria in § 653.107(a)(3)—and divide it into two sentences. The first sentence would provide that a SWA *must* staff significant MSFW one-stop centers in a manner that facilitates the delivery of ES services tailored to the unique needs of MSFWs. The second sentence would clarify that such staffing includes recruiting qualified candidates who meet the criteria for outreach worker positions in § 653.107(a)(3).

The Department received a comment concerning the proposed revisions to this section. Revisions to the merit-staffing requirement adopted in this final rule necessitate revisions to the hiring requirements in this section, as described below.

Comment: A State government agency expressed its opposition to the proposed revisions to this section and the accompanying revision to § 653.107(a)(3), noting it did not support any increase in requirements for hiring ES staff.

Response: The Department anticipates that the revisions to this section, much like the revisions proposed and adopted in § 653.107(a)(3), will help SWAs recruit staff who are better equipped to assist MSFWs in significant MSFW one-stop centers. The Department is revising the text proposed in this section to conform with changes made to the merit-staffing requirement in § 652.215 of this chapter. Under this final rule, a SWA must ensure hiring officials seek and put a strong emphasis on hiring ES staff for significant one-stop centers who meet the enumerated criteria. As explained above in the section-by-section discussion for § 653.107(a), a SWA will retain some discretion in developing their State's plan to meet this requirement, and if hiring officials are unable to identify qualified candidates who meet the required characteristics, then the SWA may proceed to hire or assign the most qualified candidate(s). It is particularly important for ES staff in significant MSFW one-stop centers to possess these characteristics, because such staff are more likely to have the skills and experience necessary to facilitate the delivery of ES services tailored to the special needs of MSFWs, and significant MSFW one-stop centers, by definition, serve greater numbers of MSFWs than other one-stop centers. The need for SWAs to ensure hiring officials recruit ES staff who are qualified to serve this unique population is therefore greater in significant MSFW one-stop centers than it is in one-stop centers who serve fewer MSFWs. The Department recognizes that compliance with the recruitment requirements adopted in this rule may require some SWAs to change their current practices. In adopting these requirements, the Department has taken this into consideration and determined that these requirements strike the right balance, because they increase the likelihood that SWAs will hire staff with appropriate skills to adequately serve MSFWs, while providing flexibility if SWAs are not able to find qualified candidates who meet the enumerated criteria.

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

Subpart F sets forth the regulations governing the ARS, including the requirements that employers must follow when submitting clearance orders for temporary or seasonal farmwork, and the requirements that SWAs must follow in processing the orders. In subpart F, the Department proposed new requirements for processing clearance orders, initiating discontinuation of services, and conducting field checks. Additionally, the Department proposed several technical, clarifying, and minor edits throughout § 653.501. As described more fully below, with the exception of proposed § 653.501(b) and (c), and the addition of a new severability provision at § 653.504, the Department finalizes subpart F as proposed.

Section 653.501 Requirements for Processing Clearance Orders

Section 653.501 describes the requirements that SWAs and ES staff must follow when processing clearance orders for the ARS. In this section, the Department proposed a new requirement that SWAs consult the Department's Office of Foreign Labor Certification (OFLC) and WHD debarment lists before placing job orders into clearance, and initiate discontinuation of ES services if an employer is so debarred. The Department also proposed several technical, clarifying, and conforming amendments. The Department's responses to public comments received on § 653.501 are set forth below. If a proposed amendment is not addressed in the discussion below, the public comments did not address that specific amendment and no changes have been made to the proposed regulatory text. The Department declines to adopt § 653.501(b) and (c), and adopts the remaining provisions in § 653.501 as proposed.

Regarding proposed § 653.501(b) and (c), the Department proposed to add a fourth paragraph to § 653.501(b), at § 653.501(b)(4), which would require ES staff to consult the Department's OFLC and WHD debarment lists before placing a job order into intrastate or interstate clearance and initiate discontinuation of ES services if the employer is debarred or disqualified from participating in one or all of the Department's foreign labor certification programs. Additionally, the Department proposed minor edits to § 653.501(c)(3) to clarify that paragraph (c) sets forth a list of the assurances that an employer must make before the SWA may place a job order into intrastate or interstate clearance.

The Department appreciates the views and recommendations of commenters that supported and opposed the proposed changes to § 653.501(b). The Department notes that on September 15, 2023, the Department published the ''Improving Protections for Workers in Temporary Agricultural Employment in the United States'' NPRM (the

''Farmworker NPRM'') in the **Federal Register**. (88 FR 63750). In the Farmworker NPRM, the Department proposed changes to paragraphs 653.501(b) and (c), which intersect with changes that were proposed in the NPRM for this rule (87 FR 23700). As discussed in the Farmworker NPRM, where the proposed changes in the Farmworker NPRM intersect or conflict with the proposed changes in this rule, the Department will utilize the Farmworker NPRM as the operative rulemaking proceeding to provide notice and opportunity to comment. The Department sees this as the most transparent approach to address this overlap, and the best way to minimize confusion within the regulated community while ensuring the public has a full opportunity to receive notice and provide comments on the proposed changes. Accordingly, as any changes to § 653.501(b) and (c) will be made through the Farmworker NPRM, the Department declines to finalize § 653.501(b) and (c) as proposed.

Comment: The Department notes that a State government agency recommended that, in § 653.501(b)(2), the Department remove the requirement to suppress employer information in clearance orders. The commenter stated that doing so would provide the same transparency to interested workers as that presently afforded when viewing the same clearance orders on the Department's *SeasonalJobs.gov* site and would remove a barrier for MSFWs that is not faced by non-agricultural job seekers viewing job order information. The commenter said this change would not only align its agricultural recruitment process with that of DOL but also benefit domestic agricultural workers through ready, unfettered access to the same H–2A employer information in the State Agricultural Reporting System as is available through *SeasonalJobs.gov.*

Response: As the Department did not propose changes to § 653.501(b)(2), the State government agency's recommendation is outside the scope of this rulemaking and the Department declines to adopt it.

Section 653.503 Field Checks

Section 653.503 describes the requirements that SWAs and ES staff must follow when conducting field checks. In this section, the Department proposed to revise § 653.503(a) to add ''transportation'' to the list of conditions that SWAs must assess and document when performing a field check. The Department also proposed to remove the word ''random'' from the existing requirement in § 653.503(a) that SWAs ''must conduct random, unannounced field checks'' on clearance orders, to 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. The Department adopts § 653.503 as proposed.

Comment: Regarding transportation, a State government agency opposed the proposal to add transportation to the list of conditions that SWAs must assess and document when performing a field check. The agency stated that ES staff are not experts on vehicle-related technical matters and should not be expected to have this level of responsibility. The agency asked the Department to clarify whether ES staff would be expected to check on the type of transportation provided by the employer or to assess the safety and maintenance of the transportation used. If the latter, the agency recommended that WHD provide appropriate training to assess transportation during field checks.

Response: The Department appreciates the concern and recommendation raised. In the NPRM, the Department proposed to add ''transportation'' to the list of conditions that SWAs must assess and document when performing a field check to ''increase health and safety of MSFWs by adding an additional safeguard against dangerous transportation tied to their employment.'' The Department clarifies that by adding the term ''transportation,'' it means the specific transportation terms described at § 653.501. The Department is not requiring ES staff to assess the safety or maintenance of transportation used. However, as with any employment-related law, if while conducting a field check, ES staff observe or receive information, or otherwise have reason to believe that an employer is violating an employment-related law—such as the transportation safety standards enforced by WHD—ES staff must document and process this information in accordance with § 653.503(d).

Comment: Regarding the proposal to remove the word ''random'' from the existing requirement that SWAs ''must conduct random, unannounced field checks,'' many commenters, including State government agencies, advocacy organizations, think tanks, and several labor unions supported the revision, uniformly stating that it ensures that MSFW working and housing conditions meet basic standards. A State government agency supported the proposed change but requested that the Department clarify in the rule or guidance either the circumstances that warrant targeted field checks or the responsibility of States to define the circumstances in policy.

Response: The Department appreciates the commenters' support for this proposed change. As noted in the NPRM, the Department believes that removal of the word ''random'' will improve MSFW protections by allowing SWAs and ES staff to conduct field checks where there are known or suspected compliance issues. Regarding the request for clarification on the circumstances that warrant targeted field checks, the Department clarifies that the circumstances must relate to the terms and conditions on the clearance order. Thus, where it is known or suspected that wages, hours, and working and housing conditions are not being provided as specified in the clearance order, a targeted field check may be warranted. The Department will issue guidance on this proposed change.

Section 653.504 Severability

Given the numerous and varied changes the Department proposed and is adopting, the Department intends this rule to be severable and is including a severability provision in parts 652, 653, and 658 in this final rule. That intent was reflected in the structure of and descriptions in the proposed rule. The inclusion of severability provisions in this final rule confirms the Department's belief that the severance of any affected provision will not impair the function of the regulation as a whole and that the Department would have proposed and implemented the remaining regulatory provisions even without any others. To the extent that a court holds any provision, or any portion of any provision, of part 653 invalid, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision will be severable from this part and will not affect the remainder thereof.

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

Part 658 sets forth systems and procedures for complaints, monitoring for compliance assessment, enforcement, and sanctions for violations of the ES regulations and employment-related laws, including discontinuation of services to employers and decertification of SWAs. The Department proposed several revisions to part 658, including removing the requirement that SMAs serve as

Complaint System Representatives or have any direct role in the Complaint System process, and clarifying the procedures for processing complaints alleging discrimination or reprisal for protected activity. Additionally, the Department proposed revisions throughout part 658 to conform with existing and proposed language in parts 651 and 653, make non-substantive technical edits, remove redundancies, and clarify terms and requirements. The Department's responses to public comments received on part 658 are set forth below. The Department did not receive comments on §§ 658.419, 658.420, and 658.422 in subparts E, G, and H. The Department is finalizing subparts E, G, and H as proposed.

Of note, the Department proposed several revisions to the discontinuation of services provisions in subpart F (§§ 658.500 through 658.504). The Department proposed to amend the bases for discontinuation to include an employer's debarment or disqualification from participating in one of the Department's foreign labor certification programs; to amend the notification procedures to require, where applicable, that SWAs specify the time-period of an employer's debarment or disqualification; and to correct cross-referencing errors in the regulatory text. The Department received comments supporting the proposed changes, but on September 15, 2023, the Department issued an NPRM regarding improved protections for workers in temporary agricultural employment (the ''Farmworker NPRM''). 88 FR 63750. In the Farmworker NPRM, the Department proposed further changes to the discontinuation of services provisions, which intersect and, in some instances, conflict with changes that were proposed in the NPRM for this rule (87 FR 23700). As discussed in the Farmworker NPRM, where the proposed changes in the Farmworker NPRM intersect or conflict with the proposed changes in this rule, the Department will utilize the Farmworker NPRM as the operative rulemaking proceeding to provide notice and opportunity to comment. The Department sees this as the most transparent approach to address this overlap, and the best way to minimize confusion within the regulated community while ensuring the public has a full opportunity to receive notice and provide comments on the proposed changes. Accordingly, as any changes to the discontinuation of services provisions will be made through the Farmworker NPRM, the Department declines to finalize subpart F as proposed.

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

Subpart E covers the purpose and scope of the Complaint System, and the requirements for processing complaints at the local, State, and Federal levels. The Department's responses to public comments received on subpart E are set forth below. If a proposed amendment to subpart E is not addressed in the discussion below, the public comments did not address that specific amendment and no changes have been made to the proposed regulatory text. With the exception of a new severability clause, the Department adopts subpart E as proposed.

Comment: Several one-stop center representatives stated they support utilization of a complaint system but questioned who will take incoming complaints when ES staff have been reassigned to UI claims.

A farmworker advocacy organization discussed the need for major procedural reforms to the Complaint System, beyond the modifications set forth in the proposed rule, if it is to be an effective tool for farmworkers to vindicate their rights. The organization asserted that the proposed subpart E ignores fundamental flaws at the heart of the Complaint System. Regarding complaints filed against employers, the organization stated that the Complaint System is often just a slower, more cumbersome means to reach another agency, like WHD or EEOC, and that farmworkers generally are better served by filing their complaints directly with those agencies. Regarding complaints filed against SWAs, the organization stated that the ES complaint process is a ''byzantine maze'' that can take years to navigate and may involve multiple levels of adjudication. Citing § 658.421(g) and examples of recent cases, the organization stated that the current process eventually reaches the Office of Administrative Law Judges (OALJ), but only after typically at least 2 years of litigation in which a complainant often does not understand the process or their rights, before State-level officials without expertise in the ES system or farmworker issues, and with little chance of systemic relief. The organization recommended that the Department allow workers direct appeal from the SWA to the OALJ, which it said would be analogous to how employers appeal foreign labor certification decisions at § 655.171. The organization stated that the Department should treat employers and workers the same, and that just as growers are allowed to appeal decisions under the labor certification regulations directly from the OFLC to the OALJ, the Department should allow workers to appeal ES complaints directly from the SWA to the OALJ.

Response: The Department clarifies that while it proposed to require States to use merit staff, in part so that States may leverage ES staff for UI, SWAs must still ensure there are adequate Complaint System Representatives to process complaints at all times. The Department further clarifies that complainants are not required to bring employment-related law complaints through the Complaint System; they may file employment-related law complaints directly with the appropriate enforcement agencies. Nevertheless, SWAs and the Department have an interest in tracking employment-related law complaints as SWAs are required to accept, informally resolve (where appropriate), and refer incoming employment-related law complaints to appropriate enforcement agencies. Additionally, SWAs and the Department have an interest in quickly and efficiently resolving ES-related complaints. The proposed revisions are designed to strengthen training, monitoring, and internal controls so that the Complaint System can more effectively and quickly resolve ES-related complaints at the local level, and quickly resolve violations to the benefit of complainants.

The Department agrees with ensuring an efficient Complaint System but disagrees with the recommendation to allow workers to appeal ES complaints directly from SWAs to the OALJ. The Department notes that the OALJ only resolves Federal administrative disputes before Departmental agencies (*e.g.,* ETA, OFLC), and does not resolve disputes before State agencies (*e.g.,* SWAs). Consequently, the Complaint System only allows for appeal to the OALJ following a formal determination from an RA and does not contemplate direct appeal of a SWA decision to the OALJ. The Department, therefore, declines to adopt this recommendation.

Section 658.410 Establishment of Local and State Complaint Systems

Section 658.410 describes procedures that SWAs and ES Offices must follow in establishing and maintaining local and State complaint systems. In this section, the Department proposed to remove the requirement in § 658.410(h) that the SMA be the Complaint System Representative designated to handle MSFW complaints and replace it with a provision prohibiting the State Administrator from assigning the SMA responsibility for doing so. Relatedly,

the Department proposed to revise § 658.410(m) to replace ''SMA'' with ''Complaint System Representative,'' thereby removing the SMA from responsibility for conducting monthly follow-up on MSFW complaints.

The Department also proposed several technical, clarifying, and conforming amendments. For example, in § 658.410(g), the Department proposed to remove the word ''local,'' which comes before ''ES office'' in the existing regulatory text, because ''ES Office'' is a defined term and removal of the word ''local'' clarifies that the regulatory text is not referring to a different type of ES Office. For that change, the NPRM preamble clearly explained that the Department was proposing to remove ''local,'' but the proposed regulatory text inadvertently retained the word. The Department adopts the text of § 658.410(g) as described in the NPRM preamble. Aside from that change, the Department adopts the regulatory text of § 658.410 as proposed.

Comment: Regarding the proposed amendments to § 658.410(h), to prohibit the SMA from being assigned to be the Complaint System Representative, a State government agency supported the changes, stating that they would allow the SMA to maintain a neutral stance and create balance within the ES program and could enhance the Complaint System and improve program monitoring and compliance. Similarly, an anonymous commenter described the removal of the SMA from the Complaint Specialist role as a ''smart call'' that leaves less opportunities for ''unwanted liabilities.'' In contrast, another State government agency said that removing the SMA from involvement in direct complaint system activities removes the staff member with the greatest expertise in understanding the complexities of the MSFW population and available resources from the complaint-taking process. Regarding the proposed amendment to § 658.410(m), the same agency stated that requiring the Complaint System Representative, and not the SMA, to follow up monthly on the processing of MSFW complaints would decentralize the ES Complaint System follow-up process; require additional time, effort, and coordination with enforcement agencies; and could entail challenges in enforcement agencies responding to ES staff requests.

Regarding the proposed amendment to § 658.410(g), two one-stop center employees opposed the proposed revision but did not state any specific concern with the proposed removal of the word ''local'' from the regulatory text. The employees stated generally that their local Complaint System representatives receive annual training from the SMA regarding the Complaint System. A farmworker advocacy organization supported the proposed amendments to § 658.410, in part. The organization stated that while it generally supports having the SMA oversee the Complaint System (rather than serve as the initial complaint recipient), ES complaints (versus complaints involving employment- or discrimination-related laws) still should go to the SMA first. The organization stated that ES complaints allege the type of ''within-agency'' problems that SMAs are charged with correcting, and are the only avenue for worker communications with SMAs that guarantee a written response. The organization further stated that Complaint System Representatives may lack the authority, information access, or confidence in their position to sufficiently address complaints alleging legal violations by their supervisors. The organization acknowledged that leaving SMAs in charge of responses to ES complaints limits their ability to meaningfully oversee the Complaint System, but stated that the benefits of doing so overshadow this concern; and that such concern is mitigated by the fact that ES complaints are relatively rare.

Response: Regarding the concern that removing SMAs from direct involvement in the Complaint System removes the staff member with the greatest MSFW expertise and resources from the complaint-taking process, the Department notes that the existing regulations require that all Complaint System representatives—SMAs or otherwise—be trained on handling MSFW complaints. Accordingly, the Department believes that the existing regulations provide for sufficient expertise among non-SMA representatives to process MSFW complaints. Additionally, the Department notes that a SMA's expertise is not lost by removing the SMA from direct involvement in the Complaint System. Monitoring activities allow for SMAs to share and apply their expertise throughout the entire Complaint System, rather than on a complaint-by-complaint basis. One such example is mentioned in the comments: two one-stop center employees stated that their Complaint Service Representatives receive annual training by the SMA on the Complaint System. Removing the SMA from direct involvement in the System will, the Department believes, allow SMAs to focus their expertise on monitoring activities that impact the Complaint System and MSFWs much more broadly.

Regarding the concern that removing the SMA from conducting monthly follow-up on MSFW complaints would decentralize the Complaint System follow-up process, the Department notes that existing regulations already require SWAs to have trained Complaint System Representatives at each ES office and that, in practice, many SWAs already have trained, non-SMA Complaint System Representatives. Regarding the concern that removing the SMA would require additional time, effort, coordination, and communication challenges with enforcement agencies, the Department respectfully disagrees. The Department believes that the Complaint System Representatives are best positioned to follow up on the complaints they process—both with the enforcement agencies to which they have made referrals and with the complainant with whom they have already communicated directly. Additionally, the Department believes there are distinct benefits in having staff other than the SMA trained in processing MSFW-related complaints, most notably the increased staff capacity to process MSFW-related complaints quickly and efficiently.

Regarding the recommendation that incoming ES complaints should still go to the SMA first, the Department notes that the SMA's primary role in the Complaint System is to monitor and report on its compliance, advocate for improvements to the system, and liaise among partners to support effective functioning of the system. The proposed amendments are meant to ensure separation of duties between SMAs and other ES staff roles. The Department believes that it cannot ensure full separation of duties by requiring SMAs to maintain direct responsibility for handling ES complaints. The Department understands the concern that non-SMA Complaint System Representatives may lack confidence to sufficiently address complaints alleging ''within-agency'' violations of the ES regulations, such as violations by their supervisors, but notes that such issues may be addressed through training, including training by the SMA. SMAs will remain available to advise Complaint System Representatives and to report any patterns of unaddressed complaints directly to SWA leadership. Therefore, the Department believes that the benefits of ensuring full separation of duties for SMAs outweigh the concerns raised. The Department declines to adopt this recommendation.

Section 658.411 Action on Complaints

Section 658.411 describes the actions that SWAs and ES Offices must take in receiving and processing complaints filed in the Complaint System. The Department proposed several changes to this section, including broadening the scope of contact methods complainants may provide when filing complaints to include ''any other helpful means''; removing language requiring SMAs to taking direct actions—such as making determinations and referrals—on complaints; broadening § 658.411(c) to apply to all complaints alleging discrimination and reprisal; and requiring SWAs and ES offices to refer discrimination and reprisal complaints to their State-level E.O. Officer. The Department also proposed several technical, clarifying, and conforming amendments. For the reasons discussed in the NPRM and below, the Department adopts § 658.411 as proposed.

Comment: A State government agency commended the Department for broadening the scope of contact methods complainants may provide when filing complaints to include social media and other applications. Another State government agency agreed with removing the SMA from taking direct actions on complaints, stating that SMAs need not play a prominent role in the Complaint System given the many entities already involved in capturing and responding to complaints, and noting that SMAs provide great value—as part of their monitoring duties—in reviewing complaints to ensure they are logged and addressed appropriately. A farmworker advocacy organization recommended that the Department further amend § 658.411 to require that, upon receipt of complaints, SWAs and ES offices immediately advise complainants of their option to work with an attorney to resolve their claims and provide complainants contact information for legal services.

The Department received several comments specific to § 658.411(c). A State government agency stated that it agreed with the intent to simplify the process for handling discrimination- and reprisal-related complaints under § 658.411(c) but that the revisions, as proposed, do not clarify the complaint process. A farmworker advocacy organization supported the increased role of State-level E.O. Officers in addressing complaints related to discrimination and retaliation, but expressed concern that State-level E.O. Officers may lack knowledge of certain farmworker-related laws, such as the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and the H–2A regulations. The organization recommended that the regulations require State-level E.O. Officers to receive training in all of these relevant areas.

Three commenters opposed the proposed changes to § 658.411(c). Two one-stop center employees stated that the section needs more clarification on the actions for complaints received from different sectors, such as MSFW complaints, Wagner-Peyser funded service complaints, and universal public complaints regarding work situations that are not serviced by the public workforce system. Additionally, a State government agency stated that referring all discrimination- and reprisal-related complaints to the State-level E.O. Officer adds another level of delay to the complaint referral process, which may bottleneck the complaint process and slow down an investigation and is contrary to the Department's efforts to eliminate delay elsewhere in the complaint process (*i.e.,* by removing the SMA from the process). Rather than refer the complaints only to State-level E.O. Officers, the agency recommended that ES staff include the State-level E.O. Officer when referring complaints to the EEOC and other relevant agencies. Additionally, the agency recommended removing the language that requires ES staff to know the types of nondiscrimination law complaints. The agency also described confusion within the one-stop system regarding tracking and handling MSFW, Title I, and Title III one-stop operation complaints, and requested that the Department provide technical assistance on this topic.

Response: Regarding the recommendation that SWAs and ES offices advise complainants of their option to work with an attorney to resolve to resolve their claims, the Department notes that existing regulations at § 658.400 already provide that a complainant may designate an individual to act as their representative before the Complaint System, and ETA Form 8429 (''Complaint/Apparent Violation Form'') notifies complainants of this option. Additionally, for complaints alleging violations of employment-related laws, existing regulations at § 658.411 already provide that complaint representatives must refer non-MSFW complaints involving employment-related laws, as well as MSFW complaints involving employment-related laws that are not informally resolved, to appropriate organizations, including legal aid or other consumer advocate organizations, as appropriate, for assistance. Regarding the related recommendation that SWAs and ES offices provide complainants contact information for legal services, the Department declines to adopt this recommendation as a requirement. The Department notes that SWAs must already provide information on organizations servicing MSFWs as part of their outreach responsibilities at § 653.107. Such organizations may include, for example, grantees of the Legal Services Corporation, a non-profit corporation established by Congress that provides grants to local organizations to provide legal services for agricultural workers and others who would be otherwise unable to afford adequate legal counsel. As to the Complaint System specifically, the Department does not wish to create the appearance of SWAs endorsing any legal services organization over others by requiring that SWAs affirmatively provide contact information for certain legal services organizations in the complaint process, but it does not prohibit SWAs from providing such contact information at their discretion.

The Department believes that the existing regulations sufficiently notify complainants of their options regarding legal representation. The Department is concerned that adding further requirements for SWAs could mislead complainants to think that legal representation is required to file a complaint with the SWA and would not comport with the SWA's role as neutral processor in the Complaint System. Accordingly, the Department declines to adopt these recommendations.

Regarding the concern that State-level E.O. Officers may lack the training needed to recognize retaliation under farmworker-related laws, such as MSPA and the H–2A regulations, and the related recommendation that State-level E.O. Officers receive training in this regard, the Department notes that the Wagner-Peyser regulations do not govern requirements for State-level E.O. Officers; these requirements, including the requirement that E.O. Officers and their staff be afforded the opportunity to receive necessary and appropriate training, are found at 29 CFR 38.28 through 38.33. As the operative regulations for the recommended training are outside the scope of this rulemaking, the Department declines to adopt this recommendation.

Regarding the concern that referring all discrimination- and reprisal-related complaints to the State-level E.O. Officer adds another level of delay to the complaint referral process, and the related recommendation that the Department instead require ES staff include the State-level E.O. Officer when referring complaints to the EEOC and other relevant agencies, the

Department declines to adopt this recommendation. The Department believes that its proposed changes simplify, streamline, and prevent delays by the Complaint System in the referral process by allowing complaint representatives to promptly refer discrimination and reprisal-related complaints to the State-Level E.O. Officer, who is best equipped and positioned to direct such complaints to appropriate enforcement agencies. Because the State-level E.O. Officer is responsible for State Program-wide coordination of compliance with the equal opportunity and nondiscrimination requirements in WIOA, it is appropriate for the State-level E.O. Officer to receive all discrimination-related complaints. Additionally, the proposed changes simplify the referral process so that referrals may occur more quickly and reliably to one identified State-level E.O. Officer, instead of requiring complaint representatives to identify one of several referral options. The State-level E.O. Officer is best suited to determine which nondiscrimination laws are at issue. The proposed changes therefore improve the effectiveness and accuracy of discrimination complaint processing to the benefit of complainants.

Regarding several commenters' general concern that the proposed changes to § 658.411(c) do not clarify the complaint process as it relates to discrimination and reprisal-related complaints, and that additional clarification is needed on processing complaints received from different sectors (*e.g.,* MSFW complaints, Wagner-Peyser funded service complaints, and complaints not serviced by the public workforce system), the Department notes that the proposed changes purposefully simplify the process so that complaint representatives must immediately refer all discrimination-related complaints to the State-level E.O. Officer. As previously mentioned, the State-level E.O. Officer is best suited to make determinations on applicable nondiscrimination laws. The SWA complaint representative will not need to make determinations regarding the type of alleged discrimination and applicable laws.

Regarding the comment that reported confusion within the one-stop system regarding tracking and handling MSFW, Title I, and Title III one-stop operation complaints, and requested the Department provide technical assistance on this topic, the Department plans to provide further technical assistance. The Department notes that the existing regulations at § 658.400(b) state that complaints alleging violations under WIOA title I programs are not covered by this subpart and must be referred to the appropriate administering agency which would follow the procedures set forth in the respective regulations. Section 683.600 describes local area, State, and direct recipient grievance procedures under WIOA title I.

Regarding the recommendation to remove language requiring ES staff to know the types of nondiscrimination laws at issue, the Department believes that the proposed changes are in line with this recommendation, as sending all discrimination complaints to the State-level E.O. Officer recognizes that State-Level E.O. Officers—and not complaint representatives—are best positioned to determine the applicable nondiscrimination laws and the agency to which complaints should be referred. Additionally, the proposed changes provide examples of the types of discrimination complaints that SWA staff may receive (*e.g.,* EEOC and DOL Civil Rights Center (CRC) complaints, and complaints under the Immigration and Nationality Act), but do not require SWA staff to know all nondiscrimination laws that may be at issue.

The Department appreciates commenters' concerns and recommendations. The Department believes that the proposed changes provide a straightforward, streamlined process for handling discrimination and reprisal-related complaints and—by utilizing the State-level E.O. Officer—ensure that such complaints are promptly and properly referred to the appropriate enforcement agency.

Section 658.419 Apparent Violations

The Department proposed several clarifying revisions to § 658.419(a). First, the Department proposed to update § 658.419(a) to replace the words ''a SWA, an ES office employee, or outreach staff'' with ''an ES staff member'' to conform with proposed revisions to ES staff at § 651.10. It is not necessary to specifically refer to ''outreach staff'' in this section, because the definition of *outreach staff* means ES staff with the responsibilities described in § 653.107(b). This change will make § 658.419 more clear because the regulatory text will use the term *ES staff* uniformly.

The Department also proposed changing the second reference to a ''suspected violation'' in § 658.419(a) to ''apparent violation'' for clarity. In addition, the Department proposed adding a sentence to § 658.419(a) to clarify that the apparent violation must be documented in the Complaint System log as described at § 658.410.

Finally, the Department proposed to add a sentence at the end of § 658.419(a) to clarify that when an apparent violation involves alleged violations of nondiscrimination laws, it must be processed according to the procedures described in § 658.411(c)—that is, it must be logged and immediately referred to the State-level E.O. Officer.

The Department did not receive any comments on this section. However, the Department is making additional changes to § 658.419 to be consistent with the definition of apparent violation that this final rule adopts in § 651.10, which refers to suspected violations that an ES staff member observes, has reason to believe, or which the staff member is in receipt of information regarding. The final rule also revises the existing regulatory text ''except as provided at § 653.503 of this chapter (field checks) or § 658.411 (complaints)'' to state more clearly ''except as part of a field check under provided at § 653.503 of this chapter.'' This phrasing is meant to more clearly state that the apparent violations processed as directed by § 658.419 are those that an ES staff observes, has reason to believe, or about which they receive information other than through field checks. The definition of apparent violations adopted by this final rule makes clear that the term does not include complaints.

Furthermore, the final rule retains the language proposed in the NPRM at § 658.419 that clarifies the ES Office Manager must document apparent violations in the Complaint System log as described at § 658.410, with the slight revision that the ES Office Manager must ensure that they are documented in the log. Finally, the final rule adopts the proposed text that apparent violations of nondiscrimination laws must be processed according to the procedures described in § 658.411(c), but for clarity moves this text into a separate paragraph (d) added at the end of § 658.419.

Section 658.420 Responsibilities of the Employment and Training Administration Regional Office

The Department proposed several revisions to § 658.420. First, the Department proposed to revise § 658.420(b)(1) to provide that if an ETA regional office receives a complaint alleging violations of nondiscrimination laws, then the complaint must be logged and immediately referred to the appropriate State-level E.O. Officer(s). This revision simplifies the process for referring nondiscrimination complaints

and provides clear instruction to ETA regional staff and task State-level E.O. Officers, who have appropriate expertise in determining how nondiscrimination complaints should be handled and by whom.

Second, the Department proposed removing existing § 658.420(b)(2), which addresses complaints alleging discrimination on the basis of genetic information, because such complaints would fall under the simplified procedures set forth in proposed § 658.420(b)(1). Third, the Department proposed making several revisions to conform with this deletion—namely, to move the text in existing § 658.420(c) to § 658.420(b) and remove all references to paragraph (b)(2) in this section.

Finally, the Department proposed revising § 658.420(c) to clarify that when an ETA regional office receives an employment-related law complaint under this subsection, it should process the complaint in accordance with § 658.422. The existing regulation incorrectly references § 658.411, which provides complaint processing procedures for ES offices and SWAs (and not ETA regional offices).

The Department did not receive comments on this section and finalizes these revisions as proposed.

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

The Department proposed several revisions to § 658.422. First, the Department proposed to revise paragraph (a) to clarify that this section applies to all ''employment-related law'' complaints submitted directly to the RA or their representative. Second, the Department proposed adding 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). The Department did not receive comments on this section and finalizes these revisions as proposed.

Section 658.427 Severability

Given the numerous and varied changes the Department proposed and is adopting, the Department intends this rule to be severable and is including a severability provision in parts 652, 653, and 658 in this final rule. That intent was reflected in the structure of and descriptions in the proposed rule. The inclusion of severability provisions in this final rule confirms the Department's belief that the severance of any affected provision will not impair the function of the regulation as a whole and that the Department would have proposed and implemented the remaining regulatory provisions even without any others. To the extent that a court holds any provision, or any portion of any provision, of part 658 invalid, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or subprovision will be severable from this part and will not affect the remainder thereof.

2. 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 proposed amending § 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). The Department proposed amending the introductory text of § 658.602(n) to replace the phrase ''in the course of'' with the word ''during''. Additionally, the Department proposed amending § 658.602(n)(1) to replace the phrase ''outreach workers'' with ''outreach staff'' because outreach staff is a defined term in § 651.10. The Department also proposed amending § 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. Finally, the Department proposed amending § 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 (f)(8). The Department did not receive any comments on this section and is finalizing these revisions as proposed.

Section 658.603 Employment and Training Administration Regional Office Responsibility

The Department proposed amending § 658.603(d)(7) to replace uses of ''job order'' with ''clearance order.'' The Department also proposed removing the word ''random'' from the requirement for the RA to conduct field checks. Finally, the Department proposed adding the word ''and'' before ''working and housing conditions'' to make clear that this is a single term that follows wages and hours in the list of items that must be specified on a clearance order.

Paragraph (i) of § 658.603 addresses RMA training. The Department proposed amending § 658.603(i) to remove the requirement that the RMA participate in training sessions approved by the National Office within the first 3 months of their tenure and replacing it with a requirement that would require the RMA to participate in training sessions offered by the National Office and additional training sessions necessary to maintain competency and enhance their understanding of issues farmworkers face (including trainings offered by Occupational Safety and Health Administration (OSHA), WHD, EEOC, CRC, and other organizations offering farmworker-related information). The Department also proposed amending § 658.603(p)(1) to replace ''workers'' with ''staff.'' Additionally, the Department proposed amending § 658.603(p)(2) to remove the word ''random'' so that the RMA understands that clearance orders selected for a field check do not need to be selected at random. The Department did not receive any comments on this section and is finalizing these revisions as proposed.

3. Subpart H—Federal Application of Remedial Action to State Workforce Agencies

Section 658.702 Assessment and Evaluation of Program Performance Data

The Department proposed amending § 658.702(f)(2) to add references to the ''RMA'' in two places to clarify that the RA must notify both the RMA and the NMA when findings and noncompliance involve services to MSFWs or the Complaint System. Additionally, this proposed change would require the Final Notification to be sent to the RMA, as well as the NMA. These changes are necessary for the RMA to be aware of all ES issues involving MSFWs and the Complaint System, which the RMA is responsible to monitor in their assigned region. The Department did not receive comments on this section and finalizes these revisions as proposed.

Section 658.704 Remedial Actions

The Department proposed amending § 658.704(f)(2) to require that copies of

the RA's notification to the SWA of decertification proceedings must be sent to the RMA and the NMA. The Department also proposed amending § 658.707(a), which addresses the circumstances in which a SWA may request a hearing, to specify that any SWA that has received a Notice of Remedial Action under § 658.707(a) of this subpart may also request a hearing, and that the SWA may do so by filing a written request with the RA within 20 business days of the SWA's receipt of the notice. Finally, the Department proposed adding a reference to the RA in § 658.707(b), because § 658.704(c) directs the SWA to send its written request to the RA. The Department did not receive any comments on this section and adopts these revisions as proposed.

VI. Rulemaking Analyses and Notices

A. Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 14094 (Modernizing Regulatory Review) and Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996

Under E.O. 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. *See* 58 FR 51735 (Oct. 4, 1993). Section 1(b) of E.O. 14094 amends sec. 3(f) of E.O. 12866 to define a ''significant regulatory action'' as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of OIRA for changes in gross domestic product) or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) create a serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the E.O. *See* 88 FR 21879 (Apr. 11, 2023). OIRA has determined that this final rule is a significant regulatory action, although not a significant regulatory action under sec. 3(f)(1) of E.O. 12866. Accordingly, OMB has reviewed this final rule.

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

The Department anticipates that the final rule will result in costs, transfer payments, and benefits for State governments and agricultural employers. The costs of the final rule will include rule familiarization and additional information collection for State governments, as well as transition costs such as recruitment, training, and technology expenses for the three States (*i.e.,* Delaware, Indiana, and Missouri) that currently use the staffing flexibility provided in the 2020 Final Rule and will need to transition to State merit staff for the provision of all Wagner-Peyser Act labor exchange services.

The transfer payments will include the changes in wages, fringe benefits, and overhead costs for the staff providing ES services in the three States that currently use the staffing flexibility provided in the 2020 Final Rule: Delaware, Indiana, and Missouri.

The benefits of the merit-staffing provisions in the final rule will 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 is also amending the regulations that govern labor exchange services provided to MSFWs, the Monitor Advocate System, and the Complaint System. These amendments will remove redundancies, clarify requirements, and improve equity and inclusion for MSFWs in the ES system.

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has designated this rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

1. Public Comments

a. Public Comments on Rule Familiarization Costs

In the NPRM, the Department anticipated that it would take a Human Resources Manager an average of 1 hour to review the rule and that the total 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) would be $4,439 (2020$).

Comment: A State government agency commented that rule familiarization estimate in the NPRM is too low because, in addition to a Human Resources Manager, other staff members would need to review the changes as well.

Response: The Department agrees that additional State staff may review the rule and that their fully loaded wage rates may be higher or lower than $82.13 per hour (2022$).[14] The 1-hour time estimate and the $82.13 hourly wage estimate are intended to be averages across all 57 jurisdictions. In some States, the combined time for all reviewers to read the rule may be more than 1 hour, while in other States, the combined time may be less than 1 hour. Similarly, the average fully loaded wage rate of the employees who familiarize themselves with the rule may be higher than $82.13 per hour in some States and lower than $82.13 per hour in other States. In the absence of supporting data from the commenter, the Department maintained its 1-hour time estimate and the $82.13 fully loaded wage rate in the final rule.

b. Public Comments on Transition Costs

The Department had insufficient data to provide estimates in the NPRM of the potential one-time transition costs (*e.g.,* recruitment, training, technology expenses) States might incur, so the Department sought additional input regarding potential transition costs.

Comment: Several commenters argued that the NPRM does not fully anticipate costs for State governments. A number of commenters, including multiple form letter campaigns, a Colorado State elected official, a Colorado State government agency, and a local government, wrote that the proposed merit-staffing requirement would cost millions of dollars for States. A Colorado State government agency estimated that the proposed rule would result in over $7 million in transition

[14] In the NPRM, this fully loaded hourly wage estimate was $77.88 in 2020 dollars.

costs for Colorado and provided a specific breakdown of these costs. A couple of State government agencies wrote that the proposed rule does not take into account the costs related to cross-training ES staff for the UI program. A Colorado local government wrote that under the proposed rule, half of PY 2023 funds would need to be utilized to transition and hire new State level staff. A Michigan advocacy organization wrote that local ES program support allows for efficient ''braided'' funding and, in contrast, the proposed rule would create siloed services that would increase overall labor costs for States.

Some commenters also argued that the proposed rule would result in a number of job losses for local staff in ES programs. In particular, several commenters, including a Colorado local government, a one-stop operator, and a trade association, stated that the proposed rule would result in job losses for local staff and provided data on expected employment reductions to support their claim. Similarly, Massachusetts and Colorado State government agencies commented that the proposed rule would result in job losses, given that State merit staff are more costly than local staff. A trade association wrote that their local workforce development board would not be able to move forward with programming for the upcoming year due to anticipated job losses as a result of the proposed rule. A Colorado State government agency and other commenters wrote that, in their region, TAA case managers are provided by local staff, and under the proposed rule these staff members would need to be rehired and trained.

An association of workforce boards wrote that the proposed rule would result in job centers closing and programs ending in States that operate their ES program using flexible staffing models, which would disproportionately impact rural areas as well as those facing barriers to employment. Some commenters stated that the proposed rule would result in service disruptions that would result in States incurring costs due to negative customer experiences, which would erode trust in the public workforce system. A State government agency wrote that the proposed rule would impose resource costs on States, while the national PY 2022 ES grant funding saw a non-adjusted increase of just 0.6 percent and the State saw a non-adjusted decline of 1.6 percent in its PY 2022 ES grants.

Response: The Department appreciates commenters' feedback on potential transition costs. After careful consideration of the comments received during the public comment period and reassessment of the NPRM, the Department is permitting the three States with longstanding reliance interests on using alternative staffing models, Colorado, Massachusetts, and Michigan, to continue using their alternative staffing models. The Department acknowledges that three other States (*i.e.,* Delaware, Indiana, and Missouri) currently using the staffing flexibility granted under the 2020 Final Rule will incur transition costs. Without pertinent data, the Department is unable to estimate the potential transition costs in this final rule. Recognizing that these States will need time to adjust their staffing models, the Department is providing 24 months of transition time for all States to comply with this final rule.

c. Public Comments on Transfer Payments

In the NPRM, the Department anticipated that four States (*i.e.,* Colorado, Delaware, Massachusetts, and Michigan) would need to transition to State merit staff for the provision of all labor exchange services. The Department estimated that Delaware, Massachusetts, and Michigan would have a combined total of $10.1 million (2020$) in annualized transfer payments over the 10-year analysis period.

Comment: Some commenters from Michigan wrote that they believe transfer payments estimated in the NPRM are too low. Specifically, they stated that the estimate of 192 full-time equivalents (FTEs) non-State-merit staff providing ES services is too low because Michigan's Wagner-Peyser Act-funded staffing is 400, equating to 220 FTEs. These commenters also asked where the funding for transfer payments would come from and, if there is not additional funding available, how the Department would close the gap.

Response: Because the Department is allowing Colorado, Massachusetts, and Michigan to administer ES services using their longstanding alternative staffing model, the Department has not sought updated data from Michigan to estimate the transfer payments associated with this final rule.

d. Public Comments on Regulatory Alternatives

In the NPRM, the Department analyzed two regulatory alternatives. Under the first alternative, the Department would return to the pre-2020 Wagner-Peyser Act regulations, reinstituting the State merit-staffing requirement for all States except for three States: Colorado, Massachusetts, and Michigan. Under the second alternative, the Department would require all States to come into compliance with the merit-staffing requirement within 30 or 60 days of issuance of the final rule rather than within 18 months from the effective date of the final rule.

Comment: Several Michigan, Colorado, and Massachusetts commenters, including State and local workforce development boards, one-stop center staff, private citizens, State and local governments, and a Colorado State elected official, urged the Department to adopt Alternative 1 as discussed in the NPRM, which would allow Colorado, Michigan, and Massachusetts to continue operating Wagner-Peyser Act programs with flexible staffing models. The commenters reasoned that this would allow their State to continue to operate what they described as innovative, streamlined, responsive, and effective ES programs. A Massachusetts local workforce development board and a Massachusetts local elected official argued that Alternative 1 was the best way to avoid service interruptions for job seekers and businesses.

To support their request for the Department to select Alternative 1, a Colorado private citizen provided figures from their local one-stop center to demonstrate the ''local return on investment'' and economic impact of Wagner-Peyser Act funding, including the estimation that every $1 of Wagner-Peyser Act funds received translates to $44.80 in value for the community.

Some commenters, including one-stop center employees, a Colorado local workforce development board, and a Colorado State government agency, critiqued the Department's mention of alignment with WIOA, and preference for alignment between ES and UI, when presenting Alternative 1 in the NPRM. A one-stop center employee asserted that Alternative 1 prioritizes UI administration over ES services despite WIOA identifying priority populations for ES service delivery. A Colorado local workforce development board argued that there was no justification for the Department's claim and provided evidence from its local programs, which it said demonstrates the benefits of alignment between Wagner-Peyser Act ES and WIOA title I services. The commenter said the proposal would result in decreased functionality of ES and argued that this adverse outcome outweighs the benefits of staffing UI during relatively shorter periods of surge claims.

A Colorado State workforce development board stated that prioritizing alignment of ES and UI so that States can provide surge capacity was not sufficient justification for the Department to discard Alternative 1 because States using flexible staffing models can provide surge capacity for UI administration. The commenter said Colorado's handling of the UI surge during the pandemic affirms county merit staff's ability to assist during UI surges. A Massachusetts local workforce development board reacted similarly to the NPRM's discussion of Alternative 1 and program alignment priorities, arguing that one-stop center staff in Massachusetts performed ably to support the UI surge during the pandemic. The commenter said the flexible staffing arrangements in Massachusetts proved useful during the pandemic, as well as during other unemployment surges throughout history, and expressed concern about losing the ability to ''manage the next crisis locally.''

A Colorado State government agency said the Department's discussion of Alternative 1 presented a false choice and argued that no studies exist over the past 14 years that prove the State merit-staffing model works better than ES staffed by county merit staff. A Colorado local workforce development board similarly stated that the Department ''dismissed'' Alternative 1 with very little justification and asserted that the Department has not provided recent studies or data to support the notion that flexible ES staffing model States perform worse than States that use only State merit staff to provide ES services. A Colorado one-stop center employee requested the Department adopt Alternative 1 and further investigate how ES staff can support UI services.

Also urging the Department to adopt Alternative 1, a Massachusetts local workforce development board discussed equity concerns with the proposal's prioritization of UI services for the recently unemployed over the needs of the longer-term unemployed and low-income workers who may need ES services. The commenter discussed historical inequities and current demographic makeups of these two groups and argued that the UI population is ''significantly less diverse'' than the rest of the job seeking population around Boston.

A Colorado State workforce development board, a Colorado State government agency, and other commenters urged the Department to adopt Alternative 1 because it would allow for the collection of evaluative evidence, prevent transfer payments and system disruptions, and maintain the ability of States with existing State merit ES staff to cross-train such workers to assist with UI surges. An anonymous commenter expressed concern about ''eliminating Alternative 1'' because ending staffing flexibility will result in ''bifurcated'' supervision for Wagner-Peyser Act workers and inconsistent service delivery. Also urging the Department to adopt Alternative 1, a Colorado one-stop operator commented that, if the Department decides against adopting Alternative 1, Congress should enshrine ES staffing flexibility into Federal law.

A Michigan State government agency suggested that, in the absence of additional analysis, the Department should implement the final rule without making a distinction between State and local merit staff, a less disruptive alternative that would allow Michigan to continue to offer ES services at current levels with qualified merit staff. The commenter argued that the Intergovernmental Personnel Act does not make a distinction between State and local merit staff, asserting that Michigan local merit staff are recruited, selected, advanced, and compensated in a manner consistent with State merit staff. This commenter opposed the proposal, alleging that it would result in fewer staff, less responsive customer service, and fewer ES locations across Michigan. The commenter requested that the Department conduct a specific, comprehensive, and independent analysis using up-to-date employment program, performance, and economic indicators to justify any changes to longstanding, successful delivery models like the one used in Michigan. The commenter said it had identified several of the proposal's anticipated adverse impacts during the current comment period and stated that the Department would ''confirm and expand'' upon these findings if it conducted an analysis.

A State government agency and a Massachusetts local workforce development board supported an ongoing exemption from the State merit-staffing requirement for the original demonstration States (Colorado, Massachusetts, and Michigan) but suggested that no additional States should receive such an exemption.

Response: After careful consideration of the comments received during the public comment period and reassessment of the NPRM, the Department has decided to permit three States with strong reliance interests—Colorado, Massachusetts, and Michigan—to continue using their approved longstanding staffing model to deliver ES services. In the 1990s, as part of a demonstration, the Department permitted Colorado and Michigan to use a combination of local and State merit-staffing and permitted Massachusetts to use non-merit staff in four of sixteen local areas for ES service delivery. During the comment period, these three States provided information about the service disruption that would result from having to upend their longstanding service delivery models. However, the initial justifications and data presented do not provide clear evidence of causation. Without evidence that alternative staffing models directly cause higher employment outcomes, balanced against widespread success in delivering services while maintaining State merit staff for ES, and further balanced by the need for ES State merit staff to be available for surges in UI claims and appeals, the Department is generally adopting the proposed requirement that States use State merit staff to provide ES services. The Department has determined that reinstating the requirement to provide ES services using State merit staff will help to allow the States to provide quality and consistent ES services in an accountable and transparent manner as we undertake an evaluation to determine whether alternative staffing models are empirically supported. All other States will have 24 months to comply with the rule's requirement to use State merit staff to provide ES services.

2. Costs

The Department anticipates that the rule will 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 [15] anticipates that the changes introduced by the rule will be reviewed by Human Resources Managers (SOC code 11–3121) employed by SWAs. The Department anticipates that it will 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 data show that the median hourly wage of State government Human Resources Managers

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

is $45.88.[16] The Department used a 62-percent benefits rate [17] and a 17-percent overhead rate,[18] so the fully loaded hourly wage is $82.13 [= $45.88 + ($45.88 × 62%) + ($45.88 × 17%)]. 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 $4,681 (= $82.13 × 1 hour × 57 jurisdictions).

b. Transition Costs

Three States would potentially incur one-time costs associated with this rule's merit-staffing requirement. Delaware currently has some non-State-merit staff who provide labor exchange services, as explained in the NPRM. Additionally, based on comments received and their State plans, Indiana and Missouri also have non-State-merit staff providing ES services. These three 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 in these States may experience nonquantifiable transition costs associated with service interruptions during the time period in which the States are making staff changes to comply with the provisions of this rule.

In its comments on the NPRM, Delaware stated that ''the proposed rule change will take away funding for 13 total contractual staff.'' The Delaware Department of Labor explained that its Division of Employment and Training has 8 FTE Wagner-Peyser contractual staff funded at 100 percent, and 5 contractual FTEs partially charged to Wagner-Peyser who are assigned to provide ES services. The State anticipates that the decrease in staffing would have a negative impact on the quality and delivery of ES services, and that it would cause an added workload on merit staff, potentially adversely affecting staff morale. Delaware explained the steps it would need to take to obtain additional State FTEs, estimating that the process would take at least 24 months and that there is no certainty that the positions would be approved by Delaware's Joint Finance Committee, its Governor, and OMB.

In its PY 2022 State plan, Indiana indicated that it would evaluate potential changes to its staffing models over the next several years in light of the flexibility provided in the 2020 Final Rule. In its comments on the NPRM, the Indiana Department of Workforce Development stated that one of the primary ways Indiana was able to respond to changing conditions during the COVID–19 pandemic was with the staffing flexibility provided in the 2020 Final Rule and the temporarily staffing flexibility provided by the CARES Act. Indiana explained that the staffing flexibility allowed it ''to retain temporary, intermittent, and contractor staff to augment existing State and local staff to better and more quickly scale up services to respond to client needs.'' Indiana expressed opposition to the proposed State merit-staffing requirement, asserting that it would result in significant inefficiencies because Indiana's AJCs would need to be staffed with a full accompaniment of both local workforce development board staff and State ES staff, a level that would be unnecessary in some AJCs ''as the populations simply do not require this many staff members for the possible client base.''

In its PY 2022 State plan, Missouri stated that Wagner-Peyser Act labor exchange services are ''provided solely by non-merit State employees.'' Missouri explained that, in 2018, the State legislature amended the State personnel law to remove merit status for all employees except those who are required to be merit by ''federal law or regulations for grant-in-aid programs.'' All employees in Missouri are at-will except when required by Federal law. Following the Department's publication of the 2020 Final Rule, Missouri's Office of Workforce Development removed the merit status of employees funded under the Wagner-Peyser Act to comply with State law. According to Missouri's State plan, the change from merit status to at-will status became effective on July 1, 2021. In its comments on the NPRM, Missouri's Office of Workforce Development expressed opposition to the merit-staffing requirement and urged the Department to preserve the longstanding staffing flexibility afforded to Colorado, Michigan, and Massachusetts and to grandfather in Missouri. Missouri asserted that ''the back-and-forth decision to allow and then disallow Wagner-Peyser Act flexibility would cause unnecessary disruptions for service delivery.'' Missouri also claimed that the merit status requirement would place an unnecessary burden on local workforce development boards that ''have planned for, budgeted for, and implemented'' ES services.

In the NPRM, the Department sought additional input about transition costs, but did not receive pertinent data for use in the final rule. The comments from Delaware, Indiana, and Missouri did not include estimates of their potential transition costs. Therefore, the Department is unable to quantify the transition costs that those three States will incur but does not anticipate that the transition costs will be large enough for this rule to be deemed a significant regulatory action under sec. 3(f)(1) of E.O. 12866.

c. Information Collection Costs

Information collection costs represent direct costs to States associated with the information collection requests (ICRs) under this rule. Five ICRs are herein discussed.

The first ICR pertains to the requirement that SWA Wagner-Peyser programs document Participant Individual Record Layout (PIRL) data element 413 for all reportable individuals. The Department anticipates that this provision will 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 will need to reprogram their ES registration systems to ask MSFW status (PIRL 413) questions earlier in the registration process. The Department anticipates that reprogramming will cost an average of $4,000 per jurisdiction,[19] 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 will 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 $27.05 for educational, guidance, and career counselors and advisors (SOC code 21–1012) employed by State governments (NAICS 999200).[20] The Department used a 62-

[16] BLS, ''Occupational Employment and Wage Statistics, National Industry-Specific Occupational Employment and Wage Estimates, NAICS 999200,'' SOC Code 11–3121, May 2022, *https://www.bls.gov/oes/current/naics4_999200.htm* (last visited May 16, 2023).

[17] BLS, ''National Compensation Survey, Employer Costs for Employee Compensation,'' *https://www.bls.gov/ncs/data.htm* (last visited May 16, 2023). For State and local government workers, wages and salaries averaged $34.88 per hour worked in 2022, while benefit costs averaged $21.51, which is a benefits rate of 62 percent.

[18] 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 May 16, 2023).

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

[20] BLS, ''Occupational Employment and Wage Statistics, National Industry-Specific Occupational

percent benefits rate and a 17-percent overhead rate, so the fully loaded hourly wage is $48.42 [= $27.05 + ($27.05 × 62%) + ($27.05 × 17%)]. Assuming ES staff assist in registering half of the 9.4 million reportable individuals (based on the average for Program Years 2018–2021), the annual cost is estimated at $7,609,895 (= 9,429,858 reportable individuals × 50% × 2 minutes × $48.42 per hour). For the annual burden on SMAs, the Department anticipates that it will take an SMA 1 hour per quarter to check the accuracy of the MSFW coding. To estimate this cost, the Department used the median hourly wage of $38.48 for social and community service managers (SOC code 11–9151) employed by State governments (NAICS 999200).[21] The Department used a 62-percent benefits rate and a 17-percent overhead rate, so the fully loaded hourly wage is $68.88 [= $38.48 + ($38.48 × 62%) + ($38.48 × 17%)]. Therefore, the annual cost is estimated at $15,705 (= 57 SMAs × 4 hours per year × $68.88 per hour).

The second ICR pertains to the requirement that SWA applicant-holding offices provide workers referred on clearance orders with a checklist summarizing wages, working conditions, and other material specifications in the clearance order. The Department anticipates that it will take an ES staff member an average of 35 minutes to read the clearance order, create a checklist, and provide the checklist to applicants. To estimate this cost, the Department used a fully loaded hourly wage of $48.42 for educational, guidance, and career counselors and advisors (SOC code 21–1012) employed by State governments (NAICS 999200). Assuming 14,580 clearance orders per year (based on the number of clearance orders reported by SWAs in Program Year 2019), the annual cost is estimated at $411,812 (= 14,580 clearance orders × 35 minutes × $48.42 per hour).

The third ICR pertains to the changes associated with the Migrant and Seasonal Farmworker Monitoring Report and Complaint/Apparent Violation Form. The Department anticipates that this provision will entail two costs: (1) time for ES Managers to update a central complaint log, and (2) additional time for SMAs to complete the Annual Summary due to content changes. For the annual burden on ES Managers, the Department anticipates that it will take an ES Manager 8 hours per year to update the central complaint log. To estimate this cost, the Department used a fully loaded median hourly wage of $68.88 for social and community service managers (SOC code 11–9151) employed by State governments (NAICS 999200). Assuming that there are approximately 2,400 ES Managers (based on the approximate number of one-stop centers), the annual cost is estimated at $1,322,496 (= 2,400 ES Managers × 8 hours per year × $68.88 per hour). For the annual burden on SMAs, the Department anticipates that it will take an SMA an additional 3 hours per year to complete the Annual Summary due to content changes. To estimate this cost, the Department used a fully loaded median hourly wage of $68.88 for social and community service managers (SOC code 11–9151) employed by State governments (NAICS 999200). Therefore, the annual cost is estimated at $11,778 (= 57 SMAs × 3 hours per year × $68.88 per hour).

The fourth ICR pertains to this rule's merit-staffing requirement. The Department will require States to describe in their Unified or Combined State Plans how the State will staff labor exchange services under the Wagner-Peyser Act using State merit staff. The Department does not anticipate additional costs related to this requirement given that States must already describe in their Unified or Combined State Plans how ES labor exchange services will be delivered.

The fifth ICR pertains to the forthcoming evaluation of three States: Colorado, Massachusetts, and Michigan. The Department will develop an evaluation to examine various staffing models and methods of delivering labor exchange services, to determine whether such models are empirically supported. The pertinent estimates will be included in a future ICR.

In total for the first three ICRs described above, the rule is expected to have first-year IC costs of $9.6 million (2022$). Over the 10-year analysis period, the annualized costs are estimated at $9.4 million at a discount rate of 7 percent (2022$).

3. Transfer Payments

According to OMB Circular A–4, transfer payments are monetary payments from one group to another that do not affect the total resources available to society. The transfer payments for this rule are the transfer payments associated with employee wages, fringe benefits, and overhead costs.

This final rule permits three States—Colorado, Massachusetts, and Michigan—to use their longstanding alternative staffing model to deliver ES services. The requirement to use State merit staff applies to the other 54 States and jurisdictions; therefore, the three States (*i.e.,* Delaware, Indiana, and Missouri) that implemented the staffing flexibility provided by the 2020 Final Rule will need to adjust their staffing arrangements and may incur additional wage costs. For purposes of E.O. 12866, these additional wage costs are categorized as transfer payments from States to employees.

The Delaware Department of Labor stated in its comments on the NPRM that ''the proposed rule change will take away funding for 13 total contractual staff.'' Delaware did not provide position titles or salary information in its comments. Therefore, the Department is unable to estimate the transfer payments for Delaware due to a lack of data.

In their comments on the NPRM, the Indiana Department of Workforce Development and the Missouri Office of Workforce Development expressed opposition to the proposal but did not provide information about the number, position titles, or annual salaries of the non-State-merit staff dedicated to delivering ES services. Therefore, the Department is unable to estimate the transfer payments for Indiana and Missouri due to a lack of data.

The Department does not anticipate that the transfer payments for Delaware, Indiana, and Missouri will be large enough for this rule to be deemed a significant regulatory action under sec. 3(f)(1) of E.O. 12866.

4. Nonquantifiable Benefits

The Department is requiring that States use only State merit staff to deliver ES labor exchange services, with exceptions for three States. 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, requires that ES labor exchange services be provided only by State merit staff because certain UI services are required to be delivered solely by State merit staff pursuant to

Employment and Wage Estimates, NAICS 999200, SOC 21–1012.'' *https://www.bls.gov/oes/current/naics4_999200.htm.*

[21] BLS, ''Occupational Employment and Wage Statistics, National Industry-Specific Occupational Employment and Wage Estimates, NAICS 999200, SOC 11–9151.'' *https://www.bls.gov/oes/current/naics4_999200.htm.*

sec. 303(a)(1) of the SSA. 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. Further, this ensures that UI services will be performed by qualified staff who are familiar with the requirements of the program during such future occurrences, ensuring the program's integrity.

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 claims, 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 services to all customers of the ES system according to established standards. In exercising its discretion under sec. 3(a) of the Wagner-Peyser Act to establish minimum levels of efficiency and promote the uniform administration of labor exchange services by requiring the use of State merit staff to deliver labor exchange services, the Department has determined that alignment of ES and UI staffing is needed to ensure that quality services are delivered by States effectively and equitably to UI beneficiaries and other ES customers.

The Department is also amending the regulations governing ES labor exchange services provided to MSFWs, the Monitor Advocate System, and the Complaint System. These amendments remove redundancies, clarify requirements, and enhance equity and inclusion for farmworkers in the ES system. The requirement that States use State merit staff to provide services to MSFWs benefits MSFWs, who are particularly vulnerable to employment-related abuses. Outreach and SMA staff receive centralized training and management from the State to ensure they are equipped to assess and respond to farmworker needs, including responding to complaints and apparent violations in the field, which may include highly sensitive subject matter like human trafficking.

5. Summary

Exhibit 1 shows the annualized rule familiarization and IC costs at discount rates of 3 percent and 7 percent. The rule is expected to have first-year rule familiarization costs of $4,681 and first-year IC costs of $9.6 million (2022$). Over the 10-year analysis period, the annualized rule familiarization costs are estimated at $623 at a discount rate of 7 percent and the annualized IC costs are estimated at $9.4 million at a discount rate of 7 percent (2022$).

Exhibit 1: Summary of Monetized Costs

Year	Rule Familiarization Costs	Information Collection Costs	Total Costs
1	$ 4,681	$ 9,599,686	$ 9,604,367
2	$ -	$ 9,371,686	$ 9,371,686
3	$ -	$ 9,371,686	$ 9,371,686
4	$ -	$ 9,371,686	$ 9,371,686
5	$ -	$ 9,371,686	$ 9,371,686
6	$ -	$ 9,371,686	$ 9,371,686
7	$ -	$ 9,371,686	$ 9,371,686
8	$ -	$ 9,371,686	$ 9,371,686
9	$ -	$ 9,371,686	$ 9,371,686
10	$ -	$ 9,371,686	$ 9,371,686
Annualized with 7% discounting	$ 623	$ 9,402,025	$ 9,402,647
Annualized with 3% discounting	$ 533	$ 9,397,636	$ 9,398,169

Due to data limitations, the Department is unable to quantify the transition costs or transfer payments that are likely to be incurred by Delaware, Indiana, and Missouri as they transition the delivery of all ES services to State merit staff. The Department does not anticipate that the transition costs or transfer payments will be large enough for this rule to be deemed a significant regulatory action under sec. 3(f)(1) of E.O. 12866.

6. Regulatory Alternatives

OMB Circular A–4 directs agencies to analyze alternatives if such alternatives best satisfy the philosophy and principles of E.O. 12866. Accordingly, the Department considered the following regulatory alternatives.

a. Alternative 1

Under this alternative, the Department would require all States and jurisdictions to use State merit staff to provide ES services, including Colorado, Massachusetts, and Michigan. In other words, under this alternative, the Department would adopt the proposal described in the NPRM. After careful consideration, the Department is not pursuing this alternative. The Department recognizes the strong reliance interests of Colorado, Massachusetts, and Michigan and is therefore permitting these three States to continue using their approved longstanding staffing model to deliver ES services. These three States must participate in evaluations of ES service delivery to be conducted by the Department.

b. Alternative 2

Under this alternative, the Department would require States to come into compliance with the requirement to use State merit staff within 30 or 60 days of issuance of the final rule. The Department is not pursuing this alternative because it could result in interruption to ES labor exchange services in the three States not already operating in compliance with

the rule: Delaware, Indiana, and Missouri. The Department recognizes that this rule may be a substantial change for those three States, and they may need time to make adjustments to personnel, contractual arrangements, and service provision. Under this alternative, with only 30 or 60 days to rapidly shift existing staff or hire new staff, Delaware, Indiana, and Missouri may find themselves in violation of contracts for services negotiated after the 2020 Final Rule. Accordingly, the Department is providing 24 months from the effective date of the final rule for States to comply with the State merit-staffing requirement rather than stipulating that the States comply immediately.

B. Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act of 1996, and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)

The Regulatory Flexibility Act (RFA), 5 U.S.C. chapter 6, requires the Department to evaluate the economic impact of this 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 rule will impose a significant economic impact on a substantial number of such small entities. The Department concludes that this rule does not regulate any small entities directly, so any regulatory effect on small entities will be indirect. Accordingly, the Department has determined this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

C. Paperwork Reduction Act of 1995

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

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

A Federal agency may not conduct or sponsor a collection of information unless it is approved by OMB under the PRA and it 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 final rule.

The ICRs in this final 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 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 final rule adds 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 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. Collecting data about participant and reportable individual characteristics, particularly related to populations that have been historically underserved, is an important tool for measuring progress in providing equal opportunity. The final rule also makes 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 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: 10,629,971.

Estimated Costs to Respondents or Recordkeepers: $9,719,287.

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

The preceding IC was the subject of a public comment, which the Department summarizes and responds to as follows.

Comment: A private citizen sought to call attention to what they described as ''an apparent typographical error'' in the NPRM's PRA section on the DOL-Only Performance Accountability, Information, and Reporting System for Reportable Individuals IC. The commenter stated that the estimated total annual burden hours of 10,610,629,971 stood out as an erroneous figure because it is beyond the current government-wide cumulative paperwork burden (citing OMB's figure of 10,521,540,269.2 hours), and because the supporting statement for the IC in question listed the total annual burden hours at 10,629,971 hours (citing Table 8). The commenter said it appears that the Department mistakenly added an extra ''610'' to that figure.

A State agency commented that, if the proposed requirement is adopted, it would cost $30,000 to $50,000 to update its IT systems to track the MSFW-status of reportable individuals, and it asked the Department to provide additional funding to cover these costs.

Response: The Department acknowledges that estimated total annual burden hours for this collection

is 10,629,971, not 10,610,629,971. The Department notes that it only received one comment indicating that the cost to update IT systems could be higher than the Department's estimate of $4,000 per jurisdiction. The Department's estimate is based on anecdotal evidence from other States, which indicated the change could cost a one-time expense of $2,000 to $6,000. The Department notes that some States may have higher costs, while other States may have lower costs. The change to this collection does not establish a new data element. Instead, it only requires States to make the existing data element 413, which is already required for participants, applicable to reportable individuals. The Department expects the burden to be minimal and will finalize the collection as proposed.

Agency: DOL–ETA.

Title of Collection: Clearance Order Checklists.

Type of Review: New Collection.

OMB Control Number: 1205–0NEW.

Description: In the NPRM, the Department proposed to add a new IC to address the requirements at 20 CFR 653.501(d)(6), which requires SWAs to provide farmworkers with ''checklists showing wage payment schedules, working conditions, and other material specifications of the clearance order,'' and 20 CFR 653.501(d)(10), which requires SWA applicant-holding offices to provide workers referred on clearance orders with a checklist summarizing wages, working conditions, and other material specifications in the clearance order. The Department proposed to include a new Agricultural Clearance Order Form, ETA Form 790B, and to withdraw OMB Control Number 1205–0134, which at the time of the NPRM was an expired ICR for which a submission requesting reinstatement was pending at OMB. Since the publication of the NPRM, OMB approved OMB Control Number 1205–0134, and therefore there is no need to withdraw OMB Control Number 1205–0134 or to create a new OMB Control Number for Form ETA–790B. For this reason, the Department declines to finalize the new collection for Form ETA–790B; however, the Department will finalize the collection for the checklist requirements and will revise the title of the new collection to be *Clearance Order Checklists.* The Department has also revised the burden estimates to only include information for the checklist requirements.

Affected Public: State Governments, Private Sector: Business or other for-profits, not-for-profit institutions, and farms.

Obligation to Respond: Required to Obtain or Retain Benefits.

Estimated Total Annual Respondents: 24,030.

Estimated Total Annual Responses: 24,030.

Estimated Total Annual Burden Hours: 13,937.

Estimated Total Annual Other Burden Costs: $0.

Regulations Sections: § 653.501(d)(6) and (10).

Agency: DOL–ETA.

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

Type of Review: Revision.

OMB Control Number: 1205–0039.

Description: The final rule requires four areas to be changed in this ICR. First, there are several changes to the required content of the SMA's Annual Summary, described at § 653.108, including a summary of how the SMA is working with the State-level E.O. Officer, an assurance that the SMA is a senior-level official who reports directly to the State Administrator or their designee, an evaluation of SMA staffing levels, a summary and analysis of outreach efforts, and other minor edits to language used to describe content in the summary. To implement these changes, the Department also is revising the ETA Form 5148 to include the content. Second, the Department is making two non-substantive corrections to the ETA Form 5148: (1) adding transportation to the types of apparent violations reported in part 1, section E, item 3; and (2) revising part 3, items 2 and 3 so that the field check requirements conform to the existing regulation at § 653.501. The Department is adding transportation to the types of apparent violations because the types of apparent violations listed on the form are intended to exactly mirror the types of complaints reported in section D, item 2. Transportation was inadvertently omitted from the prior ICR revision. Third, the Department is adding a new IC to conform with the change to § 653.107(b)(8), which requires that ES Office Managers maintain MSFW outreach logs on file for at least 3 years, to comply with 2 CFR 200.334. Fourth, the Department is adding an IC to this ICR to explain the recordkeeping requirements established at § 658.410(c) regarding maintaining a central complaint log. The Department is not establishing a required form, but rather describing the minimum contents that must be included in any complaint logs SWAs create. In addition, the Department is revising the ETA Form 5148 to conform with revisions to the minimum level of service indicators to request information regarding outreach contacts per quarter as opposed to per week as currently required under § 653.109(h).

Affected Public: State Governments.

Obligation to Respond: Required to Obtain or Retain Benefits.

Estimated Total Annual Respondents: 5,536.

Estimated Total Annual Responses: 11,450.

Estimated Total Annual Burden Hours: 29,440.

Estimated Total Annual Other Burden Costs: $0.

Regulations Sections: 2 CFR 200.334; 20 CFR 653.107(b)(8), 653.108, 653.109(h), and 658.410(c).

Agency: DOL–ETA.

Title of Collection: Wagner-Peyser Employment Service Required Elements for the Unified or Combined State Plan.

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 changes in this rulemaking described subsequently will eventually be included in OMB Control Number 1205–0522 (expires Mar. 31, 2026). After this rule is published and before the expiration of OMB Control Number 1205–0522, 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 Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act (1205–0522) and proceed to discontinue the use of the new control number.

The final rule requires all States to provide Wagner-Peyser Act ES services through State merit staff, except for three States that the Department is permitting to use their approved longstanding alternative staffing models. The Department is creating a new ICR to require Unified or Combined State Plans to describe how the State will staff labor exchange services under the Wagner-Peyser Act using State merit staff. Similarly, the Department is reinstituting the SWA's requirement to provide assurances that it will use State merit staff to deliver ES services. The final rule also provides several clarifications regarding outreach and significant MSFW one-stop center staffing, including changes to the content of the AOP. The changes will require revision to the AOP instructions. The AOP instructions in the final submission to OMB reflect one change from the NPRM related to outreach staffing levels that the Department is

making in § 653.107(a)(4) and (d)(2) in this final rule.

Affected Public: State Governments.

Obligation to Respond: Required to Obtain or Retain Benefits.

Estimated Total Annual Respondents: 57 (every 2 years).

Estimated Total Annual Responses: 38 (every 2 years).

Estimated Total Annual Burden Hours: 8,136 (every 2 years).

Estimated Total Annual Other Burden Costs: $0 (every 2 years).

Regulations Sections: §§ 652.215; 653.107(a)(1), (a)(4), (b)(11), and (d)(2)(ii) through (v).

Interested parties may obtain a copy free of charge of one or more of the ICRs submitted to OMB on the OIRA website at *https://www.reginfo.gov/public/do/PRAMain.* From that page, select Department of Labor from the ''Currently under Review'' dropdown menu, click the ''Submit'' button, and find the applicable control number among the ICRs displayed.

D. Executive Order 13132 (Federalism)

E.O. 13132 requires Federal agencies to ensure that the principles of Federalism animating our Constitution guide the executive departments and agencies in the formulation and implementation of policies, and to further the policies of the Unfunded Mandates Reform Act 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. Section 3(b) of the E.O. further provides that Federal agencies must implement regulations that have a substantial direct effect only if statutory authority permits the regulation and it is of national significance. The Department has reviewed the final rule in light of these requirements and has concluded that it is properly premised on the statutory authority given to the Secretary to set standards under the Wagner-Peyser Act.

Accordingly, the Department has reviewed this final 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 final 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 final rule 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.

Comment: Some commenters, including a State workforce development board, a professional association, and an association of State elected officials, argued that the proposal would create an unfunded Federal mandate because States' costs would increase due to the loss of flexibility and the need to recruit State merit staff and cross-train workers to support UI adjudication. A professional association, an association of workforce boards, and a State workforce development board similarly argued that the proposal would create an unfunded Federal mandate because it would force States to make additional long-term investments to employ State merit staff.

Response: The regulation contains no unfunded mandates as defined in 2 U.S.C. 658. The Department has detailed the cost burden associated with this final rule in section VI. Wagner-Peyser Employment Service grant funding is provided annually to deliver employment services, and that funding will be used to cover the cost of implementing this rule. Under UMRA, a Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector that is not voluntary. The Wagner-Peyser act, as amended by WIOA, authorizes ES activities. These program requirements are supported by Federal formula grant funds, and, accordingly, are not considered unfunded mandates.

F. Executive Order 13175 (Indian Tribal Governments)

The Department has reviewed this final 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 final rule 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 amends 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 is revised to read as follows:

Authority: 29 U.S.C. 49a and 49k; 38 U.S.C. 101, chapters 41 and 42; Secs. 3, 189 and 503, 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 by an employer, which an ES staff member observes, has reason to believe, or regarding which an ES staff member receives information (other than a *complaint* as defined in this part).

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, 1606, and 1625.

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.

Decertification means the rescission by the Secretary of Labor (Secretary) of the year-end certification made under sec. 7 of the Wagner-Peyser Act to the Secretary of the Treasury that the State agency may receive funds authorized by the Wagner-Peyser Act.

* * * * *

Employment and Training Administration (ETA) means the component of the Department that administers Federal government job training and worker dislocation programs, Federal grants to States for public ES programs, and unemployment insurance benefits. These services are provided primarily through State and local workforce development systems.

* * * * *

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

Employment Service (ES) Office Manager means the ES staff person in charge of ES services provided in a one-stop center.

* * * * *

Employment Service (ES) staff means individuals who are funded, in whole or in part, by Wagner-Peyser Act funds to carry out activities authorized under the Wagner-Peyser Act.

* * * * *

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

Field visits means announced appearances by State Monitor Advocates, Regional Monitor Advocates, the National Monitor Advocate (or National Monitor Advocate staff), or outreach staff to the working, living, and gathering areas of migrant and seasonal farmworkers (MSFWs), to perform the duties described at §§ 653.107(b) (outreach staff), 653.108(o) and (q) (State Monitor Advocates), 658.602(n) (National Monitor Advocates and National Monitor Advocate staff), and 658.603(p) (Regional Monitor Advocates). Monitor Advocates or outreach staff must keep records of each such visit.

* * * * *

Hearing Officer means a Department Administrative Law Judge, designated to preside at Department administrative hearings.

* * * * *

Interstate clearance order means an agricultural clearance order for temporary employment (employment on a less than year-round basis) describing one or more hard-to-fill job openings, which an ES office uses to request recruitment assistance from other ES offices in a different State.

Intrastate clearance order means an agricultural clearance order for temporary employment (employment on a less than year-round basis) 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.

* * * * *

Migrant farmworker means a seasonal farmworker (as defined in this section) who travels to the job site so that the farmworker is not reasonably able to return to their permanent residence within the same day.

* * * * *

*Occupational Information Network (O*NET)* means the online reference database which contains detailed descriptions of U.S. occupations, distinguishing characteristics, classification codes, and information on tasks, knowledge, skills, abilities, and work activities as well as information on interests, work styles, and work values.

* * * * *

*O*NET–SOC* means the occupational codes and titles used in the O*NET system, based on and grounded in the Standard Occupational Classification (SOC), which are the titles and codes utilized by Federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, and disseminating data. The SOC system is issued by the Office of Management and Budget and the Department is authorized to develop additional detailed O*NET occupations within existing SOC categories. The Department uses O*NET–SOC titles and codes for the purposes of collecting descriptive occupational information and for State reporting of data on

training, credential attainment, and placement in employment by occupation.

* * * * *

Outreach staff means ES staff with the responsibilities described in § 653.107(b) of this chapter. State Monitor Advocates are not considered outreach staff.

Participant means a reportable individual who has received services other than the services described in § 677.150(a)(3) of this chapter, after satisfying all applicable programmatic requirements for the provision of services, such as eligibility determination. (*See* § 677.150(a) of this chapter.)

(1) The following individuals are not participants, subject to § 677.150(a)(3)(ii) and (iii) of this chapter:

(i) Individuals who only use the self-service system; and

(ii) Individuals who receive information-only services or activities.

(2) ES participants must be included in the program's performance calculations.

Placement means the hiring by a public or private employer of an individual referred by the ES office for a job or an interview, provided that the ES office completed all the following steps:

(1) Prepared a job order form prior to referral, except in the case of a job development contact on behalf of a specific participant;

(2) Made prior arrangements with the employer for the referral of an individual or individuals;

(3) Referred an individual who had not been specifically designated by the employer, except for referrals on agricultural job orders for a specific crew leader or worker;

(4) Verified from a reliable source, preferably the employer, that the individual had entered on a job; and

(5) Appropriately recorded the placement.

* * * * *

Reportable individual means an individual who has taken action that demonstrates an intent to use ES services and who meets specific reporting criteria of the Wagner-Peyser Act (*see* § 677.150(b) of this chapter), including:

(1) Individuals who provide identifying information;

(2) Individuals who only use the self-service system; or

(3) Individuals who only receive information-only services or activities.

Respondent means the individual or entity alleged to have committed the violation described in the complaint, such as the employer, service provider, or State agency.

Seasonal farmworker means an individual who is employed, or was employed in the past 12 months, in farmwork (as defined in this section) of a seasonal or other temporary nature and is not required to be absent overnight from their permanent place of residence. Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind 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 OWI 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.

* * * * *

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

* * * * *

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 is revised to read as follows:

Authority: 29 U.S.C. chapter 4B; 38 U.S.C. chapters 41 and 42; 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), and (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:

* * * * *

(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, 1605, 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. Add § 652.10 to read as follows:

§ 652.10 Severability.

Should a court hold any portion of any provision of this part to be invalid, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or subprovision will be severable from this part and will not affect the remainder thereof.

■ 6. Revise the heading to subpart C to read as follows:

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

■ 7. Amend § 652.204 by revising the section heading to read as follows:

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

* * * * *

■ 8. 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

* * * * *

■ 9. 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.

* * * * *

■ 10. Revise § 652.215 to read as follows:

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

(a) Except as provided in paragraph (b) of this section, the Secretary requires that States deliver the labor exchange services described in § 652.3 using State merit-staff employees employed according to the merit-system principles described in 5 CFR part 900, subpart F—Standards for a Merit System of Personnel Administration. This requirement also applies to the provision of services and activities under parts 653 and 658 of this chapter.

(b) States authorized prior to February 5, 2020, to use a staffing model other than that described in paragraph (a) of this section to deliver ES services may use the staffing model consistent with the model previously authorized for the State. These States may use merit-staffing flexibility only to the same extent that the Department had authorized it prior to February 5, 2020.

(c) States using staffing models under paragraph (b) of this section are required to participate in evaluations of their delivery of ES services conducted by the Department.

(d) All States must comply with the requirements in this section no later than January 22, 2026.

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

■ 11. 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.

■ 12. 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.

* * * * *

■ 13. 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.

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

§ 653.102 Job information.

* * * SWAs must ensure ES staff at one-stop centers provide assistance to MSFWs to access job order information easily and efficiently.

■ 15. Amend § 653.103 by revising paragraphs (a) through (c) to read as follows:

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

(a) Each ES office must determine whether participants and reportable individuals are MSFWs as defined at § 651.10 of this chapter.

(b) SWAs must comply with the language access and assistance requirements at 29 CFR 38.9 with regard to all individuals with limited English proficiency (LEP), including MSFWs who are limited English proficient individuals, as defined at 29 CFR 38.4(hh). This includes ensuring ES staff comply with these language access and assistance requirements.

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

* * * * *

■ 16. Amend § 653.107 by:

■ a. Revising the section heading and paragraphs (a)(1), (a)(2)(i) and (ii), and (3);

■ b. Revising paragraphs (a)(4), the first sentence of (a)(5), introductory text of paragraph (b), (b)(1), (b)(3), introductory text of (b)(4), (b)(4)(i) and (vi), (b)(6), (b)(7), the second sentence of (b)(8), and paragraphs (b)(11), (d)(2)(ii) through (v), and (d)(4) and (5).

The revisions and additions read as follows:

§ 653.107 Outreach responsibilities and Agricultural Outreach Plan.

(a) * * *

(1) Each SWA must ensure outreach staff conduct outreach as described in paragraph (b) of this section on an ongoing basis. State Administrators must ensure State Monitor Advocates (SMAs) and outreach staff coordinate activities with WIOA title I sec. 167 grantees as well as with public and private community service agencies and MSFW groups. WIOA title I sec. 167 grantees' activities involving MSFWs does not substitute for SWA outreach responsibilities.

(2) * * *

(i) Communicate the full range of workforce development services to MSFWs; and

(ii) Conduct thorough outreach efforts with extensive follow-up activities identified at paragraph (b)(5) of this section.

(3) When hiring or assigning outreach staff, SWAs must ensure hiring officials:

(i) Seek and put a strong emphasis on hiring and assigning qualified candidates who speak the language of a significant proportion of the State MSFW population; and

(A) Who are from MSFW backgrounds; or

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

(ii) Inform farmworker organizations and other organizations with expertise concerning MSFWs of job openings and encourage them to refer qualified applicants to apply.

(4) Each SWA must ensure that there are an adequate number of outreach staff employed in the State to conduct MSFW outreach in each service area of the State and to contact a majority of MSFWs in the State annually. In the 20 States with the highest estimated year-round MSFW activity, as identified by the Department, there must be full-time, year-round outreach staff to conduct outreach duties. Full-time means each

individual outreach staff person must spend 100 percent of their time on the outreach responsibilities described in paragraph (b) of this section. For the remainder of the States, there must be year-round part-time outreach staff, and during periods of the highest MSFW activity, there must be full-time outreach staff. These 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 paragraph (d) of this section. All outreach staff must be multilingual, if warranted by the characteristics of the MSFW population in the State, and must spend a majority of their time in the field.

(5) The SWA must publicize the availability of ES services through such means as newspaper and electronic media publicity. * * *

* * * * *

(b) *Outreach staff responsibilities.* Outreach staff must locate and contact MSFWs who are not being reached by the normal intake activities conducted by the ES offices. Outreach staff responsibilities include the activities identified in paragraphs (b)(1) through (11) of this section.

(1) Outreach staff must explain to MSFWs at their working, living, or gathering areas (including day-haul sites), by means of written and oral presentations either spontaneous or recorded, the following:

* * * * *

(3) After making the presentation, outreach staff must urge the MSFWs to go to the local one-stop center to obtain the full range of employment and training services.

(4) If an MSFW cannot or does not wish to visit the local one-stop center, outreach staff must offer to provide on-site the following:

(i) Assistance in the preparation of applications for ES services;

* * * * *

(vi) As needed, assistance in making appointments and arranging transportation for individual MSFW(s) or members of their family to and from local one-stop centers or other appropriate agencies.

* * * * *

(6) Outreach staff must be alert to observe the working and living conditions of MSFWs and if an outreach staff member observes or receives information about apparent violations, the outreach staff member must document and refer the information to the appropriate ES Office Manager (as described in § 658.419 of this chapter).

(7) Outreach staff must be trained in one-stop center procedures and in the services, benefits, and protections afforded MSFWs by the ES, including training on protecting farmworkers against sexual harassment, sexual coercion, assault, and human trafficking. Such trainings are intended to help outreach staff identify when such issues may be occurring in the fields and how to document and refer the cases to the appropriate enforcement agencies. Outreach staff also must be trained in the Complaint System procedures at part 658, subpart E, of this chapter and be aware of the local, State, regional, and national enforcement agencies that would be appropriate to receive referrals. The program for such training must be formulated by the State Administrator, pursuant to uniform guidelines developed by ETA. The SMA must be given an opportunity to review and comment on the State's program.

(8) * * * These records must include a daily log, a copy of which must be sent monthly to the ES Office Manager and maintained on file for at least 3 years. * * *

* * * * *

(11) Outreach staff in significant MSFW one-stop centers must conduct especially vigorous outreach in their service areas. Outreach activities must align with and be supported by information provided in the State's AOP pursuant to paragraph (d) of this section.

* * * * *

(d) * * *

(2) * * *

(ii) Explain the materials, tools, and resources the State will use for outreach;

(iii) Describe the SWA's proposed outreach activities to contact MSFWs who are not being reached by the normal intake activities conducted by the one-stop centers. The description must identify the number of full-time and part-time outreach staff positions in the State and must demonstrate that there are sufficient outreach staff to conduct MSFW outreach in each service area of the State to contact a majority of MSFWs in the State 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.

■ 17. 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 who must be a SWA official. The State Administrator must inform farmworker organizations and other organizations with expertise concerning MSFWs of the opening and encourage them to refer qualified applicants to apply. Among qualified candidates, the SWAs must seek 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 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 the SMA functions described in this section. 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. The SMA must not perform work that conflicts with any of the SMA's 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.

(f) All SMAs and their staff must attend training session(s) offered by the Regional Monitor Advocate(s) and National Monitor Advocate and their staff 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 to the State Administrator, to the official of the SWA with authority over the ES office, and other appropriate SWA officials.

(v) If the review results in any findings of noncompliance with the regulations under this chapter, the SMA's report must include the necessary corrective action(s). To resolve the findings, the ES Office Manager or other appropriate ES staff must develop and propose a written corrective action plan. The plan must be approved or revised by SWA officials and the SMA. The plan must include the actions required to correct any compliance issues within 30 business days or, if the plan allows for more than 30 business days for full compliance, the length of and the reasons for the extended period and the major interim steps to correct the compliance issues must be specifically stated. SWAs are responsible for assuring and documenting that the ES office is in compliance within the time period designated in the plan.

(vi) SWAs must submit to the appropriate ETA regional office copies of the onsite review reports and corrective action plans for ES offices.

(vii) The SMA may delegate the review described in paragraph (h)(3) of this section to the SMA's staff, if the SMA finds such delegation necessary. In such event, the SMA is responsible for and must approve the written report of the review.

(4) 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, and that, if necessary, those ES offices in which significant problems are revealed by required reports, management information, the Complaint System, or other means are reviewed as soon as possible.

(5) Review and approve the SWA's AOP.

(6) On a regular basis, review outreach staff's daily logs and other reports including those showing or reflecting the outreach staff's activities.

(7) Write and submit annual summaries to the State Administrator with a copy to the Regional Administrator and the National Monitor Advocate.

(i) The SMA must participate in Federal reviews conducted pursuant to part 658, subpart G, of this chapter, as requested by the Regional or National Monitor Advocate.

(j) The SMA must monitor the performance of the Complaint System, as set forth at §§ 658.400 and 658.401 of this chapter. The SMA must review the ES office's informal resolution of complaints relating to MSFWs and must ensure that the ES Office Manager transmits copies of the Complaint System logs pursuant to part 658, subpart E, of this chapter to the SWA.

(k) The SMA must serve as an advocate to improve services for MSFWs.

(l) The SMA must establish an ongoing liaison with WIOA sec. 167

National Farmworker Jobs Program (NFJP) grantees and other organizations serving farmworkers, employers, and employer organizations in the State.

(m) The SMA must establish an ongoing liaison with the State-level Equal Opportunity (E.O.) Officer.

(n) The SMA must meet (either in person or by alternative means), at minimum, quarterly, with representatives of the organizations pursuant to paragraphs (l) and (m) of this section, to receive input on improving coordination with ES offices or improving the coordination of services to MSFWs. To foster such collaboration, the SMAs must communicate freely with these organizations. The SMA must also establish Memorandums of Understanding (MOUs) with the NFJP grantees and may establish MOUs with other organizations serving farmworkers as appropriate.

(o) The SMA must conduct frequent field visits to the working, living, and gathering areas of MSFWs, and must discuss the SWA's provision of ES services and other employment-related programs with MSFWs, crew leaders, and employers. Records must be kept of each such field visit.

(p) The SMA must participate in the appropriate regional public meeting(s) held by the Department of Labor Regional Farm Labor Coordinated Enforcement Committee, other Occupational Safety and Health Administration and Wage and Hour Division task forces, and other committees as appropriate.

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

(r) The SMA must review on at least a quarterly basis all statistical and other MSFW-related data reported by ES offices in order:

(1) To determine the extent to which the SWA has complied with the ES regulations; and

(2) To identify the areas of non-compliance.

(s) The SMA must have full access to all statistical and other MSFW-related information gathered by SWAs and ES offices and may interview ES staff with respect to reporting methods. After each review, the SMA must consult, as necessary, with the SWA and ES offices and provide technical assistance to ensure accurate reporting.

(t) The SMA must review and comment on proposed State ES directives, manuals, and operating instructions relating to MSFWs and must ensure:

(1) That they accurately reflect the requirements of the regulations; and

(2) That they are clear and workable. The SMA also must explain and make available at the requestor's cost, pertinent directives and procedures to employers, employer organizations, farmworkers, farmworker organizations, and other parties expressing an interest in a readily identifiable directive or procedure issued and receive suggestions on how these documents can be improved.

(u) The SMA must prepare for the State Administrator, the Regional Monitor Advocate, and the National Monitor Advocate an Annual Summary describing how the State provided ES services to MSFWs within the State based on statistical data, reviews, and other activities as required in this chapter. The summary must include:

(1) A description of the activities undertaken during the program year by the SMA pertaining to their responsibilities set forth in this section and other applicable regulations in this chapter.

(2) An assurance that the SMA is a senior-level official who reports directly to the State Administrator or the State Administrator's designee as described at paragraph (c) of this section.

(3) An evaluation of SMA staffing levels, including:

(i) An assurance the SMA devotes all of their time to Monitor Advocate functions or, if the SMA conducts their functions on a part-time basis, an assessment of whether all SMA functions are able to be effectively performed on a part-time basis; and

(ii) An assessment of 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.

(4) A summary of the monitoring reviews conducted by the SMA, including:

(i) A description of any problems, deficiencies, or improper practices the 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 one-stop centers, 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.

■ 18. 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) introductory text, and (h)(1).

The revision 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

* * * * *

(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 one-stop centers, 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.

* * * * *

■ 19. 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.

* * * * *

■ 20. 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.

* * * * *

■ 21. Amend § 653.501 by:

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

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

■ c. 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

* * * * *

(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 (d)(3) 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 within 10 business days of its receipt of the order, and the Regional Administrator or their designee must approve the areas of supply to which the order will be extended. Any denial by the Regional Administrator or their designee must be in writing and state the reasons for the denial.

* * * * *

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

* * * * *

(10) 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 checklist must include language notifying the worker that a copy of the original clearance order is available upon request.

(11) The applicant-holding office must give each referred worker a copy of the list of worker's rights described in Departmental guidance.

* * * * *

■ 22. Amend § 653.502 by revising paragraph (d) to read as follows:

§ 653.502 Conditional access to the Agricultural Recruitment System.

* * * * *

(d) *Notice of denial.* If the Regional Administrator denies the request for conditional access to the intrastate or interstate clearance system they must provide written notice to the employer, the appropriate SWA, and the ES office, stating the reasons for the denial.

* * * * *

■ 23. Amend § 653.503 by revising paragraphs (a) and (b) to read as follows:

§ 653.503 Field checks.

(a) If a worker is placed on a clearance order, the SWA must notify the employer in writing that the SWA, through its ES offices, and/or Federal staff, must conduct unannounced field checks to determine and document whether wages, hours, transportation, and working and housing conditions are being provided as specified in the clearance order.

(b) Where the SWA has made placements on 10 or more agricultural clearance orders (pursuant to this subpart) during the quarter, the SWA must conduct field checks on at least 25 percent of the total of such orders. Where the SWA has made placements on nine or fewer job orders during the quarter (but at least one job order), the SWA must conduct field checks on 100 percent of all such orders. This requirement must be met on a quarterly basis.

* * * * *

■ 24. Add § 653.504 to read as follows:

§ 653.504 Severability.

Should a court hold any portion of any provision of this part to be invalid, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or subprovision will be severable from this part and will not affect the remainder thereof.

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

■ 25. Revise the authority citation for part 658 to read as follows:

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

■ 26. Amend § 658.400 by revising the second sentence of paragraph (a) and paragraph (d) to read as follows:

§ 658.400 Purpose and scope of subpart.

(a) * * * 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 the ES regulations under parts 651, 652, 653, and 654 of this chapter and this part. * * *

* * * * *

(d) A complainant may designate an individual to act as their representative.

■ 27. Amend § 658.410 by:

■ a. Revising paragraphs (c), (g), (h), (k), and (m);

■ b. Removing paragraph (n); and

■ c. Redesignating (o) as paragraph (n) and revising the newly redesignated paragraph (n)..

The revisions and redesignation read as follows:

§ 658.410 Establishment of local and State complaint systems.

* * * * *

(c) SWAs must ensure centralized control procedures are established for the processing of complaints and apparent violations. The ES Office Manager and the State Administrator must ensure a central complaint log is maintained, listing all complaints taken by the ES office or the SWA and apparent violations identified by ES staff, and specifying for each complaint or apparent violation:

(1) The name of the complainant (for complaints);

(2) The name of the respondent (employer or State agency);

(3) The date the complaint is filed or the apparent violation was identified;

(4) Whether the complaint is made by or on behalf of a migrant and seasonal farmworker (MSFW) or whether the apparent violation affects an MSFW;

(5) Whether the complaint or apparent violation concerns an employment-related law or the ES regulations; and

(6) The actions taken (including any documents the SWA sent or received and the date the SWA took such action(s)), and whether the complaint or apparent violation has been resolved, including informally.

* * * * *

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

(h) All complaints received by a SWA must be assigned to a trained Complaint System Representative designated by the State Administrator. Complaints must not be assigned to the State Monitor Advocate (SMA).

* * * * *

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

* * * * *

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

(n) A complainant may designate an individual to act as their representative throughout the filing and processing of a complaint.

■ 28. Amend § 658.411 by:

■ a. Revising paragraphs (a)(2)(i) and (ii), (a)(3), the first sentence of paragraph (a)(4), and paragraphs (b)(1) introductory text, (b)(1)(i), and (b)(1)(ii)(A), (B), (D), and (E);

■ b. Adding paragraph (b)(1)(ii)(F); and

■ c. Revising paragraphs (c), (d)(1) introductory text, (d)(1)(i), (d)(1)(ii)(A), (B), (C), and (D), (d)(1)(iii) and (iv), the introductory text of (d)(3), (d)(4), the introductory text of (d)(5)(i), (d)(5)(ii), (d)(5)(iii)(G), and (d)(6).

The revisions and addition read as follows:

§ 658.411 Action on complaints.

(a) * * *

(2) * * *

(i) Make every effort to obtain all the information they perceive to be necessary to investigate the complaint;

(ii) Request that the complainant indicate all of the physical addresses, email addresses, telephone numbers, and any other helpful means by which they might be contacted during the investigation of the complaint; and

* * * * *

(3) The staff must ensure the complainant (or their representative) submits the complaint on the Complaint/Referral Form or another 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 regarding the ES regulations directly with a SWA, or when a MSFW complaint is referred from an ES office, the Complaint System Representative must investigate and attempt to resolve the complaint immediately upon receipt and may, if necessary, conduct a further investigation.

(ii) If resolution at the SWA level has not been accomplished within 20 business days after the complaint was received by the SWA (or after all necessary information has been submitted to the SWA pursuant to paragraph (a)(4) of this section), the Complaint System Representative must make a written determination regarding the complaint and must send electronic copies to the complainant and the respondent. The determination must follow the procedures set forth in paragraph (d)(5) of this section.

(5)(i) All written determinations by the SWA on complaints under the ES regulations must be sent by certified mail (or another legally viable method) and a copy of the determination may be sent via electronic mail. The determination must include all the following:

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

(iii) * * *

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

* * * * *

(6) A complaint regarding the ES regulations must be processed to resolution by these regulations only if it is made within 2 years of the alleged occurrence.

* * * * *

■ 29. Amend § 658.417 by revising paragraph (b) to read as follows:

§ 658.417 State hearings.

* * * * *

(b) The State hearing official may decide to 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 if conducted together.

* * * * *

■ 30. Amend § 658.419 by:
■ a. Revising paragraph (a); and
■ b. Adding paragraph (d).

The revisions and addition read as follows:

§ 658.419 Apparent violations.

(a) If an ES staff member observes, has reason to believe, or is in receipt of

information regarding an apparent violation, except as part of a field check under § 653.503 of this chapter, the staff member must document the apparent violation and refer it to the ES Office Manager, who must ensure the apparent violation is documented in the Complaint System log, as described at § 658.410.

* * * * *

(d) Apparent violations of nondiscrimination laws must be processed according to the procedures described in § 658.411(c).

■ 31. Amend § 658.420 by revising paragraphs (b) and (c) to read as follows:

§ 658.420 Responsibilities of the Employment and Training Administration regional office.

* * * * *

(b) The Regional Administrator must designate Department of Labor officials to process ES regulation-related complaints as follows:

(1) All complaints received at the ETA regional office under this subpart that allege unlawful discrimination or reprisal for protected activity in violation of nondiscrimination laws, such as those enforced by the EEOC or 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 appropriate State-level E.O. Officer(s).

(2) All complaints other than those described in paragraph (b)(1) of this section must be assigned to a regional office official designated by the Regional Administrator, provided that the regional office official designated to process MSFW complaints must be the Regional Monitor Advocate (RMA).

(c) Except for those complaints under paragraph (b)(1) of this section, the Regional Administrator must designate Department of Labor officials to process employment-related law complaints in accordance with § 658.422, provided that the regional official designated to process MSFW employment-related law complaints must be the RMA. The RMA must follow up monthly on all complaints filed by MSFWs including complaints under paragraph (b)(1) of this section.

* * * * *

■ 32. Amend § 658.421 by revising the section heading, the first sentence of paragraph (a)(1), introductory text of (a)(2), the first sentences of paragraphs (a)(2)(i) and (b), and paragraphs (c) and (d) to read as follows:

§ 658.421 Processing of Wagner-Peyser Act Employment Service regulation-related complaints.

(a) Except as provided below in paragraph (a)(2) of this section, no complaint alleging a violation of the ES regulations may be processed at the ETA regional office level until the complainant has exhausted the SWA administrative remedies set forth at §§ 658.411 through 658.418. * * *

(2) If a complaint is submitted directly to the Regional Administrator and if they determine that the nature and scope of a complaint described in paragraph (a) of this section is such that the time required to exhaust the administrative procedures at the SWA level would adversely affect a significant number of individuals, the RA must accept the complaint and take the following action:

(i) If the complaint is filed against an employer, the regional office must process the complaint in a manner consistent with the requirements imposed upon State agencies by §§ 658.411 and 658.418. * * *

* * * * *

(b) The ETA regional office is responsible for processing appeals of determinations made on complaints at the SWA level. * * *

(c)(1) Once the Regional Administrator receives a timely appeal, they must request the complete SWA file, including the original Complaint/Referral Form from the appropriate SWA.

(2) The Regional Administrator must review the file in the case and must determine within 10 business days whether any further investigation or action is appropriate; however, if the Regional Administrator determines that they need to request legal advice from the Office of the Solicitor at the U.S. Department of Labor, then the Regional Administrator is allowed 20 business days to make this determination.

(d) If the Regional Administrator determines that no further action is warranted, the Regional Administrator will send their determination in writing to the appellant within 5 days of the determination, with a notification that the appellant may request a hearing before a Department of Labor Administrative Law Judge (ALJ) by filing a hearing request in writing with the Regional Administrator within 20 working days of the appellant's receipt of the notification.

* * * * *

■ 33. Amend § 658.422 by revising the section heading and paragraphs (a) through (c) to read as follows:

§ 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).

* * * * *

■ 34. 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.

* * * * *

■ 35. 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:

* * * * *

■ 36. Add § 658.427 to read as follows:

§ 658.427 Severability.

Should a court hold any portion of any provision of this part to be invalid, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or subprovision will be severable from this part and will not affect the remainder thereof.

■ 37. Amend § 658.602 by revising paragraphs (f)(2) through (4), (g), (j) introductory text, (j)(8), (l) through (n), (o) introductory text paragraph, (p) through (r), (s) introductory text

paragraph, and (s)(2) and (3) to read as follows:

§ 658.602 Employment and Training Administration National Office responsibility.

* * * * *

(f) * * *

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

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

(4) Take steps to refer non-ES-related problems of MSFWs which come to their attention;

* * * * *

(g) The NMA must be appointed by the Office of Workforce Investment Administrator (Administrator) after informing farmworker organizations and other organizations with expertise concerning MSFWs of the opening and encouraging them to refer qualified applicants to apply through the Federal merit system. Among qualified candidates, determined through merit systems procedures, individuals must be sought who meet the criteria used in the selection of the SMAs, as provided in SWA self-monitoring requirements at § 653.108(a) of this chapter.

* * * * *

(j) The NMA must monitor and assess SWA compliance with ES regulations affecting MSFWs on a continuing basis. Their assessment must consider:

* * * * *

(8) Their personal observations from visits to SWAs, ES offices, agricultural work sites, and migrant camps. In the Annual Report, the NMA must include both a quantitative and qualitative analysis of their findings and the implementation of their recommendations by State and Federal officials, and must address the information obtained from all of the foregoing sources.

* * * * *

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

(m) The NMA 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. The NMA must advise the OWI Administrator concerning all such proposed changes which may adversely affect MSFWs. The NMA must propose directly to the OWI Administrator changes in ES policy and administration which may substantially improve the delivery of services to MSFWs. They also must recommend changes in the funding of SWAs and/or adjustment or reallocation of the discretionary portions of funding formulae.

(n) The NMA must participate in the review and assessment activities required in this section and §§ 658.700 through 658.711. As part of such participation, the NMA, or if they are unable to participate, an RMA must accompany the National Office review team on National Office on-site reviews. The NMA must engage in the following activities during each State on-site review:

(1) They must accompany selected outreach staff on their field visits.

(2) They must participate in field check(s) of migrant camps or work site(s) where MSFWs have been placed on inter or intrastate clearance orders.

(3) They must contact local WIOA sec. 167 National Farmworker Jobs Program grantees or other farmworker organizations as part of the on-site review and discuss with representatives of these organizations current trends and any other pertinent information concerning MSFWs.

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

(o) In addition to the duties specified in paragraph (f) of this section, the NMA each year during the harvest season must visit the four States with the highest level of MSFW activity during the prior fiscal year, if they are not scheduled for a National Office on-site review during the current fiscal year, and must:

* * * * *

(p) The NMA must perform duties specified in §§ 658.700 through 765.711. As part of this function, they must monitor the performance of regional offices in imposing corrective action. The NMA must report any deficiencies in performance to the Administrator.

(q) The NMA 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. The NMA must attend conferences or meetings of these groups wherever possible and must report to the Administrator and the National Farm Labor Coordinated Enforcement Committee on these contacts when appropriate. The NMA must include in the Annual Report recommendations about how the Department might better coordinate ES and WIOA sec. 167 National Farmworker Jobs Program services as they pertain to MSFWs.

(r) In the event that any SMA or RMA, enforcement agency, or MSFW group refers a matter to the NMA which requires emergency action, the NMA must assist them in obtaining action by appropriate agencies and staff, inform the originating party of the action taken, and, upon request, provide written confirmation.

(s) Through all the mechanisms provided in this subpart, the NMA must aggressively seek to ascertain and remedy, if possible, systemic deficiencies in the provisions of ES services and protections afforded by these regulations to MSFWs. The NMA must:

* * * * *

(2) Provide technical assistance to ETA regional office and ES staff for 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 Committee on these contacts when appropriate. The RMA also must make recommendations as to how the Department might better coordinate ES and WIOA sec. 167 National Farmworker Jobs Program services to MSFWs.

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

(u) The RMA must attempt to achieve regional solutions to any problems, deficiencies, or improper practices concerning services to MSFWs which are regional in scope. Further, the RMA must recommend policies, offer technical assistance, or take any other necessary steps as they deem desirable or appropriate on a regional, rather than State-by-State, basis to promote region-wide improvement in the delivery of ES services to MSFWs. The RMA must facilitate region-wide coordination and communication regarding provision of ES services to MSFWs among SMAs, State Administrators, and Federal ETA officials to the greatest extent possible.

In the event that any SWA or other RMA, enforcement agency, or MSFW group refers a matter to the RMA which requires emergency action, the RMA must assist them in obtaining action by appropriate agencies and staff, inform the originating party of the action taken, and, upon request, provide written confirmation.

(v) The RMA must initiate and maintain such contacts as they deem necessary with RMAs in other regions to seek to resolve problems concerning MSFWs who work, live, or travel through the region. The RMA must recommend to the Regional Administrator and/or the National Office inter-regional cooperation on any particular matter, problem, or policy with respect to which inter-regional action is desirable.

* * * * *

■ 39. Amend § 658.604 by revising paragraph (c)(3)(i) to read as follows:

§ 658.604 Assessment and evaluation of program performance data.

* * * * *

(c) * * *

(3) * * *

(i) Generally, for example, a SWA has direct and substantial control over the delivery of ES services such as referrals to jobs, job development contacts, counseling, referrals to career and supportive services, and the conduct of field checks.

* * * * *

■ 40. Amend § 658.702 by revising paragraphs (a), (d), (e), (f)(2), and (h)(5) to read as follows:

§ 658.702 Initial action by the Regional Administrator.

(a) The ETA Regional Administrator is responsible for ensuring that all SWAs in their region are in compliance with ES regulations.

* * * * *

(d) If the Regional Administrator determines that there is no probable cause to believe that a SWA has violated ES regulations, they must retain all reports and supporting information in Department files. In all cases where the Regional Administrator has insufficient information to make a probable cause determination, they must so notify the Administrator in writing and the time for the investigation must be extended 20 additional business days.

(e) If the Regional Administrator determines there is probable cause to believe a SWA has violated ES regulations, they must issue a Notice of Initial Findings of Non-compliance by registered mail (or other legally viable means) to the offending SWA. The notice will specify the nature of the violation, cite the regulations involved, and indicate corrective action which may be imposed in accordance with paragraphs (g) and (h) of this section. If the non-compliance involves services to MSFWs or the Complaint System, a copy of said notice must be sent to the NMA.

(f) * * *

(2) After the period elapses, the Regional Administrator must prepare within 20 business days, written final findings which specify whether the SWA has violated ES regulations. If in the final findings the Regional Administrator determines the SWA has not violated ES regulations, the Regional Administrator must notify the State Administrator of this finding and retain supporting documents in their files. If the final finding involves services to MSFWs or the Complaint System, the Regional Administrator also must notify the RMA and the NMA. If the Regional Administrator determines a SWA has violated ES regulations, the Regional Administrator must prepare a Final Notice of Noncompliance which must specify the violation(s) and cite the regulations involved. The Final Notice of Noncompliance must be sent to the SWA by registered mail or other legally viable means. If the noncompliance involves services to MSFWs or the Complaint System, a copy of the Final Notice must be sent to the RMA and the NMA.

* * * * *

(h) * * *

(5) If, as a result of this review, the Regional Administrator determines the SWA has taken corrective action but is unable to determine if the violation has been corrected due to seasonality or other factors, the Regional Administrator must notify in writing the SWA and the Administrator of their findings. The Regional Administrator must conduct further follow-up at an appropriate time to make a final determination if the violation has been corrected. If the Regional Administrator's follow-up reveals that violations have not been corrected, the Regional Administrator must apply remedial actions to the SWA pursuant to § 658.704.

* * * * *

■ 41. Amend § 658.704 by revising the fifth sentence of paragraph (d) and the fourth sentence of (f)(2) to read as follows:

§ 658.704 Remedial actions.

* * * * *

(d) * * * The Regional Administrator must notify the SWA of their findings. * * *

* * * * *

(f) * * *

(2) * * * Two must be sent to the ETA National Office, one must be sent to the Solicitor of Labor, Attention: Associate Solicitor for Employment and Training, and, if the case involves violations of regulations governing services to MSFWs or the Complaint System, copies must be sent to the RMA and the NMA. * * *

■ 42. Amend § 658.705 by revising the introductory text of paragraphs (b) and (b)(3) and paragraphs (c) through (f) to read as follows:

§ 658.705 Decision to decertify.

* * * * *

(b) The Assistant Secretary must grant the request for decertification unless they make a finding that:

* * * * *

(3) The Assistant Secretary has reason to believe the SWA will achieve compliance within 80 business days unless exceptional circumstances necessitate more time, pursuant to the remedial action already applied or to be applied. (In the event the Assistant Secretary does not have sufficient information to act upon the request, they may postpone the determination for up to an additional 20 business days to obtain any available additional 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.

* * * * *

Laura P. Watson,

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