

**DEPARTMENT OF LABOR****Employment and Training Administration****20 CFR Part 677**

[Docket No. ETA–2022–0006]

RIN 1205–AC01

**DEPARTMENT OF EDUCATION****34 CFR Parts 361 and 463**

RIN 1830–AA32

**Workforce Innovation and Opportunity Act Effectiveness in Serving Employers Performance Indicator**

**AGENCY:** Office of Career, Technical, and Adult Education (OCTAE), Rehabilitation Services Administration (RSA), Department of Education; Employment and Training Administration (ETA), Department of Labor.

**ACTION:** Joint final rule.

**SUMMARY:** The Workforce Innovation and Opportunity Act (WIOA) establishes six primary indicators of performance and defines five of those performance indicators. With this final rule, the U.S. Departments of Labor and Education (Departments) define the sixth performance indicator—effectiveness in serving employers—as Retention with the Same Employer and require it be reported by one WIOA core program on behalf of all six WIOA core programs within each State. This final rule incorporates two changes from the notice of proposed rulemaking (NPRM): the final rule does not limit the type of wage information that must be used, thereby permitting the use of supplemental wage information in the definition of the effectiveness in serving employers performance indicator, and it specifies that the definition is measuring retention in unsubsidized employment.

**DATES:** This final rule is effective March 25, 2024.

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**Acronyms and Abbreviations**

AEFLA Adult Education and Family Literacy Act  
 AJC American Job Center  
 BLS Bureau of Labor Statistics  
 CFR Code of Federal Regulations  
 COVID–19 Coronavirus disease 2019  
 Departments U.S. Departments of Labor and Education  
 DOL U.S. Department of Labor  
 ED U.S. Department of Education

E.O. Executive Order  
 ETA Employment and Training Administration  
 FEIN Federal Employer Identification Number  
 FR Federal Register  
 GS General Schedule  
 ICR Information Collection Request  
 INA Indian and Native American  
 NAICS North American Industry Classification System  
 NPRM or proposed rule notice of proposed rulemaking  
 OCTAE Office of Career, Technical, and Adult Education  
 OEWS Occupational Employment and Wage Statistics  
 OIRA Office of Information and Regulatory Affairs  
 OMB Office of Management and Budget  
 PIRL Participant Individual Record Layout  
 PRA Paperwork Reduction Act of 1995  
 Pub. L. Public Law  
 PY Program Year  
 QCEW Quarterly Census of Employment and Wages  
 RFA Regulatory Flexibility Act  
 RIA Regulatory Impact Analysis  
 RIN Regulation Identifier Number  
 RSA Rehabilitation Services Administration  
 SBA U.S. Small Business Administration  
 SLDS Statewide Longitudinal Data System  
 Stat. United States Statutes at Large  
 SWIS State Wage Interchange System  
 TAC Technical Assistance Circular  
 TEGL Training and Employment Guidance Letter  
 UI Unemployment Insurance  
 UMRA Unfunded Mandates Reform Act  
 U.S.C. United States Code  
 VR Vocational Rehabilitation  
 WDB Workforce Development Board  
 WIOA Workforce Innovation and Opportunity Act

**I. Background**

In the final rule implementing WIOA,<sup>1</sup> the Departments indicated that they would initially implement the sixth indicator of performance—effectiveness in serving employers—in the form of a pilot program to test the feasibility and rigor of three proposed approaches.<sup>2</sup> The Departments assessed the pilot outcomes through Program Year (PY) 2021, and on September 14, 2022, published a NPRM to define in a single standardized way the effectiveness in serving employers performance indicator for the regulations implementing the jointly administered requirements governing WIOA's six core programs (87 FR 56318).<sup>3</sup>

<sup>1</sup> Public Law 113–128, 128 Stat. 1425 (2014).

<sup>2</sup> *Workforce Innovation and Opportunity Act; Joint Rule for Unified and Combined State Plans, Performance Accountability, and the One-Stop System Joint Provisions; Final Rule*, 81 FR 55792, 55845 (Aug. 19, 2016) (hereinafter “Joint WIOA Final Rule”).

<sup>3</sup> *Workforce Innovation and Opportunity Act Effectiveness in Serving Employers Performance Indicator; Joint Proposed Rule*, 87 FR 56318 (Sept.

*A. Rulemaking Authority and Effectiveness in Serving Employers Performance Indicator for WIOA Core Programs*

On July 22, 2014, President Barack Obama signed into law WIOA, which superseded titles I and II of the Workforce Investment Act of 1998 and amended the Wagner-Peyser Act and the Rehabilitation Act of 1973 (Rehabilitation Act). In WIOA sec. 503(f), Congress directed the Departments to issue regulations implementing statutory requirements to ensure that the public workforce system operates as a comprehensive, integrated, and streamlined system to provide pathways to prosperity and continuously improve the quality and performance of its services to job seekers and employers. The Secretaries of Labor and Education are also authorized to promulgate regulations governing the WIOA-authorized programs, the Wagner-Peyser Act programs, and the Vocational Rehabilitation (VR) program. Specifically, WIOA sec. 189(a) permits the Secretary of Labor to prescribe rules and regulations to carry out title I of WIOA. Similarly, section 12 of the Wagner-Peyser Act permits the Secretary of Labor to promulgate rules to administer the Wagner-Peyser Act programs. Section 410 of the General Education Provisions Act authorizes the Secretary of Education to promulgate regulations governing the programs the U.S. Department of Education (ED) administers, including title II of WIOA—the Adult Education and Family Literacy Act (AEFLA)—and the VR program. Section 414 of the Department of Education Organization Act also authorizes the Secretary of Education to prescribe rules and regulations necessary or appropriate to administer and manage the function of ED.

WIOA sec. 116 establishes the performance indicators<sup>4</sup> and

14, 2022) (hereinafter “Joint WIOA Effectiveness in Serving Employers NPRM”).

<sup>4</sup> WIOA sec. 116(b)(2)(A) states the primary indicators of performance: (1) the percentage of participants who are employed during the second quarter after exit from the program; (2) the percentage of participants who are employed during the fourth quarter after exit from the program; (3) the median earnings of participants who are employed during the second quarter after exit from the program; (4) the percentage of participants who obtain a recognized postsecondary credential during the program or within 1 year of exit from the program; (5) the percentage of participants who achieve measurable skill gains during a program year; and (6) “indicators of effectiveness in serving employers.” This last indicator is the subject of this final rule. Definitions of the other five performance indicators were included in the Joint WIOA Final

performance reporting<sup>5</sup> requirements to assess<sup>6</sup> the six WIOA core programs’ effectiveness in serving WIOA customers (*i.e.*, participants, other job seekers, and employers). The core programs are the adult, dislocated worker, and youth programs under title I of WIOA; the AEFLA program under title II of WIOA; programs authorized under the Wagner-Peyser Act as amended by WIOA title III; and the VR program authorized under title I of the Rehabilitation Act as amended by WIOA title IV.

In the 2016 Joint WIOA Final Rule, the Departments initiated a phased approach to defining the effectiveness in serving employers performance indicator. Currently, 20 CFR 677.155(a)(1)(vi) and 34 CFR 361.155(a)(1)(vi) and 463.155(a)(1)(vi) implement the effectiveness in serving employers performance indicator as described in WIOA sec. 116(b)(2)(A)(i)(VI), subject to WIOA sec. 116(b)(2)(A)(iv), which requires the Secretaries of Labor and Education to jointly develop and establish the performance indicator, after consultation with representatives of State and local governments, business and industry, and other interested parties. To that end, in developing the Joint WIOA Final Rule, the Departments consulted with stakeholders and considered public comments on three proposed approaches to defining the performance indicator, and in the Joint WIOA Final Rule, the Departments stated they would work to implement a pilot program, the details of which would be further delineated in joint Departmental guidance (81 FR 55792, 55846).

The pilot tested all three approaches described by the Departments in the Joint WIOA NPRM<sup>7</sup> and Joint WIOA Final Rule, with the intent of assessing each approach for its efficacy in measuring effectiveness in serving employers. The piloted approaches were

Rule (see 20 CFR 677.155, 34 CFR 361.155, 34 CFR 463.155).

<sup>5</sup> WIOA sec. 116(d)(2)(A) requires States to include in their performance report information specifying levels of performance achieved with respect to the primary indicators of performance referenced in footnote 4 *supra* and the State adjusted levels of performance for such indicators for each program.

<sup>6</sup> WIOA sec. 116(b)(3)(A) establishes the procedures at the State, local, and Federal levels to assess levels of performance by each program, and the State as a whole, for each performance indicator.

<sup>7</sup> *Workforce Innovation and Opportunity Act; Joint Rule for Unified and Combined State Plans, Performance Accountability, and the One-Stop System Joint Provisions; Notice of Proposed Rulemaking*, 80 FR 20574 (Apr. 16, 2015) (hereinafter “Joint WIOA NPRM”).

Retention with the Same Employer, Repeat Business Customer, and Employer Penetration, which are further discussed in Section II.A below. The Departments included these approaches in the WIOA Joint Performance Information Collection Request (ICR) (Office of Management and Budget (OMB) Control Number 1205–0526) and required each State<sup>8</sup> to report on any two of the three approaches set out in the Joint WIOA Final Rule, as well as any additional measure a State established related to services to employers.<sup>9</sup> On behalf of the Departments, the Department of Labor (DOL) commissioned an examination of State experiences with the various approaches through a third-party contractor, and the Departments used the results of that study to help inform their analysis of which definition of the effectiveness in serving employers performance indicator to propose in the Joint WIOA Effectiveness in Serving Employers NPRM.

*B. Public Comments Received on Proposed Rulemaking*

Because of the narrow scope of the regulation, the Departments encouraged commenters to submit only comments regarding the definition of the effectiveness in serving employers performance indicator and the indicator’s use in determining whether sanctions are necessary for failure to achieve adjusted levels of performance as set forth herein. The proposed amendments in the Joint WIOA Effectiveness in Serving Employers NPRM were on a limited number of provisions in the performance accountability regulations at 20 CFR part 677 and 34 CFR parts 361 and 463. Therefore, the Departments determined comments received on other provisions and aspects of the WIOA regulations that were not covered in this final rule, whether promulgated jointly by the Departments or independently by each agency, to be outside the scope of this rulemaking and, thus, did not consider those comments when developing this final rule.

<sup>8</sup> Throughout this final rule, the Departments use the term “State” to mean those geographical areas covered by the definitions of “State” and “outlying area,” in WIOA secs. 3(56) and 3(45), respectively. Therefore, for purposes of this final rule, “State” includes the 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, and for certain programs, the Republic of Palau.

<sup>9</sup> Governors had the option to establish and report on a third State-specific approach for measuring effectiveness in serving employers, in addition to two of the three Departmental pilot approaches selected by the State.

The Joint WIOA Effectiveness in Serving Employers NPRM invited written comments from the public concerning this rulemaking through November 14, 2022. No commenters requested an extension of the comment period. The comments received may be viewed by entering docket number ETA-2022-0006 at <https://www.regulations.gov>.

The Departments received 47 comments in the docket for this rulemaking, and the docket for the *Workforce Innovation and Opportunity Act Title I Non-Core Programs Effectiveness in Serving Employers Performance Indicator* NPRM (ETA-2022-0005, RIN 1205-AC08) published concurrently with the Joint WIOA Effectiveness in Serving Employers NPRM received 11 comments related to the Joint WIOA Effectiveness in Serving Employers NPRM. Of those 58 comments, 43 were unique; 14 were form letter copies, and 1 was not germane. Public sector commenters included State and local government agencies, State and local workforce development boards, and one-stop operators. Nonprofit sector commenters included advocacy groups, professional associations, and training providers. Of the unique comments, about one-third came from State workforce agencies and State VR agencies. The Departments also received comments from private citizens.

This section of the final rule provides a general overview of the comments received. Section II (Section-by-Section Analysis of this Final Rule), which follows this section, describes the comments in more detail and provides the Departments' responses to them.

A commenter expressed general support for the proposed rule because, in their view, it would benefit the workforce and promote cost savings for employers in the long term. Many commenters addressed the pilot program in a myriad of ways, including discussing the advantages and disadvantages of the piloted approaches for measuring effectiveness in serving employers, making alternative recommendations, requesting flexibilities, and seeking an extension of certain aspects of the pilot.

The Departments' proposal to use Retention with the Same Employer as the indicator for measuring effectiveness in serving employers received mixed reviews, with a few agreeing that it is the preferred approach while others expressed concerns that it would not measure the right things.

A few commenters asked the Departments for clarification about how the proposed indicator will be

calculated and implemented, with some describing potential issues in data collection or recommending different approaches to calculating the indicator. Other commenters recommended that the Departments allow the use of supplemental wage information in the definition of effectiveness in serving employers. Responding to a request for comment in the proposed rule, some commenters offered recommendations about ways the Departments could mitigate potential unintended consequences and downsides of the Retention with the Same Employer measure.

Several commenters provided feedback on the Departments' proposal that the overall State indicator score for effectiveness in serving employers be a shared outcome reported by one core program on behalf of all six core programs in the State, with some opposing that approach and others supporting it. A few commenters focused on concerns about the administration and implementation of a shared outcome, requesting clarification about local level implementation of the effectiveness in serving employers performance indicator, and provided recommendations to the Departments with regard to certain aspects of implementation. A few commenters provided input on the administrative burden proposed in the Regulatory Impact Analysis (RIA) of the Joint WIOA Effectiveness in Serving Employers NPRM.

Additionally, a few commenters provided feedback on topics not within the scope of the rulemaking, including earnings data collected by workforce development boards and types of measurable skill gains under WIOA. The Departments appreciate the thoughtfulness of these comments and will address those germane to this final rule in the section-by-section analysis below. However, as explained in the Joint WIOA Effectiveness in Serving Employers NPRM and above, the scope of this rulemaking is limited to amendments to the definition of the effectiveness in serving employers performance indicator and the indicator's use in determining whether sanctions are necessary for failure to achieve adjusted levels of performance as set forth in the proposed rule. Because these comments pertain to other provisions and aspects of the WIOA regulations, they are considered outside the scope of this rulemaking and are not addressed in the section-by-section analysis below.

### *C. Summary of Changes From NPRM to Final Rule of the Effectiveness in Serving Employers Performance Indicator for WIOA Core Programs and Local Level Implementation for DOL-Administered Core Programs*

The final rule implements Retention with the Same Employer as the definition for the effectiveness in serving employers indicator, as proposed in the NPRM, with two changes. First, this final rule removes the requirement that wage records be used to document a participant's employment status for purposes of the effectiveness in serving employers performance indicator, thereby allowing for the use of supplemental wage information as States are permitted to collect and report for purposes of the three employment performance indicators defined by WIOA sec. 116. Second, the final rule definition for effectiveness in serving employers now uses the term "unsubsidized employment" to better align with WIOA statutory language used in WIOA sec. 116 with respect to other performance indicators, specifically referring to unsubsidized employment in the second and fourth quarters after exit, which are key inputs to the definition of Retention with the Same Employer.

Regarding commenters' concerns and requests for clarification about local level implementation, as detailed below, the Departments have determined that WIOA sec. 116(c)(1)(A)(i) requires that all of the primary indicators of performance, including the effectiveness in serving employers performance indicator, must be applied at the local level for the WIOA title I programs (Adult, Dislocated Worker, and Youth).<sup>10</sup> Therefore, States must apply the effectiveness in serving employers performance indicator at the local level. The Departments believe this indicator should be assessed at each level for the WIOA title I programs in the same manner as the other primary indicators of performance are assessed.

## **II. Section-by-Section Analysis of This Final Rule**

In the discussion of the regulatory text changes below, the heading references the DOL CFR part and section number. However, ED has identical provisions at 34 CFR part 361, subpart E (under its State VR program regulations) and at 34 CFR part 463, subpart I (under its AEFLA regulations). For purposes of

<sup>10</sup> Pursuant to WIOA sec. 116(c)(1)(A)(i), the requirement to implement the primary indicators of performance at the local level do not apply to the other core programs, specifically the AEFLA, Wagner-Peyser Act, and VR programs.

brevity, the discussion of regulatory text changes below appears only once—in conjunction with the DOL section number—but is applicable to all three regulatory sections and constitutes the Departments' collective explanation of the final rule. These changes to the joint performance regulations will appear in each of the CFR parts identified in this paragraph when the regulations are published in the CFR.

Section II of the final rule provides the Departments' responses to comments and explains the two changes in the language of the final rule from the proposed rulemaking. Section II.A provides greater background detail on the pilot for effectiveness in serving employers, comments regarding the pilot, commenters' suggestions for other approaches to measuring effectiveness in serving employers that were not part of the pilot, and the Departments' rationale for choosing Retention with the Same Employer as the definition of the effectiveness in serving employer performance indicator. Section II.B discusses comments received on the proposal to modify § 677.155 to adopt Retention with the Same Employer as the definition for the effectiveness in serving employers performance indicator and explains the Departments' decision to finalize the measure with two changes from the NPRM, as suggested by multiple commenters. Section II.C discusses comments on proposed modifications to § 677.190 where the effectiveness in serving employers performance indicator is incorporated into adjusted levels of performance.

#### *A. Departments' Rationale for Retention With the Same Employer as the Definition of the Effectiveness in Serving Employers Performance Indicator*

This section provides background detail on the pilot for effectiveness in serving employers, comments regarding the pilot, commenters' suggestions for other approaches to measuring effectiveness in serving employers that were not part of the pilot, and the Departments' rationale for choosing Retention with the Same Employer as the definition of the effectiveness in serving employer performance indicator.

In developing the Joint WIOA Effectiveness in Serving Employers NPRM, the Departments reviewed

annual report data<sup>11</sup> for Program Year (PY) 2017 through PY 2020<sup>12</sup> for each of the three approaches for measuring effectiveness in serving employers piloted as described in the 2016 Joint WIOA Final Rule, with a focus on using information that would provide an accurate picture of how well the public workforce system serves employers while minimizing employer burden. Specifically, States, under guidance from the Departments (hereinafter "joint guidance"), piloted the following definitions for the effectiveness in serving employers performance indicator:<sup>13</sup>

<sup>11</sup> The indicator is reported on an annual basis; therefore, the reporting period is the program year from July 1 through June 30.

<sup>12</sup> ETA, "Workforce Performance Results," <https://www.dol.gov/agencies/eta/performance/results> (last visited Oct. 23, 2021); ETA, "PY 2020 WIOA National Performance Summary," Feb. 28, 2022, <https://www.dol.gov/sites/dolgov/files/ETA/Performance/pdfs/PY%202020%20WIOA%20National%20Performance%20Summary.pdf> (last visited July 31, 2023). PY 2020 data were the most current information available at the time of the Joint WIOA Effectiveness in Serving Employers NPRM in September 2022 and, thus, were included in the Departments' rationale for the Joint WIOA Effectiveness in Serving Employers NPRM. At the time of the development of this final rule, PY 2021 data are available and are discussed below. The PY 2021 data support the Departments' rationale in this final rulemaking. ETA, "PY 2021 WIOA National Performance Summary," Feb. 28, 2022, <https://www.dol.gov/sites/dolgov/files/ETA/Performance/pdfs/PY%202021%20WIOA%20National%20Performance%20Summary.pdf> (last visited July 31, 2023).

<sup>13</sup> The Departments issued joint guidance on December 19, 2016, "Performance Accountability Guidance for Workforce Innovation and Opportunity Act (WIOA) Title I, Title II, Title III, and Title IV Core Programs" (Training and Employment Guidance Letter [TEGL] No. 10–16, OCTAE Program Memorandum 17–2, and RSA Technical Assistance Circular [TAC] 17–01), that described the pilot indicators for effectiveness in serving employers. The Departments updated this joint guidance in August 2017, with the issuance of a change to the guidance, and required States to submit the first report of annual results using data collected during PY 2017 (July 1, 2017–June 30, 2018), meaning that States did not report any data for the pilot study for purposes of PY 2016. However, due to the lag in Quarterly Census of Employment and Wages (QCEW) data availability for the Retention with the Same Employer and Repeat Business Customer approaches, the initial results for the effectiveness in serving employers performance indicator pilot were not available for reporting in the WIOA annual report due October 16, 2017. As a result, States reported their initial data in PY 2017. ETA, TEGL No. 10–16, Change 1, "Performance Accountability Guidance for Workforce Innovation and Opportunity Act (WIOA) Title I, Title II, Title III, and Title IV Core Programs," Aug. 23, 2017, page 26, [https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=3255](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3255); ED, OCTAE Program Memorandum 17–2, "Performance Accountability

- *Retention with the Same Employer:* Percentage of participants with wage records who exit from WIOA core programs and were employed by the same employer in the second and fourth quarters after exit.

- *Repeat Business Customer:* Percentage of employers who have used WIOA core program services more than once during the last three reporting periods.

- *Employer Penetration:* Percentage of employers using WIOA core program services out of all employers in the State.

During the pilot,<sup>14</sup> the Departments determined that the effectiveness in serving employers performance indicator should be a shared outcome across all six core programs within each State (*i.e.*, meaning that one program would report on behalf of all six core programs in the State), rather than reported separately by each of the six core programs.

For PY 2021—the most recent data available at the time the Departments made their decisions for this final rulemaking—the piloted approaches for the effectiveness in serving employers performance indicator provided the following performance results:<sup>15</sup>

- *Retention with the Same Employer PY 2021 Rate:* 56 percent (35 States reported effectiveness in serving employers performance using this definition);

- *Repeat Business Customer PY 2021 Rate:* 35 percent (47 States reported using this definition); and

Guidance for Workforce Innovation and Opportunity Act (WIOA) Title I, Title II, Title III, and Title IV Core Programs," Aug. 23, 2017, page 23, <https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/octae-program-memo-17-2.pdf>; ED, RSA–TAC–17–01, "Performance Accountability Guidance for Workforce Innovation and Opportunity Act (WIOA) Title I, Title II, Title III, and Title IV Core Programs," Aug. 17, 2017, page 23, <https://rsa.ed.gov/sites/default/files/subregulatory/tac-17-01.pdf>.

<sup>14</sup> The pilot study began in PY 2016 and lasted through PY 2021. However, States must continue to report on the piloted measures for the effectiveness in serving employers performance indicator until these final regulations take effect.

<sup>15</sup> The most current public workforce system performance accountability data can be found on ETA's website. ETA, "Workforce Performance Results," <https://www.dol.gov/agencies/eta/performance/results> (last visited Oct. 13, 2023). See ETA, "PY 2021 WIOA National Performance Summary," Dec. 22, 2022, page 9, <https://www.dol.gov/sites/dolgov/files/ETA/Performance/pdfs/PY%202021%20WIOA%20National%20Performance%20Summary.pdf>.

• *Employer Penetration PY 2021*  
Rate: 8 percent (48 States reported using this definition).

Exhibit 1 summarizes this information and provides further detail about the calculation methodology used to

determine the outcome rate for the three approaches.

EXHIBIT 1—PILOT DEFINITION OUTCOMES FOR PROGRAM YEAR 2021

Pilot definition	Performance outcome national rate (%)	Pilot definition calculation methodology*	Number of states reporting outcomes for definition
Retention with the Same Employer	56	The number of participants with wage records who exit during the reporting period and were employed by the same employer during the second quarter after exit and the fourth quarter after exit <i>DIVIDED</i> by the number of participants with wage records who exit and were employed during the second quarter after exit.	35
Repeat Business Customer .....	35	The total number of establishments, as defined by the Bureau of Labor Statistics (BLS) Quarterly Census of Employment and Wages (QCEW) program, served during the current reporting period ( <i>i.e.</i> , one program year) and that during the prior three reporting periods have used core program services more than once <i>DIVIDED</i> by the number of establishments, as defined by BLS QCEW, served during the current reporting period.	47
Employer Penetration .....	8	The total number of establishments, as defined by the BLS QCEW program, that received a service or, if it is an ongoing activity, are continuing to receive a service or other assistance during the reporting period <i>DIVIDED</i> by the total number of establishments, as defined by BLS QCEW. This measure is a unique count of employers using WIOA core programs. If an establishment receives, or continues to receive, more than one service during the reporting period ( <i>i.e.</i> , during the program year), that establishment should be counted only once in this calculation.	48

\* As described in the joint guidance issued by the Departments.

Throughout the pilot period, only one State reported on a State-specific approach to the effectiveness in serving employers performance indicator.<sup>16</sup> However, this State-specific approach was only applied to Wagner-Peyser Act programs (as amended by WIOA title III), not all six core programs.<sup>17</sup>

The Departments assessed the pilot through a DOL contract that resulted in a final report titled *Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act*.<sup>18</sup> (hereinafter referred

to as the Final Pilot Study Report). Specifically, the Final Pilot Study Report assessed each approach to defining the effectiveness in serving employers performance indicator for validity, reliability, practicality, and unintended consequences.<sup>19</sup> Though the Final Pilot Study Report did not definitively recommend one approach, in assessing the study’s findings for each of the three approaches of the effectiveness in serving employers performance indicator and considering the subject matter expertise gained through the Departments’ administration of WIOA, the Departments concluded, as explained in the Joint WIOA Effectiveness in Serving Employers NPRM, that Retention with the Same Employer provides a valid and reliable approach to measuring the

indicator, while placing the least amount of burden on States to implement it.

The Departments received several comments regarding the pilot, findings from the Final Pilot Study Report, and alternatives to measuring the effectiveness in serving employers performance indicator. These comments and the Departments’ responses are discussed below.

Suggestions To Use Multiple Performance Indicators To Measure Effectiveness in Serving Employers

*Comments:* One commenter asserted that the Retention with the Same Employer measure only provides a partial perspective for how the system is serving employers and urged the Departments to consider the other performance measures piloted over the previous period, as well as additional information, to more comprehensively demonstrate the impact of services rendered to employers.

A commenter stated that the Final Pilot Study Report noted the benefit of using multiple measures to understand the WIOA system’s effectiveness in serving employers. According to the commenter, the Final Pilot Study Report asserted that because the system uses multiple measures to understand the system’s effectiveness in serving workers, it would make sense to use

<sup>16</sup> See Shayne Spaulding, Burt Barnow, Amanda Briggs, John Trutko, Alex Trutko, and Ian Hecker, “Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act,” Jan. 2021, Chapter 5 (Alternative Measures and Data Sources), [https://wdr.doleta.gov/research/FullText\\_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers\\_Final%20Report.pdf](https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers_Final%20Report.pdf) (hereinafter “Final Pilot Study Report”).

<sup>17</sup> One State reported a State-specific approach to measuring effectiveness in serving employers, which the State called “Active Job Orders with Referrals.” This measure is explained in the State’s PY 2019 WIOA Annual Statewide Performance Report Narrative, which can be accessed at [https://www.dol.gov/sites/dolgov/files/eta/performance/pdfs/PY2019/PA\\_PY19%20WIOA%20Annual%20Report%20Narrative.pdf](https://www.dol.gov/sites/dolgov/files/eta/performance/pdfs/PY2019/PA_PY19%20WIOA%20Annual%20Report%20Narrative.pdf) (last visited Jan. 27, 2022).

<sup>18</sup> S. Spaulding, et al., “Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act,” Jan. 2021,

[https://wdr.doleta.gov/research/FullText\\_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers\\_Final%20Report.pdf](https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers_Final%20Report.pdf).

<sup>19</sup> See *id.* at 3–6 (stating that validity “is used to assess whether you are measuring what you intend to measure”; that reliability “refers to the ability to maintain consistency in data collection over time and across organizations collecting the data”; that practicality means that the measure “must be relatively uncomplicated and simple to administer to avoid threats to reliability and validity” and “must be practical to use in administering programs”; and that unintended consequences are “negative consequences or behaviors that result, like the displacement of goals or conflict with other goals”).

multiple measures to understand the system's effectiveness in serving employers. The commenter suggested additional data collection methods to better understand the system's effectiveness in meeting employers' needs, including periodic, random, and anonymous satisfaction surveys for both workers and employers, WIOA system user satisfaction surveys, and focus groups with both workers and employers.

*Departments' Response:* As discussed in more detail in the introduction to Section II.A. above, the Final Pilot Study Report considered each approach to defining the effectiveness in serving employers performance indicator for validity, reliability, practicality, and unintended consequences. Based upon a review of the pilot results, the Departments determined that a single measure best limits the implementation burden to States. Moreover, while the Final Pilot Study Report may have noted advantages for using multiple measures to understand the system's effectiveness in serving employers, the Departments note, in response to the commenter, that the Final Pilot Study Report did not definitively conclude multiple measures were necessary to assess effectiveness in serving employers. Therefore, the Departments decline to amend this final rule to use multiple approaches for defining the effectiveness in serving employers indicator of performance.

Over the pilot period and through stakeholder engagements, the Departments heard from employers about the burden of surveys and the preference for a measure that did not rely on survey responses. Because a survey would be too burdensome, the Departments decline to accept the suggestion to use surveys to assess effectiveness in serving employers.

#### Alternative Approaches to Defining Effectiveness in Serving Employers Performance Indicator

*Comments:* The Departments received comments in support of alternative approaches to measuring effectiveness in serving employers. These comments included preferences for other piloted approaches (Employer Penetration and Repeat Business Customer) or variations thereof, as well as a variety of suggestions for application of those various metrics.

Other commenters voiced support for different approaches, such as tracking work-based learning services, using employer satisfaction surveys, and tracking a suite of data points: number of job orders posted and number of candidates referred per posting; use of

incumbent worker training (by percentage of WIOA funds used and number of businesses served); number, array, and availability of business services offered by a workforce development board or American Job Center (AJC); funding passed from workforce development boards or AJCs through to local businesses; or number of businesses engaged with Registered Apprenticeship opportunities through workforce development boards or AJCs.

A different commenter suggested Employer Penetration could be improved by measuring the increase in businesses served rather than the actual penetration rate, using a recording period longer than a quarter, and using penetration figures determined by 3-digit North American Industry Classification System (NAICS) sectors.

*Departments' Response:* The Departments acknowledge the various benefits of the different proposed pilot approaches for measuring the effectiveness in serving employers indicator. The Departments also appreciate the suggestions of different additional approaches to be considered; however, these metrics do not apply well to all six WIOA core programs due to differences in program design. For example, among the WIOA core programs, only Wagner-Peyser Act programs provide job order services to employers. Therefore, a job order measure would not be applicable to all six WIOA core programs. Moreover, as noted in the introduction to Section II.A. above, throughout the 6-year pilot period, States could submit a State-specific approach for measuring effectiveness in serving employers. Only one State did so throughout the pilot period, which suggests that States did not identify any viable additional approaches. The Departments do not believe it is prudent to impose untested, unpiloted approaches, through this final rule, particularly given the benefits and use of the Retention with the Same Employer metric.

The suggested alternative approaches mentioned in the comments, such as Employer Penetration and Repeat Business Customer, were ultimately not selected as indicators of employer satisfaction due to (1) the nature of a very low employer penetration rate compared to all businesses within a State, leading to difficulties in improving the measure over time; and (2) the fact that a satisfied business may not need to partner with the State workforce system again. Additionally, these alternative measures are not based on existing standardized reporting mechanisms, would be impractical to apply to all grantees across core

programs, and would not fully track satisfied employers based on measuring only outputs of services provided.

In the Joint WIOA Effectiveness in Serving Employers NPRM, the Departments explained their rationale for proposing the Retention with the Same Employer measure and not proposing either Employer Penetration or Repeat Business Customer as the definition for the effectiveness in serving employers performance indicator. Specifically, the Departments noted in the Joint WIOA Effectiveness in Serving Employers NPRM that Employer Penetration, which reports the percentage of employers using services out of all employers in the State, would have required counts of services provided to employers requiring States and local areas to report unique counts of employer establishments receiving services through the WIOA core programs. While the Employer Penetration definition would have the benefit of capturing the extent to which employers within a State are engaged with WIOA core programs and would provide those programs an incentive to work with additional employers, it would require a more data-intensive analysis than the Retention with the Same Employer approach. Additionally, in the Final Pilot Study Report, the Department found significant weaknesses in this pilot approach including: (1) emphasis on quantity rather than quality or intensity of the employer service provided; (2) reliability issues associated with data entry and the process to count unique establishments; (3) measurement of program output rather than outcome; (4) potential for creation of perverse incentives to prioritize program breadth rather than depth in services; and (5) lack of sensitivity to industry sectors targeted by State and local workforce agencies.

The Repeat Business Customer definition, which reports the percentage of employers receiving services in a year who also received services within the previous 3 years requires a more data-intensive analysis than the Retention with the Same Employer. In the Final Pilot Study Report, the Department also found significant weaknesses in this pilot approach including that it: (1) may provide a disincentive to reach out to new employers; (2) is subject to variation in industry and sector economic conditions; and (3) may require a statistical adjustment model to mitigate the weaknesses and improve implementation and interpretation.

As we summarized in the introduction to Section II.A., comments received in response to the NPRM, the

findings of an independent study conducted on the pilot, and the data reported by States in their annual reports, all considered, have not persuaded the Departments to change course and adopt either of the other alternative definitions for the effectiveness in serving employers performance indicator. Instead, the Departments adopt through this final rule the Retention with the Same Employer measure as the definition for the effectiveness in serving employers performance indicator as proposed. *See* 87 FR 56318, 56323.

Regarding employer satisfaction surveys, the Departments note that employer satisfaction surveys introduce a higher level of burden and potentially inconsistent results because of the subjective nature of such surveys and the respondents completing them compared to the quantifiable and verifiable employment data collected and reported for the Retention with the Same Employer metric. Furthermore, during previous webinars and town halls with State workforce agencies, members of the employer community, and other stakeholders that the Departments held in September and October 2014 to inform the development of the Joint WIOA NPRM (80 FR 20609) and the Joint WIOA Final Rule (81 FR 55792, 55848),<sup>20</sup> employers specifically commented that they consider satisfaction surveys burdensome and recommended they not be used in this indicator. At that time, several employers also provided input that reducing employee turnover was paramount for their success.

The Departments appreciate the commenters' ideas for additional data points to be collected and encourage States to do so where it aids in guiding service delivery policies. Specifically, commenters recommended including collecting and reporting data on: the number of job orders posted and number of candidates referred per posting; use of incumbent worker

training (by percentage of WIOA funds used and number of businesses served); number, array, and availability of business services offered by a workforce development board or AJC; funding passed from workforce development boards or AJCs through to local businesses; or number of businesses engaged with Registered Apprenticeship opportunities through workforce development boards or AJCs. The Departments decline to use these additional data points in defining the effectiveness in serving employers indicator because they are not applicable to all of the programs, and in cases where the metric is a count of services they would merely measure the quantity of services provided to employers rather than the effectiveness of those services. The Departments believe these suggestions would measure outputs compared to an outcome. In most cases, an output like the number of services provided may not correlate to the ultimate goal, placing and retaining quality employees in this case, and therefore is not ideal for measuring effectiveness in serving employers.

After careful consideration of public comment opportunities, ongoing State stakeholder engagement efforts,<sup>21</sup> review of pilot data and narrative input submitted since 2017 through required annual performance reports,<sup>22</sup> and a third-party study, the Departments concluded that the Retention with the Same Employer approach provided a valid and reliable approach to measuring the indicator while placing the least amount of burden on States to implement.

#### Recommendation To Extend Pilot for an Additional 2 Years and Allow More Time for Testing Other Measures

*Comments:* Numerous commenters recommended that the pilot be extended for an additional 2 years to allow for the development of new and innovative indicators and urged that States be

encouraged to propose such indicators. Several commenters remarked on the interruptions the Coronavirus disease 2019 (COVID-19) pandemic caused to the labor market and the resulting difficulties with the collection of representative and useful data during the pilot.

A commenter recommended that the Departments allow additional time for States to identify and test different ways of measuring participant career progression instead of only employee retention.

*Departments' Response:* After reviewing the outcomes of the Final Pilot Study Report and the information learned in the study, the Departments determined the 6-year pilot period was sufficient to gather relevant experience with the possible approaches. There is no evidence to suggest, and the commenters did not provide any such evidence, that extending the pilot period for potential approaches to measure effectiveness in serving employers would result in substantially new information. WIOA reporting did not cease during the COVID-19 pandemic, and States still submitted pilot data. While there was an impact on some service delivery, particularly with respect to the approaches used for delivering those services, there was no change in the Departments' expectations for States to continue to provide services to participants and employers. Therefore, the Departments believe that the data from the program years affected by the pandemic are representative and useful to determine the definition of the effectiveness in serving employers performance indicator, and these same years will provide useful data for purposes of the statistical adjustment model when the Departments determine there are sufficient data available to produce reliable results to assess for performance of this indicator. Furthermore, there has been ample time to test and provide suggestions for other potential approaches to measure this indicator during the pilot period. The Departments do not agree that extending the pilot period for identifying new potential measures for the effectiveness in serving employers indicator at this time would likely result in substantially new information, particularly given that only one State developed its own measure during the pilot period that lasted 6 program years, which was ample time for States to suggest an alternative metric (see the introduction to Section II.A. for complete discussion). Therefore, the Departments decline to extend the pilot phase and, instead, have decided to define the indicator as described in this final rule.

<sup>20</sup> The Departments conducted an extensive consultation process regarding methods for measuring the effectiveness in serving employers performance indicator. Prior to publication of the Joint WIOA NPRM, the Departments engaged with numerous stakeholders through a series of town hall meetings with State workforce agencies, State and local workforce development boards, and members of the employer community in September and October 2014, in various cities across the country (80 FR 20609). A great deal of discussion regarding proposed methods for measuring this indicator took place during the consultation process. The outcome of these discussions was the three options listed in the NPRM. Understanding the importance of receiving extensive feedback on this issue, the Departments requested further input via the NPRM and the WIOA Joint Performance ICR (81 FR 55848).

<sup>21</sup> ETA's WorkforceGPS technical assistance website provides access to materials from trainings and stakeholder engagements, including (1) the Effectiveness in Serving Employers Resource Page accessible at <https://performancereporting.workforcegps.org/resources/2018/01/29/21/13/Effectiveness-in-Serving-Employers-Resource-Page>, (2) the 2019 Performance Accountability Training accessible at [https://performancereporting.workforcegps.org/resources/2019/10/03/20/25/WIOA\\_2019\\_Performance\\_Accountability\\_Training](https://performancereporting.workforcegps.org/resources/2019/10/03/20/25/WIOA_2019_Performance_Accountability_Training), and (3) the January 2020 Peer Learning Group event accessible at <https://www.workforcegps.org/events/2020/01/13/17/40/WIOA-Performance-Peer-Learning-Group-Effectiveness-in-Serving-Employers>.

<sup>22</sup> Annual performance reports can be found on ETA's website. ETA, "Workforce Performance Results," <https://www.dol.gov/agencies/eta/performance/results> (last visited Apr. 26, 2023).

The Departments believe this definition, as adopted in this final rule, will promote accountability in serving employers and ultimately benefit workforce system participants.

After careful consideration of the information gained from the States' reports on using the three piloted approaches, the Final Pilot Study Report's findings, and the comments on the pilot and other potential approaches to defining effectiveness in serving employers, the Departments are finalizing the proposed definition of the effectiveness in serving employers performance indicator as Retention with the Same Employer on a statewide level. As discussed in further detail below in Section II.B, this final rule implements the proposed changes to 20 CFR 677.155(a)(1)(vi) and (c)(6), with one modification.

WIOA sec. 116(b)(2)(A)(i)(VI) applies the same effectiveness in serving employers performance indicator to four non-core programs DOL administers under WIOA title I.<sup>23</sup> For consistency and alignment across WIOA programs, in addition to all the reasons discussed above, DOL is incorporating this same definition for the effectiveness in serving employers performance indicator into regulations in a separate, but related, rulemaking, *DOL-Only Performance Accountability Final Rule* (RIN 1205-AC08), published concurrently with this final rule elsewhere in the **Federal Register**.

*B. Retention With the Same Employer for the Effectiveness in Serving Employers Performance Indicator in § 677.155*

§ 677.155 What are the primary indicators of performance under the Workforce Innovation and Opportunity Act?

Section 677.155 sets forth the primary indicators of performance that the Departments use to evaluate the performance of WIOA's six core programs, as required by WIOA sec. 116(b)(2)(A)(i). These primary performance indicators apply to the six WIOA core programs (*i.e.*, adult, dislocated worker, and youth programs, the AEFLA program, Wagner-Peyser Act programs, and the VR program). These primary performance indicators create a common language shared across the programs' performance measures, support system alignment, enhance

programmatic decision-making, and help participants make informed decisions related to training, all of which are consistent with the purposes of WIOA as stated in WIOA sec. 2. Paragraphs 677.155(a)(1)(vi) and (c)(6) implement the sixth statutory performance indicator as described in WIOA sec. 116(b)(2)(A)(i)(VI), subject to WIOA sec. 116(b)(2)(A)(iv), which requires the Departments to develop the indicator after consultation with the stakeholders listed at WIOA sec. 116(b)(4)(B) and discussed above. This performance indicator measures program effectiveness in serving employers.

In this final rulemaking, for the reasons discussed in the NPRM and in Section II.A. above, the Departments have decided to revise § 677.155(a)(1)(vi) to establish Retention with the Same Employer as the standard definition for measuring effectiveness in serving employers, the sixth performance indicator for all WIOA core programs. The final rulemaking removes the general title of "effectiveness in serving employers";<sup>24</sup> defines Retention with the Same Employer as the percentage of participants who exited the program in unsubsidized employment and were employed by the same employer in the second and fourth quarters after exiting the program; clarifies that, for the six WIOA core programs, the indicator is a statewide indicator that is reported by one core program on behalf of all six core programs in the State; and references guidance to signal to States that the Departments will provide additional details and explanations for reporting on the effectiveness in serving employers performance indicator in joint guidance. The final rulemaking also updates § 677.155(c)(6) to define effectiveness in serving employers as Retention with the Same Employer for the WIOA title I youth program in a manner that mirrors the definition for the other WIOA core programs in paragraph (a)(1)(vi) as just described.

For the reasons discussed below, in response to multiple comments received to allow for the use of supplemental wage information in the definition of measuring effectiveness in serving employers, this final rulemaking removes references to wage records in § 677.155 that had been proposed in the

Joint WIOA Effectiveness in Serving Employers NPRM. This change clarifies that the sources of wage data are not limited, meaning they could be wage records or supplemental wage information. As noted above, the Departments also want to make clear the final rule uses the term "unsubsidized employment" to align the effectiveness in serving employers performance indicator to WIOA statutory language, specifically referring to unsubsidized employment in the second and fourth quarters after exit, which are key inputs to this indicator's definition of Retention with the Same Employer.

*Support for Retention With the Same Employer*

*Comments:* Several commenters were generally supportive of the proposal to use Retention with the Same Employer as the definition for effectiveness in serving employers. Supportive comments include assertions that when an employee is performing their duties competently, their employer generally tries to retain the employee. Similarly, other commenters stated that Retention with the Same Employer demonstrates the effectiveness with which employee skills and training have been matched to employer needs. Another commenter argued that Retention with the Same Employer demonstrates a continued relationship between the employer and participants, as well as the success of WIOA customers, while the other two piloted approaches are based only on employer data and fail to capture job match effectiveness. Another commenter expressed support for the proposal because, in their view, it would benefit the workforce and promote cost savings for employers in the long term.

Several commenters agreed with the Departments' conclusion that Retention with the Same Employer would be the least burdensome definition of the three piloted measures. Similarly, another commenter agreed that this definition would be the least burdensome approach because States already collect wage records for other WIOA-related reporting and because States would be able to coordinate data aggregation for the six core programs more easily with this measure than with the other two piloted measures. Another echoed this sentiment, adding that the measure would be based on data that is objective, already collected by many States, and that can be standardized across States and territories.

*Departments' Response:* We appreciate commenters supporting Retention with the Same Employer as the definition for effectiveness in

<sup>23</sup> WIOA secs. 159(c), 166(h), 167(c)(3), and 171(f) direct the Secretary of Labor to establish levels of performance for the relevant primary indicators of performance in WIOA sec. 116(b)(2)(A) for the Job Corps program, Indian and Native American programs, the National Farmworker Jobs Program, and the YouthBuild program, respectively.

<sup>24</sup> The regulations for definitions for the other WIOA performance indicators do not include descriptive or general names of the indicators; they simply provide the definitions of the indicators. For consistency with the regulations for the other indicators, final § 677.155(a)(1)(vi) removes the name of the effectiveness in serving employers indicator and adds the definition.



serving employers. As discussed in more detail in Section II.A., we agree that this definition best aligns with WIOA employment performance indicators by using existing Participant Individual Record Layout (PIRL) terms and data elements (*i.e.*, use of “participants,” “unsubsidized employment,” and “exit”) and measuring the same quarters as the employment rate indicators (*i.e.*, the second and fourth quarters after program exit), is the least burdensome definition of the three piloted measures, effectively illustrates the workforce system’s ability to serve employers by reducing new employee turnover, and minimizes the burden on States and employers in measuring effectiveness in serving employers.

#### Retention With the Same Employer Definition: Program Impacts

*Comments:* Several commenters raised numerous points in asserting that adopting Retention with the Same Employer would adversely impact service delivery design and business outreach services. Commenters expressed opposition to measuring effectiveness in serving employers with Retention with the Same Employer, asserting that changing employers often enables individuals to seek jobs with higher pay or better benefits, which is a positive outcome but would reflect negatively on WIOA programs under the proposed definition. A few commenters asserted that, by negatively counting individuals who switch jobs, the proposed measure would incentivize programs to place individuals in jobs with minimal mobility, punish programs that provide individuals with skills and knowledge that enable them to seek higher paid jobs with other employers, and disincentivize programs from sharing better job placements because retention numbers would decrease if a participant switched to a better job after their initial placement.

Other commenters shared these concerns, asserting that programs should not be punished if participants’ employment growth is with a different employer from the one with which the individual is initially placed and that WIOA participants should not be trapped in a job for the sake of WIOA programs’ performance indicators.

Similarly, one commenter expressed concern that by incentivizing placing individuals in positions with limited mobility, the measure could serve to perpetuate or worsen racial and economic inequities or lead to worker exploitation, as well as further disadvantage job seekers with criminal records, undocumented immigrants, and

individuals receiving income supplements conditioned on engaging in work activities.

Another commenter reasoned that while retention indicates some level of employer satisfaction, it may not be the desired outcome for the job seeker, who may be in a low-wage position or need to work multiple jobs to earn a living wage.

Another broad theme of opposition to the proposed measure is that Retention with the Same Employer primarily measures the success of a job seeker. A commenter asserted that success according to the proposed measure requires ongoing support of job seekers, not employers, which WIOA programs often provide, but that the employer inputs, such as wages, working conditions, and workplace culture, are not related to WIOA services. Similarly, another commenter asserted that the indicator would not measure or identify when an employer receives a service, stating that it would primarily reflect intervention with a client.

Several commenters asserted that using the proposed definition could disincentivize employers to support and train employees in such a way that enhances employees’ ability to advance into a better job with another employer. Other commenters asserted that a performance indicator that prioritizes Retention with the Same Employer would be particularly misaligned with the current economy, in which employers are offering bonuses, higher salaries, and other benefits to attract talent. Another commenter remarked that high costs of living have forced many employees to move from expensive metropolitan areas to less expensive rural areas, thus leaving their jobs.

Several commenters raised concerns that Retention with the Same Employer is not a good fit for newer and smaller employers, younger workers, and certain sectors of the economy. One commenter said that while it considered the proposed definition to be the best of the three piloted definitions, measuring effectiveness in serving employers through Retention with the Same Employer would disincentivize programs from working with new or small employers because their employee retention history may be unknown and, thus, they may be seen as a risky partner.

A couple of commenters asserted that the proposed definition would not be the best measure of effectiveness in serving employers for younger generations, who are increasingly populating the workforce, place a high value on work/life balance, and will

readily leave a position for a better opportunity, or for gig-economy workers, who change jobs frequently in search of better opportunities.

One commenter expressed concern that the proposed measure could negatively capture seasonal employment noting that some employers require seasonal employment so retention in the second and fourth quarters is not assessing the effectiveness of services provided to these employers. Similarly, another commenter noted that the metric does not recognize instances in which rapid replacements or temporary positions are necessary for fulfillment. The commenter noted that for those employers, skills training and WIOA services have little influence over retention rates. Similarly, another commenter asserted that the proposed measure would reflect negatively on WIOA programs in States where much of the workforce is transient.

*Departments’ Response:* The Departments acknowledge the wide range of concerns expressed by commenters that implementing the Retention with the Same Employer definition may have adverse impacts on job seeker services and business outreach. The Departments address these concerns below.

*Job mobility:* The Departments note that an individual who moves to a new job with the same employer would be considered a successfully retained participant under this indicator because the indicator measures retention “with the same employer” in the second and fourth quarters; there is no requirement that the participant remain in the same employment status or position with the employer to count as a positive outcome. The Departments also note that the employer that will be measured for purposes of this indicator for this particular participant is not always the same employer that received services from a core program and initially hired the participant. The Departments also agree that many circumstances affect an employer’s retention of employees, some of which may be outside the purview of WIOA services, including the general economy and business landscape of an area, which may include seasonal employers or other industries with cyclical work cycles that could impact calculated retention rates. These external economic impacts are likely not unique to one specific geographic area. If external economic factors were to affect the outcome of the indicator, they would be captured in the statistical adjustment model. Additionally, regarding States with a higher transient worker population or where individuals are more likely to

leave for a higher paying job, the Departments' statistical adjustment model will account for such differences as it adjusts for variations in economic conditions and participant characteristics. These adjustment differences by the statistical adjustment model will be critical when the Departments determine there are sufficient data to produce reliable results for performance assessment purposes with the effectiveness in serving employers indicator.

The Departments acknowledge that individuals may leave for higher wages with a new employer, but States can seek to address these concerns in a variety of ways that are beneficial to both the employer and the participant, such as striving to find quality job placements or working with employers to develop career pathways and good jobs that more effectively incentivize participants they have hired to maintain their employment with the same employer. Despite these concerns and as discussed more fully in Section II.A., the Departments are adopting the Retention with the Same Employer definition of the indicator for multiple reasons, specifically because it: is the least burdensome since it uses data elements reported by States for other performance indicators; has a stable data collection mechanism in that the requisite data are already reported via an OMB-approved information collection request; aligns with other employment performance indicators in that it uses similar terminology and data elements; and demonstrates maintained relationships between employers and employees, thereby demonstrating that the services provided by the WIOA core programs not only meet the long-term needs of the participants but also the needs of employers in each State.

*Equity:* The Departments disagree with the comment that the selected metric will potentially perpetuate or worsen racial and economic inequities or negatively impact those with justice system issues, immigrants, and those receiving income supplements conditioned on engaging in work activities. As discussed in other parts of this final rule, we believe the Retention with the Same Employer metric does allow for employment opportunities and upward mobility for all workers. To be clear, the metric measures the number of participants who remained with the same employer over a period of time, not necessarily in the same job position or even the same geographic location. Consistent with various requirements of WIOA, the Departments continually emphasize that States and local areas should serve all participants so that they

may obtain unsubsidized and sustainable employment. For example, as discussed more fully in "Requirements for Workforce Innovation and Opportunity Act (WIOA) State Plans for Program Years (PYs) 2024–2027," jointly issued by the Departments on October 31, 2023,<sup>25</sup> when developing their annual plans, States and local areas should demonstrate how they will develop education, training, and career service strategies that better address and promote equity to improve access and outcomes for disadvantaged populations. Furthermore, serving all participants, including those with barriers to employment, so that they may obtain unsubsidized and sustainable employment is reflected in the WIOA primary indicators of performance that measure all participants' employment in the second and fourth quarters after exit. Given that the definition of effectiveness in serving employers adopted by this final rule uses the data obtained in these indicators, the effectiveness in serving employers indicator will also reflect States' service delivery to all WIOA participants, including those with barriers to employment.

Another example is WIOA sec. 134(c)(3)(E), which requires that priority be given to recipients of public assistance, low-income individuals, and individuals who are basic skills deficient (including English language learners) when individualized career services and training services are provided using funds allocated to a local area for the WIOA title I Adult program. This priority of service requirement applies when providing these services under the title I Adult program at all times, regardless of the amount of funds available to provide services in the local area. WIOA requires States to develop criteria, policies, and procedures for applying this priority for purposes of the title I Adult program, including monitoring local areas' compliance with this priority (see 20 CFR 680.600 and TEGL No. 19–16). Moreover, for the AEFLA and VR programs, section 427 of the

<sup>25</sup> ETA, TEGL No. 04–23, "Requirements for Workforce Innovation and Opportunity Act (WIOA) State Plans for Program Years (PY) 2024–2027," Oct. 31, 2023, <https://www.dol.gov/agencies/eta/advisories/tegl-04-23>; ED, OCTAE Program Memorandum 24–2, "Requirements for Workforce Innovation and Opportunity Act (WIOA) State Plans for Program Years (PY) 2024–2027," Oct. 31, 2023, <https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/octae-program-memo-24-2.pdf>; ED, RSA–TAC–24–02, "Requirements for Workforce Innovation and Opportunity Act (WIOA) State Plans for Program Years (PY) 2024–2027," Oct. 31, 2023, <https://rsa.ed.gov/sites/default/files/subregulatory/TAC-24-02.pdf>.

General Education Provisions Act (20 U.S.C. 1228a) requires grantees to include in their applications—*i.e.*, their WIOA State Plans—a description of how they will ensure participants' equitable access to and participation in the programs by addressing barriers based on gender, race, national origin, color, disability, and age. Lastly, WIOA permits States to develop and use internal metrics in addition to those reported to the Departments. This encourages States and local areas to develop and track additional measures that enhance internal service delivery policies, and continue to track the impact of any sector-specific strategies particularly relevant to their State. Therefore, the Departments have concluded that the Retention with the Same Employer definition for the effectiveness in serving employers performance indicator will not contribute to racial and economic inequities or negatively impact WIOA core program participants.

*Counting services provided to employers:* Some commenters suggested defining the measure as a count of the services delivered to employers. As discussed above in Section II.A, the Departments note that counting services would be measuring an input (effort) rather than an output (effectiveness). Aligning with the approach of all other indicators, Retention with the Same Employer measures output (results), whether an exiter is retained at the same employer in both the second and fourth quarters after exit, rather than a count of services to employers. The number of services does not necessarily provide a direct correlation to the effectiveness in serving employers. Therefore, the Departments have decided to use an outcome measure, such as retention of employees, as the desired goal to be measured through this indicator.

*Lack of inclusion of the job seeker:* Commenters expressed concern that the chosen definition for this measure focused unnecessarily on services to employers to the detriment of job seekers. WIOA sec. 116(b)(2)(A)(i)(VI) requires the Departments to assess "effectiveness in serving employers." Therefore, this metric necessarily focuses on services to employers, not the job seekers. Nevertheless, Retention with the Same Employer highlights the alignment between employers and job seekers by measuring the workforce system's alignment with employer needs during the second and fourth quarters after a participant exits WIOA programs.

Effectiveness in serving employers is one of six indicators of performance under WIOA; it is the only shared

indicator across core programs, and the only indicator that is not designed to measure job seeker outcomes. In other words, all other performance indicators (*i.e.*, employment in the second and fourth quarters after exit, median earnings in the second quarter after exit, credential attainment, and measurable skill gains) are designed to assess job seeker outcomes. However, the Departments also recognize that a service delivery design solely focused on the effectiveness in serving employers performance indicator, without regard to job seeker needs, would be at risk of failing to meet other areas of program performance. Therefore, the Departments have concluded that the chosen definition for the effectiveness in serving employers performance indicator strikes the proper balance between the needs of employers and those of job seekers and, thus, will not have a detrimental impact on job seekers.

*Employer training:* The Departments believe it more likely that employers provide training to encourage employees to advance within their own company. The performance indicator under WIOA is intended to measure the effectiveness of the WIOA core programs in serving employers. Retention with the Same Employer is calculated as the percentage of participants in unsubsidized employment who exited the program and were employed by the same employer in the second and fourth quarters after exiting the program. As such, the indicator is not designed to measure the internal training practices of employers, but rather the effectiveness of AJC services by reducing employee turnover within the first year of employment.

*Outreach to and working with smaller or newer employers:* The Departments acknowledge the needs of new and small employers and have determined that the definition for effectiveness in serving employers makes no distinction about the size of the employer, and therefore is not a disincentive for working with employers of any size. The Departments encourage programs, at both the State and local levels, to work closely with new and small employers to find participants who match well with the employers' needs. Ultimately it is the responsibility of the programs to assist job seekers in finding meaningful, long-lasting employment opportunities. Moreover, the Retention with the Same Employer calculation is not restricted to employers who received a direct employer service through a WIOA core program, so there is no incentive for WIOA core programs

to avoid providing services to new or small employers.

The Departments acknowledge that individuals may leave for higher wages with a new employer, but there are a variety of ways in which States can seek to address these concerns in ways that are beneficial to both the employer and the participant, such as striving to find quality job placements or working with employers to develop career pathways and good jobs that more effectively incentivize participants they have hired to maintain their employment with the same employer. The Departments encourage provision of WIOA services to new and small employers to enhance employee retention. Examples of such services include, but are not limited to, the provision of labor market information to demonstrate what constitutes competitive wages and benefits in their industry, working with employers to develop career pathways for employees to pursue and advance in employment, providing technical assistance on the hiring of individuals with disabilities (including the requirements of the Americans with Disabilities Act), and sharing other research on the factors that increase retention rates. The Departments note that there is no restriction on working with new and small employers and expect that Retention with the Same Employer will lead to better services.

*Seasonality:* In cases of temporary seasonal work, AJCs should strive to place participants into long-term employment opportunities when possible. While a seasonal employee will not be a positive outcome in the indicator, the statistical adjustment model will account for this, and the Departments do not expect States to achieve a 100 percent positive outcome.

Retention With the Same Employer and Other Aspects of Effectiveness in Serving Employers

Another broad theme that commenters raised in opposition to the proposed measure was that it would not measure all of the aspects of effectiveness in serving employers. Their primary assertions were that outcomes may be skewed due to the inclusion or exclusion of specific populations, wage sources, or employers in the calculation.

*Comments:* One commenter expressed concern that not all employers who receive a service from the local workforce development board would have the effectiveness of those services assessed using the Retention with the Same Employer definition. For example, the commenter stated that if a local workforce development board hosted a

job fair and an employer hired someone who was not a WIOA participant, those services to the employer would not be taken into account.

Commenters provided feedback regarding the pools of individuals and employers being measured in the proposed Retention with the Same Employer approach. They suggested that only employers that received a direct WIOA service be measured, that only targeted industries be included, that businesses that issue Worker Adjustment and Retraining Notification (WARN) Act notices be exempted, that participants employed by companies impacted by a qualified plant closing or mass layoff identified through the WARN Act Notification process if they lose or change employment locations be excluded, that employers that close or conduct layoffs during the reporting period be excluded from the measure's calculations, that the metric not include changes in employer caused by firms going bankrupt or downsizing, or that the measure extend beyond WIOA-funded programs.

Another comment mentioned that the proposed rule will solely focus on dislocated workers and that the greater public workforce system will suffer as this rulemaking will not encourage collaboration where dislocated workers are not present.

Some commenters noted that employers may have received no services. One commenter argued that while retention indicates some level of employer satisfaction, it does not speak to what business service an employer received. Similarly, a few commenters asserted that the performance indicated by the measure might not be a result of employers receiving a direct service from the workforce development system. Another commenter stated that the measure would say little about actual interactions between employers and their local workforce development board.

One commenter asserted that the proposed measure would not reflect the effectiveness of direct employer interaction, because placement of participants at a specific employer is not the result of employer service delivery but of credential skills obtained through tuition assistance, and that the employers reflected in the measure may not have sought or received a service but simply had a job opening filled by a program participant. Several commenters asserted that the proposed measure has no mechanism for linking the retention of a particular employee with instances of employer services being provided, therefore only indirectly reflecting effectiveness in

serving employers and failing to inform strategic action to improve performance.

The commenters further stated that the measure can be calculated without any employer services data. Other commenters stated that Retention with the Same Employer does not capture all services to an employer. A commenter critical of the proposed measure asserted that there are too many services provided to employers that are unrelated to a program-funded job seeker, and furthermore that employment status at program exit is unknown to local program operators. The commenter also asserted that the measure would not truly capture effectiveness because it is limited to program-funded job seekers and would not evaluate all employer services and is instead primarily a retention metric for WIOA-funded job seekers.

Similarly, one commenter expressed opposition to the proposed measure, arguing that because AJCs and workforce development boards refer a universal pool of candidates for job openings, it would be inappropriate to only measure success for WIOA-enrolled customers. Other commenters similarly criticized the proposed indicator because, while workforce systems will provide services to any job seeker, the only employers that would be captured are those that a WIOA-funded job seeker exits a program to be employed by. Another commenter noted that Retention with the Same Employer does not speak to acuity of placement (for example, how difficult the position was to fill, how in demand the position is, whether the role was seasonal specific and not intended to maintain retention, rarity of skill set, or time to hire). A different commenter relatedly suggested that combining Retention with the Same Employer with some measure of acuity (such as skill/education level of the position or time to placement) and the ability to filter for those employers who received a business service would improve the measure.

*Departments' Response:* As noted previously, the Departments have determined that Retention with the Same Employer in both the second and fourth quarters after exit demonstrates a successful match between the job seeker and the employer. Moreover, the services delivered by core programs routinely benefit the broader employer community by increasing basic skills of the candidate pool, enhancing free job posting and search tools, and preparing workplaces and job seekers with disabilities for successful employment. WIOA participants who receive services that successfully prepare them to fill

jobs that meet employers' needs benefit all the employers in the local economy, regardless of whether a specific employer directly received services from a WIOA core program.

Regarding the pool of participants measured in this indicator, one commenter mentioned that this metric only utilizes dislocated workers, but that is incorrect. The indicator will include all WIOA core program participants, regardless of employment status at time of participation or program enrollment.

Regarding whether the proposed indicator measures all aspects of effectiveness in serving employers, the Departments believe there are many aspects to employer effectiveness, some of which are very difficult to quantify and report. Therefore, the Departments chose one aspect of effectiveness that employers stated would be beneficial and can be measured across programs and States with minimal burden to employers—employee retention.

The Retention with the Same Employer calculation of effectiveness in serving employers is not restricted to employers who received a direct employer service through a WIOA core program. However, the services delivered by core programs, whether to participants or to the employers themselves, routinely benefit the broader employer community by increasing basic skills of the candidate pool, enhancing free job posting and search tools, and preparing workplaces and job seekers with disabilities for successful employment.<sup>26</sup> WIOA participants who receive services that successfully prepare them to fill jobs that meet employers' needs benefit all the employers in the local economy, regardless of whether a specific employer directly received services from a WIOA core program; therefore, the Departments have determined that excluding employers that have not received a WIOA core program service within the reporting period is not an appropriate holistic measure of the workforce system's impact on Retention with the Same Employer. In fact, such

<sup>26</sup> For example, 34 CFR 361.3 authorizes State VR agencies to expend VR funds on the costs of providing VR services and administering the program. According to 34 CFR 361.5(c)(2)(iii) and (iv), administrative costs include providing information about the VR program to the public (which, for purposes of this final rule, would include the broader employer community) and technical assistance and support services to other State agencies, private nonprofit organizations, and businesses and industries. In addition, 34 CFR 361.49(a)(4) permits State VR agencies to provide technical assistance to businesses that are seeking to employ individuals with disabilities. There is no requirement the business be seeking to hire a current VR program participant.

an approach would be contrary to the purpose of the performance measure itself. For example, it would be possible for a participant to obtain employment—from an employer that received services from a core program—as a result of services received from one of the six core programs, but change jobs within the first quarter after exiting the program to a new job with a different employer (that did not receive services from a WIOA core program) where the participant remained for at least a year. In these final regulations, the Departments define the effectiveness in serving employers performance indicator as the participant's Retention with the Same Employer in the second and fourth quarters after exiting the program. In other words, in this example, the employer that will be measured for purposes of this indicator for this particular participant is not the same employer that received services from a core program and initially hired the participant. Furthermore, the Departments acknowledge that this metric is one of many aspects of effectiveness in serving employers, but believe that retention is an important aspect to measure as stated by employer representatives during stakeholder engagements. States are encouraged to measure effectiveness in serving employers in other methods that are not required to be submitted officially to the Departments for performance accountability, consistent with WIOA sec. 116(b)(1)(A)(ii).

The Departments disagree with the suggestion that the metric should exclude cases where the participants are employed with employers that have a mass layoff or issue WARN notices. We did not exclude these employers because it is not practical to exclude them from the measure calculation. This is due to the limitations of the information that is currently available in State wage records, which will be the typical source for States to collect the required inputs for this metric. To the extent that States are concerned that this could impact results, the Departments anticipate the statistical adjustment model<sup>27</sup> will take into account this

<sup>27</sup> Pursuant to WIOA sec. 116(b)(3)(A)(viii), the Departments developed an objective statistical adjustment model that is used to both negotiate expected levels of performance for each of the performance indicators to be incorporated into the approved Unified or Combined State Plan or State Plan modification (WIOA sec. 116(b)(3)(A)(iv)), and for purposes of determining the adjusted levels of performance for each indicator at the end of the Program Year (WIOA sec. 116(b)(3)(A)(vii)). For more detailed information about the statistical adjustment model, see the negotiations and sanctions guidance in TEGL No. 11–19, Change 1,

concern. For this and other reasons, the Departments will not negotiate targets for this indicator at 100 percent.

With regard to the concern that the definition of Retention with the Same Employer only indirectly reflects the effectiveness in serving employers and is not useful in informing strategic action to improve performance, the Departments note that this metric does not prevent States from including the information they feel is necessary in their strategic plans. States should incorporate labor market information, such as which occupations and industries are in demand, in their strategic plans. The Departments believe that information such as whether WIOA participants retain employment is important data to consider when States strategically plan outreach, business services, and participant service delivery design. Therefore, in terms of strategic planning at the State or local level, this metric will indicate the types of jobs participants are entering and retaining employment with, which may provide some indication of job quality. If a State's outcome results for the Retention with the Same Employer metric are below target, strategic policies can be made to ensure participants are entering long-term sustainable unsubsidized employment at a higher rate.

With regard to concerns that the Retention with the Same Employer indicator does not measure acuity of the WIOA participant's job placement, the Departments continue to acknowledge that this metric is one of many aspects of assessing effectiveness in serving employers. As noted above, States are encouraged to measure effectiveness in serving employers in other methods that are not required to be submitted to the Departments for performance accountability.

*Comments:* Commenters also expressed concerns about implementing one measure only and that one measure,

and related ED guidance. ETA, TEGL No. 11–19, Change 1, “Negotiations and Sanctions Guidance for the Workforce Innovation and Opportunity Act (WIOA) Core Programs,” May 10, 2023; <https://www.dol.gov/agencies/eta/advisories/tegl-11-19-change-1>; ED, OCTAE Program Memorandum 20–2, “Negotiations and Sanctions Guidance for the Workforce Innovation and Opportunity Act (WIOA) Core Programs,” May 10, 2023, <https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/octae-program-memo-20-2.pdf>; ED, OCTAE Program Memorandum 20–2, Attachment I “Calculation—Overall State Indicator and Program Scores,” May 10, 2023, <https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/octae-program-memo-20-2-attachments.pdf>; ED, RSA–TAC–20–02, “Negotiations and Sanctions Guidance for the Workforce Innovation and Opportunity Act (WIOA) Core Programs,” May 10, 2023, [https://rsa.ed.gov/sites/default/files/subregulatory/RSA-TAC-20-02\\_0.pdf](https://rsa.ed.gov/sites/default/files/subregulatory/RSA-TAC-20-02_0.pdf)

or one data point, may not address all the facets of the effectiveness in serving employers indicator. Commenters also said that Retention with the Same Employer was not the best indicator of a program's success in serving employers.

One commenter expressed opposition to the proposed definition, asserting that it will be impacted by variables outside the control of State workforce agencies, such as “talent migration.” Similarly, another commenter asserted that many reasons that an employee might choose to leave a position within two quarters have little to do with how effectively the employer was served by the system.

One commenter asserted that the proposed measure is not a good indicator of WIOA program performance because it is significantly impacted by employers' choices as to wages, working conditions, and workplace culture, over which WIOA programs have little control. Another commenter expressed similar concerns, asserting that retention depends on employers and employees learning to communicate effectively and employees getting along, adapting to company culture, acquiring new skills, and being satisfied with their job, which AJCs cannot control. A third commenter echoed these concerns, adding that factors such as labor shortages likely encourage employees to switch employers.

One commenter stated that long-term employee retention is not solely about initial placement after exiting a program, asserting that commitment is required by both the employee and employer, and concluding that as a measure of effectiveness in serving employers, Retention with the Same Employer would not be able to prove or disprove the success of a program.

Another commenter asserted that the proposed measure could deter local workforce development board and one-stop center staff from taking a customer-based approach to career services and thus skew the results of the statistical adjustment model.

*Departments' Response:* The Departments recognize that there are many factors, beyond the control of the WIOA core programs, that can impact a participant's Retention with the Same Employer. For that reason, as discussed more fully in Section II.A. above, the Departments considered other approaches during the 6-year pilot period and encouraged States to devise their own State-specific approaches to measuring effectiveness of serving employers. After considering all the evidence, the Departments considered the options of implementing more than one metric to measure effectiveness in

serving employers, but determined a single indicator approach was most logistically feasible, aligned with the existing performance indicator structure, and resulted in lowest burden to grantees; this single indicator is set forth in this final rule at 20 CFR 677.155(a)(1)(vi) and (c)(6).

*Single data point:* The reason for selecting this one metric (and not a combination of measures) is that it is most applicable across the differing mandates and program designs of all six core programs, uses existing joint PIRL data elements, and effectively illustrates the broad impact of the workforce system's ability to serve employers by reducing new employee turnover through effective job placement. Commenters to the proposed rule have provided several alternatives to the proposed measure, which are described in this document, and States are encouraged to internally adopt any of those suggested metrics that will provide feedback on the success of efficiently serving employers. To reduce burden on States, and to ensure that all States can accurately report on the data elements required, the Departments have decided to use one measure for the effectiveness in serving employers performance indicator, using existing common data elements across all core programs.

The Departments acknowledge the challenges related to developing an indicator that reflects the efforts of multiple programs, avoids additional collection and reporting burden, and results in stable data that can be assessed across programs. The Departments note that Retention with the Same Employer has the benefit of aligning with two of the three employment-related performance indicators, specifically the employment in the second and fourth quarters after exit indicators that measure the employment outcomes of program participants. As such, it promotes the statutory purpose of WIOA to “support the alignment of workforce investment . . . in support of a comprehensive, accessible, and high-quality workforce development system in the United States.” WIOA sec. 2(2). The alignment of definitions, data elements, and performance indicators with one another, as the Departments have done with the Retention with the Same Employer metric for measuring the effectiveness in serving employers indicator, improves the comprehensiveness of the workforce development system in each State and nationwide. Information such as whether WIOA participants are retained in job placement is important data to

consider when States strategically plan outreach, business services, and participant service delivery design to ensure that the workforce system is matching employers with skilled workers to meet business needs, thereby satisfying another purpose of WIOA, as set forth in WIOA sec. 2(2), which is to “provide America’s employers with the skilled workers the employers need to succeed in a global economy.”

*Addressing all factors of effectiveness in serving employers:* The Departments agree that many circumstances affect an employer’s retention of employees, some of which may be outside the purview of WIOA services, including the general economy and business landscape of an area. However, an indication that an employee maintains employment with the same employer in both the second and fourth quarters after exiting from a WIOA program demonstrates a level of success for employers (*i.e.*, successfully preparing participants to fill jobs that meet employers’ needs). Retention of an employee reduces the costs to the employer associated with employee turnover and retraining, which is enhanced when participants are placed in jobs aligned to their skills and career goals.

Commenters also said that Retention with the Same Employer was not the best indicator of a program’s success in serving employers. Retention with the Same Employer is a measure of the workforce system’s alignment with employer needs and is measured during the second and fourth quarters after a participant exits WIOA programs. The Departments acknowledge that individuals may leave for higher wages with a new employer, but there are a variety of ways in which States can seek to address these concerns that are beneficial to both the employer and the participant, such as striving to find quality job placements or working with employers to develop career pathways and good jobs that more effectively incentivize participants they have hired to maintain their employment with the same employer.

The Departments acknowledge that the limitations for Retention with the Same Employer could include the unintended consequence that this approach may be at odds with an employee seeking a higher paying job or employment benefits. It is possible that a significant percentage of participants will not be counted in the numerator for this indicator. However, many of those participants who have left their current employer for another will contribute toward improved performance on employment-based indicators, such as

median earnings. Moreover, as discussed above, the Departments believe that Retention with the Same Employer accomplishes the goals of WIOA with the least burden on the States.

Regarding the comment that service delivery approaches taken by local workforce development boards and one-stop staff to assist employers will skew the statistical adjustment model outcomes, the Departments disagree and note that the model does in fact account for results of these employer engagements.

Effectiveness in serving employers is one of six indicators of performance under WIOA; it is the only shared indicator across core programs, and the only indicator that is not designed to measure job seeker outcomes. Local workforce development boards and one-stop center staff delivering services solely focused on the effectiveness in serving employers indicator without regard to job seeker needs would be at risk of failing to meet other areas of program performance. The statistical adjustment model will account for economic factors affecting the Retention with the Same Employer indicator in the State and local areas. Therefore, the Departments have concluded that States will still focus on providing quality services to job seekers.

#### Questions and Requests for Clarifications About Calculations, Data Sources, Wage Records, and External Factors That Impact the Measure

*Comments:* Commenters suggested that the calculation for the Retention with the Same Employer measure be expanded to include supplemental wage information. One commenter asserted that by relying exclusively on wage records, the measure will produce an incomplete picture of the effectiveness of the WIOA system because it would obscure the ways WIOA programs serve employers by developing employees with the skills to respond flexibly and creatively to changing working challenges, whether for the same employer or a different one.

Some commenters were concerned that local providers do not know the status of a participant’s employment at exit. A few commenters stated that workforce programs may not receive hiring outcome information and may be unable to report information for Wagner-Peyser Act participants.

Another commenter asked how common exit would apply to this measure and which programs’ exit date will be used to determine this measure when an individual participant is co-

enrolled in more than one core partner program.

One commenter recommended that the Departments explore methods of capturing data that demonstrate employment success for self-employed individuals and individuals employed by the Federal Government. Relatedly, another commenter recommended not limiting the performance indicator to individuals with wage records but rather expanding it to include participants whose employment can be verified by other means, specifically the same supplemental data sources as are permitted for the other primary performance indicators, such as information provided to case managers. Other commenters cautioned that wage records are not readily available for Federal, military, and self-employment, asserting that this would lead to negative performance results in States with high proportions of individuals seeking these types of employment or necessitate statistical adjustments. Similarly, another commenter questioned if Federal agencies would provide additional wage data sources on individuals employed by the military, Postal Service, or Federal Government.

Some commenters discussed whether State Wage Interchange System (SWIS) data could be used to collect and report on the proposed measure, given that SWIS data show how many employees work across State lines, a figure that becomes increasingly important in the post-pandemic shift to remote work. Another commenter expressed concerns about being able to match employers consistently in wage data and noted that during the pilot period their concerns over the Retention with the Same Employer measure caused them to choose the Repeat Business Customer and Employer Penetration rates for reporting. The commenter noted that the approach had the lowest adoption rate (per the Joint WIOA Effectiveness in Serving Employers NPRM) of the three pilot measures, suggesting that other States may have shared the commenter’s concerns about choosing it.

*Departments’ Response:* The Departments agree that supplemental wage information could play a vital role when wage records are either unavailable for a participant or difficult to obtain. For this reason, we revise § 677.155(a)(1)(vi) and (c)(6) of this joint final rule to remove the requirement that wage records be used to document a participant’s employment status for purposes of the effectiveness in serving employers performance indicator. This change allows for the effectiveness in serving employers indicator to include the same data sources as the other

WIOA employment-based primary indicators of performance, including supplemental wage information. The Departments also agree that core programs will be able to obtain wage data for performance reporting purposes through the SWIS Clearinghouse for those participants employed across State lines.

Regarding the commenter's observation that the fewest number of States selected Retention with the Same Employer measure for the pilot and the commenter's interpretation that this lowest adoption rate indicates that States did not think it was a useful measure, the Departments did not inquire why States chose certain measures during the pilot period, and note that there is no evidence that a lower adoption rate correlates with a lack of usefulness in measuring effectiveness in serving employers in the State. The Departments note that Retention with the Same Employer was the easiest measure to implement based on it being calculated from existing PIRL elements. Therefore, it is plausible that fewer States chose to pilot this measure because they already knew how to calculate this measure and would not have needed to test how to implement it in their State. They may have wanted to assess how the two other pilot measures would work. The Departments cannot determine if this was the case, but it seems reasonable that this possibility could have led to the lower adoption rate for the Retention with the Same Employer measure.

*Measuring only WIOA-funded programs:* Regarding the comments that stated measuring only WIOA core programs was not a reflection of the effectiveness of the workforce system's services to employers, the performance indicator under WIOA is intended to measure the effectiveness of the WIOA core programs in serving employers. While States and organizations may provide services to employers through other programs, it is appropriate in this instance to limit the metric to those participants who have exited from WIOA-funded programs.

*Use of supplemental wage information:* The Departments proposed that the effectiveness in serving employers indicator only include participants whose employment status is obtainable through wage records because wage records are the least burdensome records to use; States already have these records for other WIOA-required reporting purposes, and they are the most standardized and statistically valid records available. Most employers are covered through

unemployment insurance (UI) wage records and therefore wage records remain the most accurate and least burdensome method of calculating this indicator.

However, the Departments acknowledge that certain categories of employment, such as entrepreneurial employment, Federal employment, employment with the U.S. Postal Service and the military, and farmwork, are not reflected in State UI wage record databases. Additionally, participants are not required to provide Social Security numbers, which are needed to use wage records, to obtain services and some participants may be reluctant to share this information. WIOA's regulations and implementing guidance authorize the use of supplemental wage information for the calculation of the median earnings indicator. See TEGL No. 26–16.<sup>28</sup>

To ensure that effectiveness in serving these additional employers is assessed, the Departments concur with commenters that the Retention with the Same Employer measure should be expanded to include the number of participants with wage records or supplemental wage information who exit during the reporting period and were employed by the same employer during the second quarter after exit and the fourth quarter after exit DIVIDED by the number of participants with wage records or supplemental wage information who exit and were employed during the second quarter after exit. Organizations collecting supplemental wage information for the purposes of calculating Retention with the Same Employer must be able to ascertain that the participant's wage information reflects the same establishment (which may include tax documents, payroll records, employer records, and follow-up surveys from program participants) in both the second and fourth quarters after exit.

*Questions about program exit:* Regarding commenters' concern about local providers not knowing a participant's employment status at program exit, the Departments note that States already report this information to the Departments. Additionally, the Departments understand that there are mechanisms in place that local providers use to track participants'

employment status after program exit. Local providers interested in monitoring their performance in this area may wish to leverage existing follow-up practices to identify if participants who have exited services are employed, and to work with cognizant State agencies to monitor their performance.

Regarding the commenter's question about common exit, the implementation of this definition for the effectiveness in serving employers performance indicator will not alter existing policy around common exit dates. The Departments will release future guidance regarding implementation of the common exit date for participants enrolled in multiple core programs.

*Comments:* A commenter questioned how the proposed measure would apply to employees changing positions to subsidiaries of the same company, as well as how it would count individuals working part time in order to maintain Social Security eligibility, because the commenter interpreted the proposal as covering full-time employment only. Another commenter similarly asserted that when determining whether a participant is employed with the same employer in the second and fourth quarters after exit, the Departments should take into account all establishments and physical addresses of the employer, to ensure that employees who move locations are still counted as being employed by the same employer.

*Departments' Response:* The Departments clarify that employment is not required to be full-time. The determination whether someone is employed with the same employer will typically be based on an employer identification number, such as the Federal Employer Identification Number (FEIN) or tax ID found in the individual's wage record. For the specific scenario raised by the commenter, a participant who is employed by the same employer in a different physical location would count positively in the numerator of the metric if the FEIN/tax ID is the same. The Departments acknowledge that if the FEIN/tax ID is different for a subsidiary of a given employer, the participant may not be captured as a positive outcome by using wage records alone and would require the collection of supplemental wage information to verify Retention with the Same Employer.

*Comments:* One commenter recommended that individuals who maintained employment with a different employer but at a higher wage be included in the numerator in the calculation, as this indicates the success of the employee and the quality of

<sup>28</sup> The Departments issued joint guidance on June 1, 2017, "Guidance on the use of Supplemental Wage Information to implement the Performance Accountability Requirements under the Workforce Innovation and Opportunity Act," TEGL No. 26–16, OCTAE Program Memorandum 17–6, and RSA–TAC–17–04, that describes the Departments' protocols on the use and reporting of supplemental wage information.

training from their initial employer. The commenter also recommended excluding from the Retention with the Same Employer performance measure participants who have changed employers but increased their wages between the second and fourth quarters after exit, because doing otherwise would disincentivize upward mobility. Another commenter recommended measuring retention within the same industry rather than with the same employer.

Another commenter was concerned that retention of employees may vary based on “right-to-work” rules, working conditions, pay and benefits, production volumes, or any number of business factors that occur well after interaction with the workforce system. Commenters also voiced concerns that variations in economic conditions would impact States’ ability to meet targets for the effectiveness in serving employers indicator because of downturns in the local economy and specific industries that were in-demand and used by the system are suddenly experiencing layoffs.

*Departments’ Response:* The Departments acknowledge the alternatives commenters presented. However, these alternatives do not reflect the effectiveness of services to the employer that originally hired the participant. Including individuals who moved from one employer to another and obtained a higher wage does not demonstrate success in serving the individual’s employer in the second quarter as that employer would need to repeat the process of recruitment and referrals and undertake the cost of hiring and training a new employee. Similarly, including individuals who are within the same industry in the second and fourth quarters after exit but not with the same employer, results in the same issue—the individual’s first employer needs to rehire and train a new employee.

The Departments recognize that there are numerous factors in a participant’s ability and willingness to remain employed with the same employer, including those mentioned by the commenter, such as pay/benefits, work volumes, temporary jobs, industry and economic variations, and unexpected layoffs. Because of this, it is very likely a State’s suggested target from the statistical adjustment model will never be 100 percent, just like the other five indicators of performance.

As noted earlier, there are a variety of ways in which States can seek to address these concerns that are beneficial to both the employer and the participant, such as striving to find

quality job placements or working with employers to develop career pathways and good jobs that more effectively incentivize participants they have hired to maintain their employment with the same employer.

Regarding the comments on the effects of economic conditions, the Departments agree that many circumstances affect an employer’s retention of employees, some of which may be outside the purview of WIOA services, including the general economy and business landscape of an area. The Departments acknowledge that different States experience different economic conditions. As noted above, the statistical adjustment model will account for economic factors impacting Retention with the Same Employer outcomes for WIOA core programs, so that no State is unfairly impacted by its economic conditions.

*Comments:* A commenter recommended shortening the amount of time that the system tracks workers with the same employer or to simultaneously track job quality to mitigate the potential consequence that the proposed measure could trap workers in poor-quality jobs or incentivize the WIOA system to push workers into any job instead of high-quality jobs.

Another commenter recommended that the Departments consider labor market trends or other relevant information in a State or region when negotiating performance for individuals who leave a position for a higher wage or better benefits. Several commenters similarly recommended adjusting the performance indicator to count individuals who leave positions and achieve higher wages, better benefits, or better working conditions as successes.

One commenter raised cautions “that [the Retention with the Same Employer measure] is subject to variation in industry and sector economic conditions, and that it may have a negative impact on sensitivity to industry sectors targeted by State and local workforce agencies.” Another commenter stated that the proposed measure could lead to employers “cherry-picking” employees who they believe could lead to higher retention rates. The commenter suggested that to mitigate this potential effect, the Departments could require States to submit reports on the demographics of WIOA participants to ensure there are no negative changes by race, ethnicity, or gender among workers between reporting periods that do not correspond to similar changes in the local labor market.

To avoid disincentivizing the use of WIOA funding for transitional jobs, a

commenter recommended excluding such jobs from the performance indicator. The commenter cited studies showing that transitional job programs have significant positive impacts for workers, families, communities, and employers, such as reducing poverty rates substantially, particularly for Black and Hispanic workers.

Another commenter recommended increasing access to and sharing of information between workforce partners, to enable agencies to track employer retention information, and developing best practices and a unified reporting structure among WIOA agencies.

*Departments’ Response:* The Departments will not be shortening the amount of time for tracking participant outcomes in the Retention with the Same Employer metric. Determining whether an individual is still employed with the same employer in the second and fourth quarters after exit allows the Departments to assess whether the individual stayed with the employer, which leads to savings for the employer as the employer would not need to undergo the rehiring and retraining process. The second-and-fourth-quarter time frame allows the Departments to assess whether employers benefit from the WIOA system. Additionally, using information collected for other WIOA indicators of performance under the same established time frames reduces reporting burden for the States.

Additionally, as discussed throughout this document, the Departments note that effectiveness in serving employers is oriented to the employer experience rather than the participant experience. The proposed metric may encourage promotional opportunities from within the original employer.

For these reasons, the Departments believe the established time frames are appropriate to demonstrate Retention with the Same Employer.

Regarding commenters’ concerns about labor market trends, including variations in industry and sector economic conditions, the Departments are aware of external factors that influence the outcome of this measure. The Departments will adjust for those external factors in the statistical adjustment model, and those adjustments will play a key role when the Departments determine they have sufficient data to produce reliable results for assessing performance of the effectiveness of serving employers indicator.

The Departments appreciate comments regarding participants who leave positions for higher paying job opportunities. While this is a benefit to



participants and should be encouraged, this also leaves employers with the need to fill open vacancies. The Departments will continue to evaluate wage growth after exit and the statistical adjustment model will account for participants who leave a position for a higher-paying job. This metric, like all WIOA indicators of performance, will never be targeted at 100 percent for this reason.

The Departments considered the alternative definition of Retention with the Same Employer commenters suggested—including as a success the individuals who have higher wages in the fourth quarter after exit even though they are working at a different employer. However, the Departments decided not to adopt this definition because in these situations, an employer still has a need to fill an open vacancy. The Departments recognize that while this is a benefit to participants, it is not assessing how the workforce system served employers. Therefore, the Departments determined this is not an appropriate method of assessing the effectiveness in serving employers.

Effectiveness in serving employers is measured after the participants exit a program. Regarding potential exclusion of participants placed in transitional jobs, the Departments note that transitional jobs are a participant level service that would prevent a participant from exiting, and therefore are not included in the calculation of the measure. Therefore, this definition of the indicator does not disincentivize use of transitional jobs as a service strategy.

Regarding other potential exclusions for the measure, consistent with the Departments' rationale in Section II.A. above, the Departments believe that simplicity in the measure calculation is important, both in terms of collecting data that reflect the real world of employment, and consistency with the other participant employment and earnings indicators of performance. Therefore, the measure calculation will not include exclusions other than those mentioned for existing WIOA indicators of performance. Additionally, the commenter mentioned benefits to the participant, but not to the employer who experiences turnover and needs to re-fill a position. The Retention with the Same Employer measure advocated for by business customers and employers in stakeholder engagements, alignment with the other WIOA participant employer performance measures/indicators, and support due to strengths over weaknesses of the measures assessed in the Final Pilot Study Report can best meet the system's goals for assessing and ensuring the effectiveness in servicing employers, the workforce

system's dual or equal customer served by the workforce system.

Regarding analysis of this metric by race, ethnicity, or gender, the Departments currently collect these data elements and will report outcomes by each of these. The existing WIOA indicators of performance are already reported by these data elements in the Departments' respective annual reports.

After consideration of the comments, as discussed above the Departments have decided to revise the definition of Retention with the Same Employer in this final rule to remove reference to wage records, thereby permitting States to include individuals in the metric who may not have wage records but who are still employed with the same employer in the second and fourth quarters after exit. This revision allows States to use supplemental wage information to capture these individuals.

Final § 677.155(a)(1)(vi) and (c)(6) implement the changes as outlined in the proposed rule with one modification to remove the term “wage records,” thereby allowing for the use of supplemental wage information, and adds a clarification that participants tracked by this performance measure are those in unsubsidized employment during the second quarter who exit from the program. While the nature of wage records would have limited this indicator to unsubsidized employment without explicitly stating the requirement, the removal of the wage record requirement, thereby enabling States to use supplemental wage information for reporting purposes, necessitates the addition of language limiting the indicator to those in unsubsidized employment in order to align this indicator with the other employment-based indicators, all of which track the percentage of participants in unsubsidized employment at either the second or fourth quarter after exiting from a program. In so doing, the Departments ensure that the employment reported, for purposes of assessing the effectiveness in serving employers, is that which is consistent with the purpose of WIOA sec. 2 (e.g., to increase the prosperity of workers and employers, the economic growth of communities, and the global competitiveness of the United States).

### *C. Adjusted Levels of Performance for WIOA Core Programs—Changes to § 677.190*

§ 677.190 When are sanctions applied for failure to achieve adjusted levels of performance?

Currently, 20 CFR 677.190 details the circumstances under which sanctions are applied when WIOA core programs fail to achieve adjusted levels of performance. Paragraph (c) sets forth criteria the Departments use to determine which States have met adjusted levels of performance: (1) the overall State program score (§ 677.190(c)(1)); (2) the overall State indicator score (§ 677.190(c)(3)); and (3) the individual indicator score (§ 677.190(c)(5)).

In this final rulemaking the Departments revise § 677.190 to include the effectiveness in serving employers performance indicator in the criteria for determining if a State has failed to meet adjusted levels of performance as part of the overall State indicator score. Final § 677.190 establishes conforming language regarding the assessment of effectiveness in serving employers as a statewide performance indicator, as expressed in the Joint WIOA Final Rule, and the definition for effectiveness in serving employers proposed in § 677.155(a)(1)(vi) and (c)(6). Final § 677.190(c)(1) excludes the effectiveness in serving employers performance indicator from the calculation of an overall State program score, which compares a program's results regarding the other primary indicators of performance with the adjusted levels of performance for that program. This final rulemaking adds two paragraphs to § 677.190(c)(3) to ensure the effectiveness in serving employers performance indicator's sole use as a shared statewide indicator. Final § 677.190(c)(3)(i) specifies that the overall State indicator score is the average of the percentages achieved of the adjusted levels of performance by all the core programs on the performance indicator and would exclude the effectiveness in serving employers performance indicator from this calculation. Final § 677.190(c)(3)(ii) adopts in regulations the recommendation in the joint guidance that one core program report performance data for the effectiveness in serving employers performance indicator on behalf of all six core programs. Final § 677.190(c)(3)(ii) also establishes that the indicator would be assessed only as an overall State indicator score, the State indicator score for effectiveness in serving employers is calculated as the statewide percentage

achieved of the statewide adjusted level of performance, and includes mention of guidance to signal to States that the Departments will provide additional details and explanations for reporting on the effectiveness in serving employers performance indicator in joint guidance. Final § 677.190(c)(5) specifies that the Departments will not include the effectiveness in serving employers performance indicator when calculating individual indicator scores. Finally, as the Joint WIOA Effectiveness in Serving Employers NPRM explained, consistent with how the Departments have implemented the provisions for the other five performance indicators, the effectiveness in serving employers performance indicator will not be included in sanctions determinations until the Departments collect a minimum of 2 years of performance data, develop a statistical adjustment model that yields reliable estimates for the indicator, provide additional guidance regarding the process for negotiating this joint indicator, and then negotiate performance levels for the indicator.

The Departments received no comments on the proposed exclusion of effectiveness in serving employers from the overall State program score in § 677.190(c)(1) and the proposed exclusion of effectiveness in serving employers when calculating individual indicator scores in § 677.190(c)(5). The Departments received several comments regarding provisions for the statewide nature of the effectiveness in serving employers performance indicator in § 677.190(c)(3)(ii), application of this indicator at the local level, performance level negotiation and the statistical adjustment model, and inclusion of the effectiveness in serving employers indicator in sanctions determinations. These comments are discussed below. No changes are made to proposed § 677.190; the final rule implements § 677.190 as proposed.

#### Support for the Implementation of a Shared Statewide Indicator

*Comments:* Several commenters expressed support for the proposed use of a shared outcome for all core programs. One commenter stated that the shared outcome measure supports the WIOA reporting goal and also reduces the burden of collecting data.

*Departments' Response:* We appreciate commenters supporting effectiveness in serving employers as a shared outcome for all WIOA core partner programs. We agree that this definition best aligns with WIOA employment performance indicators by utilizing already existing PIRL elements

and minimizes the burden on States and employers in measuring the effectiveness in serving employers.

*Comments:* Several commenters opposed the provisions, urging that Retention with the Same Employer should not be a shared outcome and should be reported for each of the six core programs individually. A few of these commenters discussed the difficulties of reporting the measure as a shared outcome, particularly the specifics of creating and implementing a unified statistical adjustment model that accounts for program- and State-level differences. The commenters described the particular challenge and burden for States that did not pilot the proposed measure or do not currently have a shared data system across core programs. One commenter noted that the different performance indicators arise from different reporting systems, which further complicates the process of unifying the reporting into a shared outcome model. Another commenter described the issues of incorporating data from the separate systems for title II and title IV, incorporating other data from referrals placed by job seeker teams outside the State, and a lack of Social Security number collection by the State agency responsible for title II programs in the State. Other commenters noted that while many States are reporting this measure, not all do so with the coordination and full contribution of title II data, and asserted that some States' title II programs that are not currently reporting this data on title II students will need additional time to update data match agreements and data reporting processes in order to participate in State reporting. One different commenter noted that the performance measure is not defined by statute as a shared system-wide measure and suggested that sharing confidential data across State programs may not be supported by State laws. The commenter further asserted that complying with the varied reporting deadlines for different programs might be difficult under a unified model. This commenter also expressed concern about the costs and time associated with developing a system that combines data across all programs. Further, the commenter said, to successfully capture data from multiple agencies, States that are not already doing so would need to establish a cross-agency data system or statewide longitudinal data system (SLDS), which may require costs for set-up, storage, management, and maintenance. The commenter cited a recent evaluation that indicated that a comprehensive SLDS project would take

3 years to establish and cost \$1 million to \$3 million for staffing and technology.

*Departments' Response:* The Departments recognize that there are challenges in coordinating the reporting of data across agencies, but also note that reporting this indicator as a shared measure supports closer alignment, increased coordination, and improved data sharing across State agencies, which are important parts of the vision and purpose of WIOA, and the Departments will work with States towards realizing this vision. In fact, the Departments' guidance details the requirements set forth in WIOA, specifically that closer alignment, increased coordination, and improved data sharing across State agencies in reporting on the WIOA core performance indicators are an important part of the vision of WIOA. See TEGL No. 10–16, Change 1. Current and further resources to provide technical assistance and guidance,<sup>29</sup> and community of practice tools<sup>30</sup> will be provided to support States in the collection of required performance data, as well as supplemental data, and development of State plans<sup>31</sup> to ensure accountability of service provision.

Additionally, since this is an annual measure, with alignment of performance accountability reporting to consolidate reporting across WIOA core programs and alleviate variation in deadlines for common reporting, the Departments do not consider individual program reporting deadlines to be an issue. Finally, the Departments note that all reporting is due to the agencies on the same date so that there should not be issues with reporting deadline differences.

The Departments note that there will be challenges in developing a statistical adjustment model for any definition of this measure and there is no reason to believe the development would be any less challenging if the Departments were to select an alternative definition for this indicator or to assess this indicator by program.

States are not required to collect this information using an SLDS. States are

<sup>29</sup> ETA, "WIOA Technical Assistance Resources and Tools," <https://www.dol.gov/agencies/eta/Performance/resources> (last visited July 31, 2023).

<sup>30</sup> S. Spaulding, et al., "Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act," Jan. 2021, [https://wdr.doleta.gov/research/FullText\\_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers\\_Final%20Report.pdf](https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers_Final%20Report.pdf).

<sup>31</sup> ETA, "WIOA Plans, Waivers, & Performance," <https://www.dol.gov/agencies/eta/wioa/plans-waivers-performance> (last visited July 31, 2023).

not required to share confidential data across programs to report on this measure. However, the sharing of confidential data across programs is a permissible approach for reporting on the effectiveness in serving employers performance indicator, if the State does so in accordance with State and Federal law requirements. Performance accountability reporting across WIOA core programs will continue to be conducted in the current manner for all of the six primary WIOA core programs indicators of performance and measures, including collection and sharing of data as necessary to retain the integrity of the data collected for the Retention with the Same Employer effectiveness in serving employers performance indicator.

With regard to concerns about reporting by title II programs for a single, statewide outcome for all WIOA core programs on the Retention with the Same Employer measure, the State's title II program would be expected to provide the data it has collected for title II participants who were employed in the second and fourth quarters to the State agency responsible for reporting on the effectiveness in serving employers indicator. If the State's title II program does not have access to the information required to determine Retention with the Same Employer through a data match, the State agency responsible for reporting on the indicator would use the data provided by the State's title II program to determine Retention with the Same Employer.

*Comments:* A few commenters recommended that this measure be reported and assessed just as the other five are reported and assessed: across programs and indicator scores. The commenter stated that if effectiveness in serving employers is measured only at the system level using a single target, as the Departments proposed, programs that achieved less than 90 percent of target on this one measure for 2 years in a row would be sanctioned. The commenter asserted that such a result would not be consistent with the Departments' original intent of leveling sanctions in cases of "catastrophic failures on a single measure (<50% of target)" or "systemic performance issues in a program or in a measure across programs (average of <90% of target)." The commenter, expressing concern about the proposal resulting in programs facing significantly greater risk of sanction, thus recommended that the standard of 90 percent of target not be applied to the effectiveness in serving employers measure if it is treated as a shared outcome.

*Departments' Response:* The Departments agree that State performance falling below 90 percent of the adjusted level of performance on this measure for 2 consecutive years would be subject to sanctions. However, at a systemic level, this is no different than it is for any other primary indicator of performance where 2 consecutive years of averaging below 90 percent of the adjusted level of performance across programs for an indicator would be subject to sanctions. Since the Departments are assessing this indicator as a shared outcome across all programs in a State, the individual indicator score assessments do not apply. Therefore, performance failure where an individual indicator score falls below 50 percent does not apply. Additionally, because the statistical adjustment model will be used to establish the adjusted level of performance, the risks of failure due to low performance resulting from external factors will be mitigated.

*Comments:* One commenter asserted measuring outcomes at the individual program and workforce area levels does not discourage statewide coordination and collaboration but rather provides for both accountability for poor performance and credit for performance success, which promotes coordination across programs and contributes to continuous improvement.

*Departments' Response:* The Departments acknowledge that coordination and collaboration are indeed occurring in many States. However, the comments received on the proposed rule as well as feedback during the pilot phase have underscored the need for increased collaboration and coordination and highlighted the partnership benefits that additional shared performance accountability incentives would yield.

*Comments:* Several commenters stated that the effectiveness in serving employers performance indicator should not be applied at the local level and recommended restricting its application in that context. Commenters discussed the restriction on including the indicator in individual score calculations, asserting that States should not be allowed to set and evaluate local operator targets for the shared outcome indicator, to include effectiveness in serving employers as part of the calculation to determine the individual indicator scores for a local workforce area, or to assess these indicators to determine sanctions on local areas or local operators. The commenters expressed concern that sanctioned States might pass on "punishments" from the sanctions to local operators. Acknowledging that State performance

necessarily aggregates the performance of individual local and State program operators, the commenters nevertheless asserted that local operators would bear too high a cost from the unintended consequences of performance failure if the measure is applied as proposed. Another commenter suggested that the indicator should only apply at the State level as local workforce development areas that have administrative oversight for non-core programs cannot rely on outcomes achieved by the title II program, Wagner-Peyser Act programs (title III), and VR program (title IV) to help achieve performance goals set for achieving the "more robustly defined" statewide performance target. The commenter requested further guidance to States on this point.

*Departments' Response:* WIOA sec. 116(c)(1)(A)(i) requires that all of the primary indicators of performance, including the effectiveness in serving employers indicator, must be applied at the local level for the WIOA title I programs (Adult, Dislocated Worker, and Youth). Therefore, States must apply the effectiveness in serving employers indicator at the local level. Furthermore, § 677.205(a) provides that "[e]ach local area in a State under WIOA title I is subject to the same primary indicators of performance for the core programs for WIOA title I under § 677.155(a)(1) and (c) that apply to the State." The Departments are not changing this provision in this rulemaking; therefore, the same definition and method of assessing performance applies at the local level. The Departments will provide updates to any guidance related to this as needed.

#### Sanctions Determinations

*Comments:* Several commenters supported the proposal to delay the inclusion of the effectiveness in serving employers indicator in sanctions determinations and suggested that the Departments should consider an even longer time period than proposed to collect the data. Commenters noted that not all States currently work with WIOA title I data and that extra time might be required to facilitate the data inclusion. Other commenters noted that this additional time would be particularly helpful in determining targets. One commenter suggested a specific extension of at least an additional year of data collection and reasoned that the additional time frame would allow States to implement the necessary methods of data collection, particularly if they did not pilot the proposed measure; learn from other States that have implemented the statewide

measure; and train personnel on implementing the data collection and sharing requirements.

*Departments' Response:* The Departments will implement this indicator similarly to how other indicators have been approached under WIOA. This will include providing technical assistance to States to ensure that they have the systems in place that are necessary to begin reporting on this indicator according to timelines that the Departments will establish and announce in guidance following the finalization of this rulemaking.

The Departments note that sanctions only occur after 2 consecutive years of performance failures for the same score. Furthermore, the implementation of performance assessments requires a minimum of 2 years of data before the Departments would use a statistical adjustment model in the negotiations process, and any potential implementation of performance assessments would be conditional upon having sufficient data to produce an objective statistical adjustment model. The metric uses existing data collected in the PIRL; States have been required to collect this information since the inception of the jointly administered performance accountability system established in WIOA sec. 116. The Departments believe there is sufficient time built into the implementation process and are not extending the implementation time frame currently.

*Comments:* One commenter questioned if an effectiveness in serving employers indicator dropped below a certain threshold could trigger a probation period for additional oversight by the Departments, possibly including sanctions as well.

*Departments' Response:* The Departments appreciate the commenter's suggestion and note that the first year of failure to meet 90 percent of a State's adjusted level of performance on the effectiveness in serving employers indicator would trigger required technical assistance, including a corrective action plan, and the second consecutive year of failure in this same manner would result in a sanction against the Governor's Reserve for statewide activities under the title I adult, dislocated worker, and youth formula programs under WIOA sec. 116(f)(1)(B). The Departments reiterate that this indicator will be treated similarly to how other indicators have been approached under WIOA.

*Comments:* Several commenters questioned whether the sanctions would be leveraged only against State set-aside title I allocations, expressing concern

that the penalty would be inequitable if it impacted all six core programs.

*Departments' Response:* As is the case for each of the six primary indicators of performance, WIOA sec. 116(f)(1)(B) requires that the application of sanctions is against the Governor's Reserve for statewide activities under the title I adult, dislocated worker, and youth formula programs. The Departments recognize the commenters' concerns regarding funding and sanctions being tied to individual programs; however, WIOA sec. 116(f)(1)(B) makes clear that the sanctions are imposed against the Governor's Reserve for statewide activities under the title I adult, dislocated worker, and youth formula programs regardless of which of the six core programs' performance constitutes a failure giving rise to the sanction. Therefore, given the explicit statutory requirement, the Departments do not have the authority to do as these commenters suggest. No change to the regulatory text was made in response to these comments.

#### Statistical Adjustment Model

*Comments:* Several commenters recommended ensuring that the statistical adjustment model accounts for fluctuations in employment rates caused by the seasonal and migrant workforces, particularly in the construction, agriculture, and hospitality sectors. Similarly, another commenter recommended that the statistical adjustment model incorporate factors such as self-employment, temporary employment, transitioning job seekers, and gig workers. The commenter further recommended that the Departments consider external factors that would cause measurement deviations, such as participants seeking immediate employment to avoid hardship, participants accepting a better job offer with sustainable wages or benefits, and participants seeking opportunities to upgrade their skills.

One commenter stated that the proposed measure would require additional statistical adjustments, that it would be subject to variations based on sector and economic conditions, and that it would not reflect current workforce trends like increases in self-employment. Another commenter expressed similar concerns about the measure's ability to accurately capture effectiveness in serving employers given particular economic conditions and differences across industries. A third commenter likewise asserted that the indicator would be subject to fluctuating economic conditions.

One commenter recommended that the Departments consider additional factors in the final rule, including: factors that can affect the median tenure of workers, which is lower for younger people; difficulty in accounting for differences among regions, such as areas with relatively greater or fewer employment opportunities; inconsistencies among reporting platforms; differences in tracking timelines and reporting requirements among workforce partners; and the possibility that employer retention rates can increase or decrease without changes in levels of employer services being provided.

*Departments' Response:* The Departments thank the commenters for these recommendations. The Departments acknowledge the commenters' recommendations and note that the statistical adjustment model will address the commenters' concerns. The Departments will conduct a thorough development process for the statistical adjustment model for this indicator, as has been and continues to be done in the development of the model for the other five primary indicators of performance. The Departments will provide updates to the appropriate performance guidance and technical assistance for reporting on this indicator.

#### Request for Guidance

*Comments:* Commenters requested that the Departments provide grantees with defined methods for gathering and reporting the relevant data to ensure that all programs collect and report the data consistently. Another commenter asked for guidance on how performance negotiations would be handled in States without centralized organization into one agency, specifically if the designated State workforce agency will complete the negotiations for this statewide measure in such cases. Another commenter noted that retention with employers during the second and fourth quarters after exit is reported on the RSA 911 and the PIRL and suggested that the Departments use State ETA 9169 reports to collect the percentage of retention, a practice that it said would reduce any duplicate reporting. Another commenter asked multiple questions related to implementation of the Retention with the Same Employer measure, namely how it would affect the reporting requirements outlined in TEGL No. 10-16, Change 2, Attachment IV, Table B; what the impacts would be for the defined services to business since those measures would no longer be required to be reported; and how

employer establishments would be reported.

*Departments' Response:* The Departments appreciate these comments and note that the Departments will provide detailed information on these requirements through ICRs, guidance, instructions, and technical assistance relating to definitions, data collection and reporting, negotiations, and local level application of this primary indicator of performance.

The Departments made no changes to proposed § 677.190; the final rule implements § 677.190 as proposed.

**III. Regulatory Analysis and Review**

*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 Executive Order (E.O.) 12866, the 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 section 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). This final rule is a significant regulatory action under section 3(f) of E.O. 12866, as amended by E.O.14094.

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.

**1. Outline of the Analysis**

Section III.A.2 provides a summary of the results of the RIA. Section III.A.3

describes the need for the final rule, and Section III.A.4 describes the process used to estimate the costs and cost savings of the final rule and the general inputs used, such as wages and number of affected entities. Section III.A.5 explains how the provisions of the final rule will result in quantified costs and cost savings and presents the calculations the Departments used to estimate them. In addition, Section III.A.5 describes the qualitative benefits of the final rule. Section III.A.6 summarizes the estimated first-year and 10-year total and annualized costs, cost savings, and net costs of the final rule. Finally, Section III.A.7 describes the regulatory alternatives considered when developing the final rule.

**2. Analysis Summary**

The Departments estimate that the final rule will result in costs and cost savings. As shown in Exhibit 2, the final rule is expected to have an annualized quantified cost of \$44,208 and a total 10-year quantifiable cost of \$310,497 at a discount rate of 7 percent.<sup>32</sup> The final rule is estimated to have annualized quantified cost savings of \$2.30 million and total 10-year quantifiable cost savings of \$16.13 million at a discount rate of 7 percent.<sup>33</sup> The Departments estimate that the final rule will result in an annualized net quantified cost savings of \$2.25 million and a total 10-year net cost of \$15.82 million, both at a discount rate of 7 percent and expressed in 2022 dollars.<sup>34</sup>

**EXHIBIT 2—ESTIMATED MONETIZED COSTS, COST SAVINGS, AND NET COST SAVINGS OF THE FINAL RULE**  
[2022 \$millions]

	Costs	Cost savings	Net cost savings
Undiscounted 10-Year Total .....	\$0.35	\$21.46	\$21.11
10-Year Total with a Discount Rate of 3% .....	0.33	18.85	18.52
10-Year Total with a Discount Rate of 7% .....	0.31	16.13	15.82
10-Year Average .....	0.03	2.15	2.11
Annualized at a Discount Rate of 3% .....	0.04	2.21	2.17
Annualized at a Discount Rate of 7% .....	0.04	2.30	2.25

The cost of the final rule is associated with rule familiarization and the requirement to calculate and report Retention with the Same Employer for the effectiveness in serving employers performance indicator for 57 States and

78 VR agencies.<sup>35</sup> No longer requiring States to collect, calculate, and report for two alternative definitions of the effectiveness in serving employers performance indicator and instead requiring States to calculate and report

only the Retention with the Same Employer definition of the indicator will contribute to the cost savings of the final rule. See the costs and cost savings subsections of Section III.A.5 (Subject-by-Subject Analysis) below for a

<sup>32</sup> The final rule would have an annualized cost of \$38,607 and a total 10-year cost of \$329,323 at a discount rate of 3 percent in 2022 dollars.

<sup>33</sup> The final rule would have an annualized cost savings of \$2.21 million and a total 10-year cost savings of \$18.85 million at a discount rate of 3 percent in 2022 dollars.

<sup>34</sup> The final rule would have an annualized net cost savings of \$2.17 million and a total 10-year cost of \$18.52 million at a discount rate of 3 percent in 2022 dollars.

<sup>35</sup> Consistent with WIOA sec. 3(56) and 20 CFR 677.150(d), the use of the term “States” in this RIA refers to the 50 States; the District of Columbia;

Puerto Rico; and the outlying areas of American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands; and the Republic of Palau, a country in free association with the United States. See also footnote 8 *supra*.

detailed explanation. To be clear, however, the Departments' decision with respect to this final rule was not based on the cost savings but rather on the programmatic and data benefits described previously in Sections II.A and II.B above.

The Departments cannot quantify the benefits of the final rule; therefore, Section III.A.5 (Subject-by-Subject Analysis) describes the benefits qualitatively.

Comments that the Departments received regarding the RIA set forth in the proposed rule are summarized and responded to below.

*Comments:* A commenter expressed concern about the costs and time associated with developing a system that combines data across all programs. Further, the commenter said, to successfully capture data from multiple agencies, States that are not already doing so would need to establish a cross-agency data system or SLDS, which may require costs for set-up, storage, management, and maintenance. The commenter cited a recent evaluation that indicated that a comprehensive SLDS project would take 3 years to establish and cost \$1 million to \$3 million for staffing and technology.

*Departments' Response:* The Departments estimate the costs of the requirements of the final rule, which are to calculate and report the Retention with the Same Employer indicator. Those costs include the time for programming and reporting. Currently, States report on two of the three pilot measures for effectiveness in serving employers. Therefore, States are already reporting effectiveness in serving employers measures that include data across all core programs in the State. In other words, this is not a new approach for reporting data for this indicator and, thus, is familiar to States. The Retention with the Same Employer measure is not requiring the establishment of a cross-agency data system.

*Comments:* A commenter said that although using the proposed measure, Retention with the Same Employer, may require less administrative costs than the other piloted alternatives, meeting the performance goals would be difficult and thus negate the cost savings.

*Departments' Response:* Retention with the Same Employer supports meeting performance goals as it is a valid measure of WIOA's core programs'

effectiveness in serving employers with lesser administrative costs. As discussed in the qualitative benefits section of the RIA, Retention with the Same Employer demonstrates a continued relationship between the employer and participants who have exited WIOA core programs. While many circumstances can have an impact on an employer's retention of employees, an indication that an employee is still working for the same employer in both the second and fourth quarters after exiting from a WIOA program demonstrates a level of success for both parties, as retention of an employee reduces the costs to the employer associated with employee turnover and retraining (see also the Departments' Responses to comments in Section II.B). In terms of meeting the performance goals, the Departments disagree that meeting the target for this measure will be more difficult compared to the other piloted alternatives. As would be true for all the piloted measures and like the other primary indicators of performance, the statistical adjustment model will adjust based on actual values from the States, and therefore the Departments do not believe this definition of the indicator will be more difficult to achieve success than any of the other indicators.

### 3. Need for Regulation

In the Joint WIOA Final Rule, the Departments described a phased approach, which included a pilot study, to defining in regulation the sixth statutory performance indicator—effectiveness in serving employers—required by WIOA. This final rulemaking is necessary to complete implementation of the performance accountability requirements as discussed in the Joint WIOA Final Rule and required by statute. Specifically, States, under the Departments' joint guidance, piloted the following definitions for the effectiveness in serving employers performance indicator:

- Retention with the Same Employer: Percentage of participants with wage records who exit from WIOA core programs and were employed by the same employer in the second and fourth quarters after exit.
- Repeat Business Customer: Percentage of employers who have used WIOA core program services more than once during the last three reporting periods.

- Employer Penetration: Percentage of employers using WIOA core program services out of all employers in the State.

The Departments are establishing Retention with the Same Employer as the standard definition of the effectiveness in serving employers performance indicator to complete implementation of the WIOA performance accountability requirements to assess the effectiveness of States and local areas in achieving positive outcomes.

## 4. Analysis Considerations

### a. WIOA Core Programs

The Departments estimated the costs and cost savings of the final rule relative to the existing baseline (*i.e.*, the current practices for complying with the joint WIOA performance accountability regulations and the Departments' joint guidance). WIOA sec. 116 establishes the requirement for performance indicators and performance reporting requirements to assess the effectiveness of the WIOA core programs enumerated in WIOA sec. 116(b)(3)(A)(ii) in serving employers. The core programs include adult, dislocated worker, and youth programs under title I of WIOA; the AEFLA program under title II; programs authorized under the Wagner-Peyser Act as amended by WIOA title III; and the VR program authorized under title I of the Rehabilitation Act as amended by WIOA title IV. The analysis refers to the WIOA title I and Wagner-Peyser Act programs jointly as the DOL programs.

The baseline consists of the combination of piloted approaches for effectiveness in serving employers that States collected in 2021 and would be expected to continue to report in the absence of this final rule. The baseline uses DOL historical data on the number of States that report each combination of the three piloted approaches for the effectiveness in serving employers performance indicator. Exhibit 3 displays DOL data from 2017 through 2021 on the existing effectiveness in serving employers approach combinations. The Departments used the most recent year of State data reported for PY 2021 to define the existing baseline of States reporting combinations of approaches to the effectiveness in serving employers performance indicator.

EXHIBIT 3—STATE REPORTING COMBINATIONS OF EFFECTIVENESS IN SERVING EMPLOYERS DEFINITIONS

	Retention with the same employer + employer penetration	Retention with the same employer + repeat business customer	Repeat business customer + employer penetration	All three effectiveness in serving employers approaches	Total states reporting
2017 .....	12	5	17	10	44
2018 .....	10	10	17	15	52
2019 .....	9	11	18	14	52
2020 .....	9	12	20	15	56
2021 .....	10	9	22	16	57

In accordance with the RIA guidance articulated in OMB’s Circular A–4 and consistent with the Departments’ practices in previous rulemakings, this RIA focuses on the likely consequences of the final rule (i.e., costs and cost savings that accrue to entities affected). The analysis covers 10 years (from 2024 through 2033) to ensure it captures major costs and cost savings that accrue over time. The Departments express all quantifiable impacts in 2022 dollars and use discount rates of 3 and 7 percent, pursuant to OMB Circular A–4.

Exhibit 4 presents the number of entities that are expected to be affected by the final rule. The Departments provide these estimates and use them throughout this analysis to estimate the costs and cost savings of the final rule.

EXHIBIT 4—WIOA CORE PROGRAMS— NUMBER OF AFFECTED ENTITIES BY TYPE

Entity type	Number
<i>DOL Programs:</i>	
States .....	57
Local Workforce Development Boards (WDBs) .....	580
<i>AEFLA Program:</i>	
States .....	57
Local AEFLA providers <sup>36</sup> .....	1,719
<i>VR Program:</i>	
VR agencies .....	78

b. Compensation Rates

In Section III.A.5 (Subject-by-Subject Analysis), the Departments present the costs, including labor, associated with the implementation of the provisions of the final rule. Exhibits 5a through 5c present the hourly compensation rates for the occupational categories expected to experience a change in level of effort

(workload) due to the final rule. We used the BLS mean hourly wage rate for State and local employees.<sup>37 38</sup> We also used the wage rate from the Office of Personnel Management’s Salary Table for the 2022 General Schedule for Federal employees in the management analyst occupation (Grade 14, Step 5).<sup>39</sup> To reflect total compensation, wage rates include nonwage factors, such as overhead and fringe benefits (e.g., health and retirement benefits). For all labor groups (i.e., local, State, and Federal governments), we used an overhead rate of 17 percent.<sup>40</sup> For the State and local sectors, we used a fringe benefits rate of 62 percent, which represents the ratio of average total compensation to average wages for State and local government workers in March 2022.<sup>41</sup> For the Federal Government, we used a fringe benefits rate of 63 percent.<sup>42</sup> We then multiplied the sum of the loaded wage factor and overhead rate by the corresponding occupational category wage rate to calculate an hourly compensation rate.<sup>43</sup>

EXHIBIT 5a—COMPENSATION RATES FOR LOCAL EMPLOYEES [2022\$]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
Management Analyst .....	N/A	\$43.61	\$27.04 (\$43.61 × 0.62)	\$7.41 (\$43.61 × 0.17)	\$78.06
Database Administrator .....	N/A	\$49.01	\$30.39 (\$49.01 × 0.62)	\$8.33 (\$49.01 × 0.17)	\$87.73

<sup>36</sup> Local AEFLA providers include local educational agencies; community-based organizations; faith-based organizations; libraries; community, junior, and technical colleges; 4-year colleges and universities; correctional institutions; and other agencies and institutions.

<sup>37</sup> BLS, “May 2022 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 999200—State Government, excluding schools and hospitals (OEWS Designation).” [https://www.bls.gov/oes/current/naics4\\_999200.htm](https://www.bls.gov/oes/current/naics4_999200.htm) (last updated April 25, 2023).

<sup>38</sup> BLS, “May 2022 National Industry-Specific Occupational Employment and Wage Estimates:

NAICS 999300—Local Government, excluding schools and hospitals (OEWS Designation).” [https://www.bls.gov/oes/current/naics4\\_999300.htm](https://www.bls.gov/oes/current/naics4_999300.htm) (last updated April 25, 2023).

<sup>39</sup> Office of Personnel Management, “Salary Table 2022,” [https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2022/GS\\_h.pdf](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2022/GS_h.pdf) (last visited Aug. 29, 2023).

<sup>40</sup> Cody Rice, U.S. Environmental Protection Agency, “Wage Rates for Economic Analyses of the Toxics Release Inventory Program,” June 10, 2002, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005>.

<sup>41</sup> BLS, “Employer Costs for Employee Compensation—March 2022,” June. 16, 2022,

[https://www.bls.gov/news.release/archives/ecec\\_06162022.pdf](https://www.bls.gov/news.release/archives/ecec_06162022.pdf). Calculated using Table 1. Employer Costs for Employee Compensation by ownership.

<sup>42</sup> DOL, “Workforce Innovation and Opportunity Act (WIOA) Common Performance Reporting” OMB Control No. 1205–0526, [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=202012-1205-003](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202012-1205-003) (last visited Aug. 29, 2023).

<sup>43</sup> The hourly compensation rates presented in Exhibit 5a, Exhibit 5b, and Exhibit 5c are rounded. Calculations used throughout the RIA use the unrounded value. Therefore, numbers may not sum due to rounding for the convenience of the reader.

EXHIBIT 5b—COMPENSATION RATES FOR STATE EMPLOYEES  
[2022\$]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
Management Analyst .....	N/A	\$35.31	\$21.89 (\$35.31 × 0.62)	\$6.00 (\$35.31 × 0.17)	\$63.20
Staff Trainer .....	N/A	\$39.31	\$24.37 (\$39.31 × 0.62)	\$6.68 (\$39.31 × 0.17)	\$70.36
Rehabilitation Counselor .....	N/A	\$27.31	\$16.93 (\$27.31 × 0.62)	\$4.64 (\$27.31 × 0.17)	\$48.88

EXHIBIT 5c—COMPENSATION RATES FOR FEDERAL EMPLOYEES  
[2022\$]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
Management Analyst .....	GS-14, Step 5	\$52.12	\$32.84 (\$52.12 × 0.63)	\$8.86 (\$52.12 × 0.17)	\$93.82

5. Subject-by-Subject Analysis

The Departments' analysis below covers the estimated costs and cost savings of the final rule.

c. Costs

The following sections describe the costs of the final rule.<sup>44</sup>

(1) WIOA Core Programs Rule Familiarization

State- and local-level DOL programs, State- and local-level AEFLA programs, and State VR agencies will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost in the first year.

To estimate the first-year cost of rule familiarization at the State level, the Departments multiplied the estimated number of management analysts (1) by the time required to read and review the rule (1 hour), and by the applicable

hourly compensation rate (\$63.20/hour). We multiplied this result by the sum of the number of States (57) for the DOL programs, the number of States (57) for the AEFLA programs, and the number of VR agencies (78). This calculation yields \$12,135 in one-time labor costs, which is equal to an average annual cost of \$1,214 over the 10-year analysis period.

At the local level for the DOL programs, the Departments multiplied the estimated number of management analysts (1) by the time required to read and review the rule (1 hour), by the applicable hourly compensation rate (\$78.06/hour), and by the number of local WDBs (580). This calculation yields \$45,276 in one-time labor costs, which is equal to an average annual cost of \$4,528 over the 10-year analysis period.<sup>45</sup>

At the local level for the AEFLA programs, the Departments multiplied

the estimated number of management analysts (1) by the time required to read and review the rule (1 hour), by the applicable hourly compensation rate (\$78.06/hour), and by the number of local AEFLA providers (1,719). This calculation yields \$134,188 in one-time labor costs, which is equal to an average annual cost of \$13,419 over the 10-year analysis period.

The sum of these costs yields a total one-time labor cost of \$191,600 for State- and local-level DOL programs, State- and local-level AEFLA programs, and State VR agencies to read and review the new rule. Over the 10-year period of analysis, these estimated one-time costs result in an average annual cost of \$19,160 undiscounted, or \$22,461 and \$27,279 at discount rates of 3 and 7 percent, respectively. Exhibit 6 summarizes the above calculations.

EXHIBIT 6—WIOA CORE PROGRAMS, RULE FAMILIARIZATION ONE TIME COST

Agency	Management analyst hours	Number of management analysts	Loaded wage rate	Population <sup>1</sup>	Total <sup>2</sup>
State-level DOL .....	1	1	\$63.20	57	\$3,602
Local-level DOL .....	1	1	78.06	580	45,276
State-level AEFLA .....	1	1	63.20	57	3,602
Local-level AEFLA .....	1	1	78.06	1,719	134,188
State-level VR .....	1	1	63.20	78	4,930
Total Initial Cost .....					191,600

<sup>1</sup> Population figures represent States (57) and VR agencies (78).

<sup>2</sup> Numbers may not sum due to rounding for the convenience of the reader.

<sup>44</sup> Numbers may not sum due to rounding for the convenience of the reader.

<sup>45</sup> Numbers may not sum due to rounding for the convenience of the reader.



## (2) Calculating and Reporting Retention With the Same Employer

WIOA sec. 116(b)(2)(A)(i)(VI) provides that the sixth primary indicator of performance will be an indicator that measures program effectiveness in serving employers, which WIOA sec. 116(b)(2)(A)(iv) directs the Departments to establish. Currently, under the Departments' joint guidance, States must report at least two of the following three approaches to measuring effectiveness in serving employers: Retention with the Same Employer, Employer Penetration, and Repeat Business Customer. All States will be required to adopt the same approach to measure effectiveness in serving employers: Retention with the Same Employer. Seventeen States do not currently report the Retention with the Same Employer approach to the effectiveness in serving employers performance indicator.<sup>46</sup> These 17 States will have new costs associated with setting up procedures to calculate and report Retention with the Same Employer and annual costs associated with continuing to calculate and report Retention with the Same Employer. To estimate the cost of establishing Retention with the Same Employer as the effectiveness in serving employers performance indicator, the Departments followed the assumptions used to estimate the pilot cost of the Retention with the Same Employer approach to effectiveness in serving employers in the 2016 Joint WIOA Final Rule. However, we updated those assumptions for this analysis by removing the cost of collecting data (4 hours) because all States are already collecting the required data in the baseline. We then increased the number of hours we assume State-level DOL programs require for one-time costs of programming (from 4 to 6 hours) based on the Departments' experience with initial costs for programming following the Joint WIOA Final Rule. The assumptions and costs are summarized as follows:

At the Federal level for the DOL core programs, the Departments estimate the one-time labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of GS-14, Step 5 management analysts (one) by the time required for technical assistance

development (8 hours) and by the hourly compensation rate (\$93.82/hour). This calculation results in a one-time labor cost of \$751.

The Departments estimated DOL's annual labor costs for calculating and reporting Retention with the Same Employer by multiplying the estimated number of GS-14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate (\$93.82/hour). This calculation results in an annual labor cost of \$375.

At the State level for the DOL core programs, the Departments estimated the one-time labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of management analysts (one) by the time required for programming (6 hours) and by the hourly compensation rate (\$63.20/hour). We multiplied the labor cost (\$379) by the number of States (57) to estimate this one-time cost at \$21,616.

The Departments estimated the State-level DOL core programs' annual labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of management analysts (one) by the time required for Federal reporting (4 hours) and by the hourly compensation rate (\$63.20/hour). We multiplied the labor cost (\$253) by the number of States (57) to estimate this annual cost at \$14,411.

At the Federal level for the AEFLA program, the Departments estimated the one-time labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of GS-14, Step 5 management analysts (one) by the time required for technical assistance development (8 hours) and by the hourly compensation rate (\$93.82/hour). This calculation results in a one-time labor cost of \$751.

The Departments estimated AEFLA's annual labor cost for calculating and reporting Retention with the Same Employer at the Federal level by multiplying the estimated number of GS-14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate (\$93.82/hour). This calculation results in an annual labor cost of \$375.

At the State level for the AEFLA program, the Departments estimated the one-time labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of management analysts (one) by the time required for programming and data collection (6

hours) and by the hourly compensation rate (\$63.20). We multiplied the labor cost (\$379) by the number of States (57) to estimate this one-time cost at \$21,616.<sup>47</sup>

The Departments estimated the State-level AEFLA program's annual labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of management analysts (one) by the time required for Federal reporting (4 hours) and by the hourly compensation rate (\$63.20/hour). We multiplied the labor cost (\$53) by the number of States (57) to estimate this annual cost at \$14,411.

At the Federal level for the VR program, the Departments estimated the one-time labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of GS-14, Step 5 management analysts (one) by the time required for technical assistance development (8 hours) and by the hourly compensation rate (\$93.82/hour). This calculation results in a one-time labor cost of \$751.

The Departments estimated the annual labor costs associated with calculating and reporting Retention with the Same Employer at the Federal level for the VR program by multiplying the estimated number of GS-14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate (\$93.82/hour). This calculation results in an annual labor cost of \$375.

At the State level for the VR program, the Departments estimated the one-time labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of management analysts (one) by the time required for programming (6 hours) and by the hourly compensation rate (\$63.20/hour). We multiplied the labor cost (\$379) by the number of VR agencies (78) to estimate this one-time cost at \$29,580.

The Departments estimated the State-level VR program's annual labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of management analysts (one) by the time required for Federal reporting (4 hours) and by the hourly compensation rate (\$63.20/hour). We multiplied the labor cost (\$253) by the number of VR agencies (78) to estimate this annual cost of \$19,720.

<sup>46</sup> Thirty-five States report Retention with the Same Employer according to DOL data. DOL collects data on 52 of 57 States defined in this analysis. DOL assumes the remaining 5 States report the cheapest combination of pilot approaches (Retention with the Same Employer + Employer Penetration), resulting in the RIA assuming 40 States report Retention with the Same Employer.

<sup>47</sup> Numbers may not sum due to rounding for the convenience of the reader.

The sum of these one-time costs of the retention measure yields \$75,064 for individuals from the Federal- and State-level DOL core programs, AEFLA

program, and VR program. In addition, the sum of the annual costs associated with calculating and reporting Retention with the Same Employer for these

entities yields \$49,667 per year. Exhibits 7a and 7b summarize the above calculations.

EXHIBIT 7a—RETENTION WITH THE SAME EMPLOYER, INITIAL COST

Agency	Management analyst hours <sup>1</sup>	Number of management analysts	Loaded wage rate	Population <sup>2</sup>	Total <sup>3</sup>
Federal-level DOL .....	8	1	\$93.82	NA	\$751
State-level DOL .....	6	1	63.20	57	21,616
Federal-level AEFLA .....	8	1	93.82	NA	751
State-level AEFLA .....	6	1	63.20	57	21,616
Federal-level VR .....	8	1	93.82	NA	751
State-level VR .....	6	1	63.20	78	29,580
<b>Total Initial Cost .....</b>					<b>75,064</b>

<sup>1</sup> Management analysts on the Federal level are GS–14, Step 5.  
<sup>2</sup> Population figures represent States (57) and VR agencies (78).  
<sup>3</sup> Numbers may not sum due to rounding for the convenience of the reader.

EXHIBIT 7b—RETENTION WITH THE SAME EMPLOYER, ANNUAL COST

Agency	Management analyst hours <sup>1</sup>	Number of management analysts	Loaded wage rate	Population <sup>2</sup>	Total <sup>3</sup>
Federal-level DOL .....	4	1	\$93.82	NA	\$375
State-level DOL .....	4	1	63.20	57	14,411
Federal-level AEFLA .....	4	1	93.82	NA	375
State-level AEFLA .....	4	1	63.20	57	14,411
Federal-level VR .....	4	1	93.82	NA	375
State-level VR .....	4	1	63.20	78	19,720
<b>Total Annual Cost .....</b>					<b>49,667</b>

<sup>1</sup> Management analysts on the Federal level are GS–14, Step 5.  
<sup>2</sup> Population figures represent States (57) and VR agencies (78).  
<sup>3</sup> Numbers may not sum due to rounding for the convenience of the reader.

The costs in Exhibits 7a and 7b represent the costs for all 57 States to report the Retention with the Same Employer approach to the effectiveness in serving employers performance indicator. Currently, 40 States already report Retention with the Same Employer. The remaining 17 States will face costs with having to start reporting Retention with the Same Employer. We therefore multiply the total one-time costs (\$75,064) and annual costs (\$49,667) by the 29.8 percent of States not currently reporting the retention measure (17 out of 57) yielding \$22,387 in one-time costs and an additional \$14,813 in annual costs to increase the number of States reporting the retention measure from 40 to all 57.

The estimated total cost from requiring all States to report Retention with the Same Employer over the 10-year period is \$155,704 undiscounted, or \$137,723 and \$118,898 at discount rates of 3 and 7 percent, respectively, with an annualized cost over the 10-year period of \$16,145 and \$16,928 at discount rates of 3 and 7 percent, respectively.

d. Cost Savings

The following sections describe the cost savings of the final rule.

(1) Summary of Approach

The pilot program announced in the 2016 Joint WIOA Final Rule required States to report two of the three approaches for measuring effectiveness in serving employers. Under this final rule States will no longer face costs associated with collecting the information required to calculate the Employer Penetration or Repeat Business Customer approaches to the effectiveness in serving employers performance indicator. To estimate the cost savings, we first update the costs associated with collecting each of these pilot approaches following the assumptions used to estimate the cost of the Retention with the Same Employer pilot approach in the 2016 Joint WIOA Final Rule. We then estimate the cost savings under the final rule associated with the proportion of States that will no longer report the various combinations of the pilot approaches that States report in the baseline.

Currently, 15 States report Retention with the Same Employer and Employer Penetration, 9 States report Retention with the Same Employer and Repeat Business Customer, 22 States report Employer Penetration and Repeat Business Customer, and 16 States report all 3 approaches to defining the effectiveness in serving employers performance indicator. To estimate cost savings, we first estimate the annual cost of all 57 States collecting data for, calculating, and reporting the percentage of employers using services out of all employers in the State (Employer Penetration) and the percentage of repeat employers using services within the previous 3 years (Repeat Business Customer). We then multiply the annual cost by the percentage of States currently using the pilot approach to estimate the cost savings. Below, we present the updated costs associated with all 57 States reporting each pilot approach, and then present the cost savings associated with the proportion of States no longer reporting them.

(2) Employer Penetration: Percentage of Employers Using Services Out of All Employers in the State

Under the pilot program, States must use two of three specified approaches to measure effectiveness in serving employers. The final rule will only require States to collect data for, calculate, and report the first approach (Retention with the Same Employer). This section calculates the cost for all 57 States to collect data, calculate, and report Employer Penetration and then uses these costs to estimate cost savings for the proportion of States that will no longer report Employer Penetration under the final rule.

At the Federal level for the DOL core programs, the Departments estimated the annual labor cost associated with Employer Penetration by multiplying the estimated number of GS-14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate (\$93.82/hour). This calculation results in an annual labor cost of \$375.

At the State level for the DOL core programs, the Departments estimated Employer Penetration’s annual labor cost by multiplying the estimated number of management analysts (one) by the sum of time required for data collection (4 hours), providing training and technical assistance to Local WDBs (3 hours), and Federal reporting (4 hours) and by the hourly compensation rate (\$63.20/hour). We multiplied the labor cost (\$695) by the number of States (57) to estimate this annual cost at \$39,629.

For local-level DOL core programs, the Departments estimated the annual labor cost for Employer Penetration by multiplying the estimated number of management analysts (one) by the time required for data collection (4 hours) and by the hourly compensation rate (\$78.06/hour). We multiplied the labor cost (\$312) by the number of Local WDBs (580) to estimate this annual cost at \$181,104.

At the Federal level for the AEFLA program, the Departments estimated the annual labor cost associated with Employer Penetration by multiplying the estimated number of GS-14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate (\$93.82/hour). This calculation results in an annual labor cost of \$375.

At the State level for the AEFLA program, the Departments estimated Employer Penetration’s annual labor cost by multiplying the estimated number of management analysts (one) by the sum of time required for data collection (4 hours), providing training and technical assistance to local AEFLA providers (3 hours), and Federal reporting (4 hours) and by the hourly compensation rate (\$63.20/hour). We multiplied the labor cost (\$695) by the number of States (57) to estimate this annual cost at \$39,629.

For the local-level AEFLA program, the Departments estimated the annual labor cost for Employer Penetration by multiplying the estimated number of management analysts (one) by the time required for data collection (4 hours) and by the hourly compensation rate

(\$78.06/hour). We multiplied the labor cost (\$312) by the number of local AEFLA providers (1,719) to estimate this annual cost at \$536,754.<sup>48</sup>

At the Federal level for the VR program, the Departments estimated the annual labor cost associated with Employer Penetration by multiplying the estimated number of GS-14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate (\$93.82/hour). This calculation results in an annual labor cost of \$375.

At the State level for the VR program, the Departments estimated Employer Penetration’s annual labor cost by multiplying the estimated number of management analysts (one) by the time required for Federal reporting (4 hours) and by the hourly compensation rate (\$63.20/hour). In addition, we added the estimated number of rehabilitation counselors (62 assistants) by the time required for data collection (1 hour each) and by the hourly compensation rate (\$48.88/hour). We summed the labor cost for both categories and multiplied it (\$3,284) by the number of VR agencies (78) to estimate this annual cost at \$256,127.

Summing these annual costs for all 57 States to calculate and report Employer Penetration yields \$1,054,369 per year for the Federal-, State-, and local-level DOL core programs and AEFLA programs and the State-level VR programs. The Departments used the updated costs in Exhibit 8 to estimate the cost savings for States that will no longer report this pilot approach.

EXHIBIT 8—EMPLOYER PENETRATION, ANNUAL

Agency	Labor category <sup>1</sup>	Hours	Workers	Loaded wage rate	Population <sup>2</sup>	Total <sup>3</sup>
Federal-level DOL	Management Analyst	4	1	\$93.82	NA	\$375
State-level DOL	Management Analyst	11	1	63.20	57	39,629
Local-Level DOL	Management Analyst	4	1	78.06	580	181,104
Federal-level AEFLA	Management Analyst	4	1	93.82	NA	375
State-level AEFLA	Management Analyst	11	1	63.20	57	39,629
Local-Level AEFLA	Management Analyst	4	1	78.06	1,719	536,754
Federal-level VR	Management Analyst	4	1	93.82	NA	375
State-level VR	Management Analyst	4	1	63.20	78	19,720
State-level VR	Rehab Counselor	1	62	48.88	78	236,407
Annual Total						1,054,369

<sup>1</sup> Management analysts on the Federal level are GS-14, Step 5.

<sup>2</sup> Population figures represent States (57), VR agencies (78), and AEFLA providers (1,719).

<sup>3</sup> Numbers may not sum due to rounding for the convenience of the reader.

<sup>48</sup> Numbers may not sum due to rounding for the convenience of the reader.

(3) Repeat Business Customer: Percentage of Repeat Employers Using Services Within the Previous 3 Years

This section calculates the cost for all 57 States to collect data, calculate, and report the Repeat Business Customer approach to the effectiveness in serving employers performance indicator. The Departments use these costs to estimate cost savings for the proportion of States that will no longer report this pilot approach under the final rule.

At the Federal level for the DOL core programs, the Departments estimated the annual labor cost associated with Repeat Business Customer by multiplying the estimated number of GS-14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate (\$93.82/hour). This calculation results in an annual labor cost of \$375.

At the State level for the DOL core programs, the Departments estimated Repeat Business Customer’s annual labor cost by multiplying the estimated number of management analysts (one) by the sum of time required for data collection (4 hours), providing training and technical assistance to Local WDBs (3 hours), and Federal reporting (4 hours) and by the hourly compensation rate (\$63.20/hour). We multiplied the labor cost (\$695) by the number of States (57) to estimate this annual cost at \$39,629.

For the local-level DOL core programs, the Departments estimated the annual labor cost for Repeat Business Customer by multiplying the

estimated number of management analysts (one) by the time required for data collection (6 hours) and by the hourly compensation rate (\$78.06/hour). We multiplied the labor cost (\$468) by the number of Local WDBs (580) to estimate this annual cost at \$271,655.

At the Federal level for the AEFLA program, the Departments estimated the annual labor cost associated with Repeat Business Customer by multiplying the estimated number of GS-14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate (\$93.82/hour). This calculation results in an annual labor cost of \$375.

At the State level for the AEFLA program, the Departments estimated Repeat Business Customer’s annual labor cost by multiplying the estimated number of management analysts (one) by the sum of time required for data collection (4 hours), providing training and technical assistance to local AEFLA providers (3 hours), and Federal reporting (4 hours) and by the hourly compensation rate (\$63.20/hour). We multiplied the labor cost (\$695) by the number of States (57) to estimate this annual cost at \$39,629.

For the local-level AEFLA program, the Departments estimated the annual labor cost for Repeat Business Customer by multiplying the estimated number of management analysts (one) by the time required for data collection (6 hours) and by the hourly compensation rate (\$78.06/hour). We multiplied the labor cost (\$468) by the number of local

AEFLA providers (1,719) to estimate this annual cost at \$805,130.

At the Federal level for the VR program, the Departments estimated the annual labor cost associated with Repeat Business Customer by multiplying the estimated number of GS-14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate (\$93.82/hour). This calculation results in an annual labor cost of \$375.

At the State level for the VR program, the Departments estimated Repeat Business Customer’s annual labor cost by multiplying the estimated number of management analysts (one) by the time required for Federal reporting (4 hours) and by the hourly compensation rate (\$63.20/hour). In addition, we added the estimated number of rehabilitation counselors (62 counselors) by the time required for data collection (1 hour each) and by the hourly compensation rate (\$48.88/hour). We summed the labor cost for both categories (\$3,284) and multiplied it by the number of VR agencies (78) to estimate this annual cost of \$256,127.

Summing these annual costs for all States to calculate and report Repeat Business Customer yields \$1,413,298 per year for the Federal-, State-, and local-level DOL core programs and AEFLA programs and the State-level VR programs. The Departments used the updated costs in Exhibit 9 to estimate the cost savings for States to no longer report this pilot approach.

EXHIBIT 9—REPEAT BUSINESS CUSTOMER, ANNUAL

Agency	Labor category <sup>1</sup>	Hours	Workers	Loaded wage rate	Population <sup>2</sup>	Total <sup>3</sup>
Federal-level DOL .....	Management Analyst .....	4	1	\$93.82	NA	\$375
State-level DOL .....	Management Analyst .....	11	1	59.70	57	39,629
Local-Level DOL .....	Management Analyst .....	6	1	73.67	580	271,655
Federal-level AEFLA .....	Management Analyst .....	4	1	93.82	NA	375
State-level AEFLA .....	Management Analyst .....	11	1	59.70	57	39,629
Local-Level AEFLA .....	Management Analyst .....	6	1	73.67	1,719	805,130
Federal-level VR .....	Management Analyst .....	4	1	93.82	NA	375
State-level VR .....	Management Analyst .....	4	1	59.70	78	19,720
State-Level VR .....	Rehab Counselor .....	1	62	47.94	78	236,407
Annual Total .....	.....	.....	.....	.....	.....	1,413,298

<sup>1</sup> Management analysts on the Federal level are GS-14, Step 5.

<sup>2</sup> Population figures represent States (57), VR agencies (78), and AEFLA providers (1,719).

<sup>3</sup> Numbers may not sum due to rounding for the convenience of the reader.

(4) Summary of Cost Savings

Under the final rule, the 15 States that currently report only the Retention with the Same Employer and Employer Penetration pilot approaches will have cost savings from no longer having to collect data for, calculate, and report Employer Penetration. Multiplying the annual cost for all 57 States to collect data for, calculate, and report Employer Penetration (\$1,054,369) by the 26.3 percent of States reporting these two pilot approaches only (15 out of 57) yields annual cost savings of \$277,466.

The 9 States currently reporting only the Retention with the Same Employer and Repeat Business Customer pilot approaches will have cost savings from no longer collecting data for, calculating, and reporting Repeat Business Customer. Multiplying the annual cost for all 57 States to collect data for, calculate, and report Repeat Business Customer (\$1,413,298) by the 15.8 percent of States reporting these two pilot approaches only (9 out of 57) yields annual cost savings of \$223,152.

The 22 States currently reporting only Employer Penetration and Repeat Business Customer and the 16 States currently reporting all three pilot approaches to the effectiveness in serving employers performance indicator will have cost savings from no longer collecting data for, calculating, and reporting both Employer Penetration and Repeat Business Customer. Multiplying the sum of annual costs for all 57 States to collect data for, calculate, and report both Employer Penetration and Repeat Business Customer (\$2,467,667) by the 38.6 percent of States reporting Employer Penetration and Repeat Business Customer only and by the 28.1 percent of States reporting all three

approaches yields annual cost savings of \$952,433 and \$692,679, respectively.

Summing these annual cost savings yields total annual cost savings for all 57 States of \$2,145,729 from the final rule. The Departments estimate total cost savings over the 10-year period at \$21,457,293 undiscounted, or \$18,852,612 and \$16,125,654 at discount rates of 3 and 7 percent, respectively. At discount rates of 3 and 7 percent, the 10-year period results in annualized cost savings of \$2,210,101 and \$2,295,930, respectively.

e. Qualitative Benefits Discussion

(1) General Benefits of Measuring Effectiveness in Serving Employers

The Departments cannot quantify the final rule’s benefits associated with improving the WIOA core programs’ effectiveness in serving employers. Measuring effectiveness in serving employers allows the DOL, AEFLA, and VR programs to set goals, monitor, and learn how to serve employers more effectively.<sup>49</sup> Reporting a measure of effectiveness in serving employers also helps Federal, State, and local policymakers evaluate program performance and inform future policy changes to better meet program goals, particularly providing employers with skilled workers and other services.

The Departments cannot quantify these estimated benefits because we do not have quantitative data on how the effectiveness in serving employers performance measure has influenced program implementation and how much it will influence future policies.

(2) Specific Benefits of Reporting Retention With the Same Employer

Requiring all States to calculate and report Retention with the Same Employer as the effectiveness in serving

employers performance indicator will make it easier to compare WIOA core programs’ effectiveness in serving employers performance across States and ensure all States have an indicator of job turnover and match quality between workers exiting WIOA core programs and employers. Retention with the Same Employer demonstrates a continued relationship between the employer and participants who have exited WIOA core programs. While many circumstances can have an impact on an employer’s retention of employees, an indication that an employee is still working for the same employer in both the second and fourth quarters after exiting from a WIOA program demonstrates a level of success for both parties, as retention of an employee reduces the costs to the employer associated with employee turnover and retraining. Thus, reporting Retention with the Same Employer can help inform design and implementation of program services to reduce job turnover and improve employer-employee match quality. Improved matching and reduced turnover allow employees and employers to operate closer to their productive potential and can make it more worthwhile for employers to invest in training their employees and for employees to invest in learning employer-specific skills.

6. Summary of the Analysis

Exhibit 10 summarizes the estimated total costs and cost savings of the final rule over the 10-year analysis period. Discontinuing reporting of Employer Penetration and Repeat Business Customer has the largest effect as a cost savings. The Departments estimate the total net cost savings of the final rule at \$16,125,654 at a discount rate of 7 percent.

EXHIBIT 10—ESTIMATED 10-YEAR MONETIZED COSTS AND COST SAVINGS OF THE FINAL RULE BY PROVISION [2022 \$millions]

Provision	Cost	Cost savings	Total net cost savings
Rule Familiarization .....	\$0.13	.....	.....
Reporting Retention with the Same Employer .....	0.16	.....	.....
No Longer Reporting Other Measures .....	.....	\$21.46	.....
Undiscounted .....	0.35	21.46	\$21.11
With a Discount Rate of 3% .....	0.33	18.85	18.52
With a Discount Rate of 7% .....	0.31	16.13	15.82

The Departments estimate the annualized costs of the final rule at \$44,208 and the annualized cost savings

at \$2,295,930, at a discount rate of 7 percent. The Departments estimate the final rule will result in an annualized

net quantifiable cost savings of \$2,251,723 and a total 10-year net cost savings of \$15,815,157, both at a

<sup>49</sup> S. Spaulding, et al., “Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce

Innovation and Opportunity Act,” Jan. 2021, [https://wdr.doleta.gov/research/FullText\\_Documents/ETAOP2021-17%20Measures%20](https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20)

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discount rate of 7 percent and expressed savings of the final rule over the 10-year in 2022 dollars. Exhibit 11 summarizes analysis period. the estimated total costs and cost

EXHIBIT 11—ESTIMATED MONETIZED COSTS, COST SAVINGS, AND NET COST SAVINGS OF THE FINAL RULE [2022\$]

Year/total	Costs	Costs savings	Net cost savings
2024 .....	\$213,987	\$2,145,729	\$1,931,742
2025 .....	14,813	2,145,729	2,130,916
2026 .....	14,813	2,145,729	2,130,916
2027 .....	14,813	2,145,729	2,130,916
2028 .....	14,813	2,145,729	2,130,916
2029 .....	14,813	2,145,729	2,130,916
2030 .....	14,813	2,145,729	2,130,916
2031 .....	14,813	2,145,729	2,130,916
2032 .....	14,813	2,145,729	2,130,916
2033 .....	14,813	2,145,729	2,130,916
Undiscounted 10-Year Total .....	347,304	21,457,293	21,109,989
10-Year Total with a Discount Rate of 3% .....	329,323	18,852,612	18,523,289
10-Year Total with a Discount Rate of 7% .....	310,497	16,125,654	15,815,157
10-Year Average .....	34,730	2,145,729	2,110,999
Annualized with a Discount Rate of 3% .....	38,607	2,210,101	2,171,495
Annualized with a Discount Rate of 7% .....	44,208	2,295,930	2,251,723

7. Regulatory Alternatives

The Departments considered two alternatives to the proposed definition of the effectiveness in serving employers performance indicator. First, the Departments considered requiring use of the Employer Penetration pilot approach, which reports the percentage of employers using services out of all employers in the State. This approach would have required counts of services provided to employers, requiring States and local areas to report unique counts of individual employers receiving services through WIOA's programs. Employer Penetration would require a more data-intensive analysis than the proposed approach of Retention with the Same Employer. Employer

Penetration would have the benefit of capturing the extent to which employers within a State are engaged with WIOA-funded services and would provide State programs an incentive to work with additional employers. As discussed earlier in Section II.A (Pilot Programs for WIOA Core Programs), on behalf of the Departments, DOL commissioned an examination of State experiences with the various approaches through a third-party contractor (the Final Pilot Study Report discussed elsewhere in this final rule), which found weaknesses in this pilot approach, including (1) an emphasis on quantity rather than quality or intensity of the employer service provided; (2) reliability issues associated with data entry and the process to count unique

establishments; (3) measurement of program output rather than outcome; (4) potential for creation of perverse incentives to prioritize program breadth rather than depth in service and delivery; and (5) a lack of sensitivity to industry sectors targeted by State and local workforce agencies.<sup>50</sup> The Departments estimated the costs and cost savings of this alternative using the same method as the proposed approach. That is, the Departments used the estimated cost of collecting data, calculating, and reporting Employer Penetration, and then estimated the cost for the proportion of States that would need to start using this approach to reporting effectiveness in serving employers (4 States). Exhibit 12 summarizes these calculations below.

EXHIBIT 12—SUMMARY OF REGULATORY ALTERNATIVE 1 COSTS

Non-reported measure	Number of states	Updated 2016 cost estimates: initial cost	Updated 2016 cost estimates: annual cost	Adjusted cost estimates: updated cost estimates × (# states ÷ 57), initial cost	Adjusted cost estimates: updated cost estimates × (# states ÷ 57), annual cost
Employer Penetration .....	4	\$264,215	\$1,054,369	\$18,541	\$73,991

Costs include calculating and reporting Employer Penetration and rule familiarization for WIOA core programs. The Departments estimate the total cost of the first alternative over the 10-year period at \$876,059 undiscounted, or

\$786,242 and \$692,209 at discount rates of 3 and 7 percent, respectively, and an annualized cost of the 10-year period at \$92,172 and \$98,555 with discount rates of 3 and 7 percent, respectively.

To calculate cost savings the Departments used the estimated cost of collecting data for, calculating, and reporting the two other effectiveness in serving employers approaches (Retention with the Same Employer and

<sup>50</sup> S. Spaulding, et al., "Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce

Innovation and Opportunity Act," Jan. 2021, page 68, [https://wdr.doleta.gov/research/FullText\\_Documents/ETAOP2021-17%20Measures%20](https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20)

[of%20Effectiveness%20in%20Serving%20Employers\\_Final%20Report.pdf](#).

Repeat Business Customer), and then estimated the cost savings for the proportion of States that would transition from their existing reporting combination of two or three effectiveness in serving employers approaches to the single Employer Penetration approach to the performance indicator. Exhibit 13 summarizes these calculations below.

EXHIBIT 13—SUMMARY OF REGULATORY ALTERNATIVE 1 COST SAVINGS

Reported measures	Number of states	Updated 2016 cost estimates: annual cost savings	Adjusted cost savings estimates: updated cost estimates × (# states ÷ 57): annual cost savings
Employer Penetration + Retention with the Same Employer .....	15	\$49,667	\$13,070
Employer Penetration + Repeat Business Customer .....	22	1,413,298	545,483
Retention with the Same Employer + Repeat Business Customer (No Employer Penetration) .....	9	1,462,965	230,994
All Three .....	16	1,462,965	410,657

The Departments estimated the total cost savings associated with the first alternative over the 10-year period at \$12,002,050 undiscounted, or \$10,545,132 and \$9,019,820 at discount rates of 3 and 7 percent, respectively, with an annualized cost savings associated with the first alternative over the 10-year period at \$1,236,211 and \$1,284,219 with discount rates of 3 and 7 percent, respectively.

We estimate the first regulatory alternative to result in total net cost savings over the 10-year period of \$11,125,992 undiscounted, or \$9,758,890 and \$8,327,611 at discount rates of 3 and 7 percent, respectively, with an annualized net cost savings of the 10-year period at \$1,144,040 and \$1,185,664 with discount rates of 3 and 7 percent, respectively.

The Departments considered a second regulatory alternative that would require the use of the Repeat Business Customer approach to the effectiveness in serving employers performance indicator, which reports the percentage of employers receiving services in a year who also received services within the previous 3 years. This approach to the effectiveness in serving employers measure requires counts of services provided to employers through WIOA’s core programs. Repeat Business Customer requires a more data-intensive analysis than the proposed approach of Retention with the Same Employer. Repeat Business Customer captures the extent to which employers within a State can find workers and the employer’s level of satisfaction with the public workforce system services. The Departments, in the Final Pilot Study

Report, found weaknesses in this pilot approach, including that it (1) may provide a disincentive to reach out to new employers; (2) is subject to variation in industry and sector economic conditions; and (3) may require a statistical adjustment model to mitigate the weaknesses and improve implementation and interpretation.<sup>51</sup> The Departments estimated the costs and cost savings of this alternative using the same method as the proposed approach. That is, the Departments used the estimated cost of collecting data, calculating, and reporting Repeat Business Customer, and then estimated the cost for the proportion of States that would need to start using this approach to reporting effectiveness in serving employers (10 States). Exhibit 14 summarizes these calculations below.

EXHIBIT 14—SUMMARY OF REGULATORY ALTERNATIVE 2 COSTS

Non-reported measure	Number of states	Updated 2016 cost estimates: initial cost	Updated 2016 cost estimates: annual cost	Adjusted cost estimates: updated cost estimates × (# states ÷ 57), initial cost	Adjusted cost estimates: updated cost estimates × (# states ÷ 57), annual cost
Repeat Business Customer .....	10	\$260,613	\$1,413,298	\$45,722	\$247,947

Costs include the cost of calculating and reporting Repeat Business Customer and the cost of rule familiarization for WIOA core programs. The Departments estimated the total cost of the second alternative over the 10-year period at \$2,468,844 undiscounted, or \$2,167,864 and \$1,852,753 at discount rates of 3 and 7 percent, respectively, with an annualized cost of the 10-year period at

\$254,140 and \$263,790 with discount rates of 3 and 7 percent, respectively. To calculate cost savings, the Departments used the estimated cost of collecting data for, calculating, and reporting the two other effectiveness in serving employers approaches (Retention with the Same Employer and Employer Penetration), and then estimated the cost savings for the

proportion of States that would transition from their existing reporting combination of two or three effectiveness in serving employers approaches to the single Repeat Business Customer approach to the performance indicator. Exhibit 15 summarizes these calculations below.

<sup>51</sup> S. Spaulding, et al., “Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce

Innovation and Opportunity Act,” Jan. 2021, page 67, [https://wdr.doleta.gov/research/FullText\\_Documents/ETAOP2021-17%20Measures%20](https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20)

[of%20Effectiveness%20in%20Serving%20Employers\\_Final%20Report.pdf](#).

EXHIBIT 15—SUMMARY OF REGULATORY ALTERNATIVE 2 COST SAVINGS

Reported measures	Number of states	Updated 2016 cost estimates: annual cost savings	Adjusted cost savings estimates: updated cost estimates × (# states ÷ 57): annual cost savings
Repeat Business Customer + Retention with the Same Employer .....	9	\$49,667	\$7,842
Repeat Business Customer + Employer Penetration .....	22	1,054,369	406,950
Employer Penetration + Retention with the Same Employer (No Repeat Business Customer) .....	15	1,104,036	290,536
All Three .....	16	1,104,036	309,905

The Departments estimated total cost savings associated with the second alternative over the 10-year period is \$10,152,326 undiscounted, or \$8,919,944 and \$7,729,709 at discount rates of 3 and 7 percent, respectively with an annualized cost savings associated with the second alternative over the 10-year period is \$1,045,690 and \$1,086,299 with discount rates of 3 and 7 percent, respectively.

The Departments estimate the second regulatory alternative to result in total net cost savings over the 10-year period

of \$7,683,482 undiscounted, or \$6,752,081 and \$5,776,955 at discount rates of 3 and 7 percent, respectively, with an annualized net cost savings of the 10-year period at \$791,550 and \$822,508 with discount rates of 3 and 7 percent, respectively.

Exhibit 16 summarizes the estimated net cost savings associated with the three considered approaches to the effectiveness in serving employers performance indicator (*i.e.*, the three piloted approaches). The Departments prefer the proposed approach of

requiring the use of Retention with the Same Employer because it has data more readily available, and, therefore, is less burdensome. The Retention with the Same Employer approach better aligns with workforce system goals of supporting employer-employee job match quality and reducing turnover without the weaknesses associated with the other two approaches to defining the effectiveness in serving employers performance indicator.

EXHIBIT 16—ESTIMATED MONETIZED COSTS OF THE FINAL RULE AND REGULATORY ALTERNATIVES

[2021 \$millions]

	Final rule	Regulatory alternative 1	Regulatory alternative 2
Total 10-Year Net Cost Savings .....	\$21.1	\$11.1	\$7.7
Total with 3% Discount .....	18.5	9.8	6.8
Total with 7% Discount .....	15.8	8.3	5.8
Annualized with 3% Discount .....	2.17	1.14	0.79
Annualized with 7% Discount .....	2.25	1.19	0.82

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

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Mar. 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5

U.S.C. 603 and 604. The RFA permits an agency, in lieu of preparing such an analysis, to certify that the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605.

The Departments determined that the final rule will not have a significant economic impact on a substantial number of small entities because any impacted small entities are already receiving financial assistance under the WIOA program and likely would continue to do so. The Departments have certified this to the Chief Counsel for Advocacy, Small Business Administration, pursuant to the RFA. 5 U.S.C. 605.

1. Affected Small Entities

The WIOA title I adult, dislocated worker, and youth program grantees, the WIOA title II State-level AEFLA grantees, Wagner-Peyser Act grantees (under the Wagner-Peyser Act as amended by WIOA title III), and VR

program grantees (under the Rehabilitation Act as amended by WIOA title IV), are State government agencies and, therefore, are not considered small entities. However, the final rule could have a minimal impact on a variety of AEFLA local providers, some of which are small entities by U.S. Small Business Administration (SBA) size standards:<sup>52</sup> (1) local educational agencies (NAICS 611710; \$24.0 million); (2) community-based organizations (NAICS 813410; \$9.5 million); (3) faith-based organizations (NAICS 813110; \$13.0 million); (4) libraries (NAICS 519210; \$21.0 million); (5) community, junior (NAICS 611210; \$32.5 million), and technical colleges (NAICS 611519; \$21.0 million); (6) 4-year colleges and universities (NAICS 611310; \$34.5

<sup>52</sup> SBA, “Table of size standards,” effective March 17, 2023, <https://www.sba.gov/document/support-table-size-standards> (last visited September 13, 2023). Dollar values provided in parentheses are the SBA average annual receipts small entity threshold (2022 dollars) for the relevant NAICS code.



million); (7) correctional institutions (NAICS 922410; NA<sup>53</sup>); (8) other institutions, such as medical and special institutions not designed for justice-involved individuals (NAICS 623210; \$19.0 million); and (9) other public or private nonprofit agencies or institutions (NAICS 813319; \$18.0 million).

*Comments:* Some commenters stated that the proposed rule assumes the only small entities affected by the rule would be AEFLA local program operators. However, the commenters said, in Michigan, local program operators of title I adult, dislocated worker, and youth programs, title II AEFLA programs, and title III Wagner-Peyser Act programs all meet the definition of small entities.

*Departments' Response:* This RFA section includes a discussion of the multiple types of small entities that may be affected by the rule, including local educational agencies (NAICS 611710), community-based organizations (NAICS 813410), public or private non-profit agencies or institutions (NAICS 813319), and additional local AEFLA provider classifications discussed in the RFA that might be implicated. The only cost of the final rule to these entities is \$73.67 for rule familiarization, which would pose a *de minimis* cost for even the smallest entity.

## 2. Impact on Small Entities

The final rule definition of the effectiveness in serving employers performance indicator will have a minimal impact on AEFLA local providers. Each local AEFLA provider is expected to incur a \$78.06 cost to review the rule. The \$78.06 cost to review the rule is a *de minimis* burden on the entities incurring the cost, including the smallest entities subject to the rule. For example, the smallest category of community-based organization (NAICS 813410—civic and social organizations) has annual revenue of \$58,521 in 2022 dollars.<sup>54</sup> They would therefore spend only 0.13 percent of their annual revenue on this cost. Amongst the smallest category of libraries (NAICS 519120—libraries and archives) this cost would also be 0.13 percent of the average entity's annual revenue of \$58,581 in 2022 dollars.<sup>55</sup>

Local AEFLA providers are not estimated to incur any new costs,

beyond the cost to review the rule, to report Retention with the Same Employer. Some local AEFLA providers may incur net cost savings if they currently report Employer Penetration or Repeat Business Customer. Local AEFLA providers that currently report Employer Penetration will incur cost savings of \$312 and local AEFLA providers that currently report Repeat Business Customer will incur cost savings of \$468. Therefore, some local AEFLA providers would have net cost savings of between \$233.94 (= \$312 – \$78.06) and \$389.94 (= \$468 – \$78.06) depending on the measure they currently report. For these local AEFLA providers the net cost savings would still be less than 1% of revenue (0.40% and 0.67% respectively for the smallest categories of entities in NAICS 813410 and NAICS 519120).<sup>56</sup> Federal transfer payments to States would fully finance the minor WIOA program cost burdens on grantees that would result from the final rule. Therefore, the Departments hereby certify that the final rule will not have a significant economic impact on a substantial number of small entities.

### 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 their continuing efforts to reduce paperwork and respondent burden, the Departments conduct a preclearance consultation program to provide the general 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 (1) the public understands the Departments' collection instructions; (2) respondents can provide the requested data in the desired format; (3) reporting burden (time and financial resources) is minimized; (4) collection instruments are clearly understood; and (5) the

Departments can properly assess the impact of collection requirements on respondents. Furthermore, the PRA requires all Federal agencies to analyze proposed regulations for potential time burdens on the regulated community created by provisions in the proposed regulations that require any party to obtain, maintain, retain, report, or disclose information. The information collection requirements also must be submitted to OMB for approval.

A Federal agency may not conduct or sponsor a collection of information unless it is approved by OMB under the PRA and displays a currently valid OMB control number. The public also is 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. *See* 44 U.S.C. 3512.

The final rule revises ETA 9169, WIOA Statewide and Local Performance Report Template approved under OMB Control Number 1205–0526. The revision requires “Retention with the Same Employer” as the only definition of the effectiveness in serving employers performance indicator in the WIOA Common Performance Reporting ICR by an entity that reports to the Departments on behalf of the State. Data elements for the collection and calculation for the two other piloted definitions of the effectiveness in serving employers performance indicator—Repeat Business Customer and Employer Penetration—are removed from the ICR, along with the corresponding breakouts of the employer services that comprise them. No other changes were proposed for this ICR in the Joint WIOA Effectiveness in Serving Employers NPRM. In accordance with the PRA, the Departments submitted the associated ICR to OMB in concert with the publishing of the proposed rule, and provided the public with a 60-day opportunity to submit comments on the ICR, either directly to the Departments or to OMB, which began with the submission of the ICR to OMB. The Departments and OMB received no comments on the proposed changes.

*Agency:* DOL–ETA.

*Title of Collection:* Workforce Innovation and Opportunity Act (WIOA) Common Performance Reporting.

*Type of Review:* Revision of an approved ICR.

*OMB Control Number:* 1205–0526.

<sup>53</sup> There is no SBA size standard for this NAICS code.

<sup>54</sup> The smallest category are entities with less than \$100,000 in annual revenue. Revenue data from U.S. Census Bureau “Statistics of U.S. Businesses,” <http://www.census.gov/programs-surveys/susb/data.html> (last updated May 10, 2022).

<sup>55</sup> *Ibid.*

<sup>56</sup> For NAICS 813410 average revenue is \$58,521 for entities with less than \$100,000 in revenue and for NAICS 519120 average revenue is \$58,581 for entities with less than \$100,000 in revenue. 0.4% and 0.67% is based on either net savings of \$233.94 or \$389.94 (0.40 = 233.94 + 58,521; 0.67 = 389.94 + 58,521).

*Description:* The final rule requires Retention with the Same Employer as the only definition of the effectiveness in serving employers performance indicator in ETA 9169, WIOA Statewide and Local Performance Report Template by an entity that reports to the Departments on behalf of the State. Data elements for the collection and calculation for the two other piloted definitions of the effectiveness in serving employers performance indicator—Repeat Business Customer and Employer Penetration—are to be removed from the ICR, along with the corresponding breakouts of the employer services that comprise them. This package is unchanged except to remove the data elements discussed above. The final rule makes no other changes to this ICR.

*Affected Public:* State Governments.

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

*Frequency:* Annually.

*Estimated Total Annual Respondents:* 19,114,129.

*Estimated Total Annual Responses:* 38,216,054.

*Estimated Total Annual Burden*

*Hours:* 9,863,057.

*Estimated Total Annual Other Burden*

*Costs:* \$34,594,532.

*Authority for the Information*

*Collection:* 20 CFR 677.155(a)(1)(vi), and 34 CFR 361.155(a)(1)(vi) and 463.155(a)(1)(vi).

#### *D. Executive Order 13132 (Federalism)*

E.O. 13132 aims to guarantee the division of governmental responsibilities between the Federal Government and the States and to further the policies of the Unfunded Mandates Reform Act of 1995 (UMRA). Accordingly, E.O. 13132 requires executive departments and agencies to ensure that the principles of federalism guide them in the formulation and implementation of policies. Further, agencies must adhere to constitutional principles, examine the constitutional and statutory authority supporting a regulation that would limit the policymaking discretion of the States, and assess the need for such a regulation. To the extent practicable, agencies must consult State and local officials before implementing any such regulation.

E.O. 13132 further provides that agencies must implement a regulation that limits the policymaking discretion of the States only where there is constitutional and statutory authority for the regulation, and it addresses a problem of national significance. For a regulation administered by the States, the Federal Government must grant the

States the maximum administrative discretion possible to avoid intrusive Federal oversight of State administration, and agencies must adhere to special requirements for a regulation that pre-empts State law. E.O. 13132 also sets forth the procedures agencies must follow for certain regulations with federalism implications, such as preparation of a summary impact statement.

Accordingly, the Departments reviewed this WIOA-required final rule for federalism implications and have concluded that none exist in this rulemaking. This joint final rule does not contain any substantial direct effects on States, on the relationships between the States, or on the distribution of power and responsibilities among the various levels of government as described by E.O. 13132. Therefore, the Departments concluded that this final rule does not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

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

UMRA directs agencies to assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector. 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.

Following the consideration of the above factors, the Departments concluded this joint final rule contains no unfunded Federal mandates, as defined in 2 U.S.C. 658(6) to include either a “Federal intergovernmental mandate” or a “Federal private sector mandate.” Reporting Retention with the Same Employer as the effectiveness in serving employers performance indicator as proposed does not place any additional burdens on State, local, and Tribal governments because the WIOA core programs already collect and report the necessary information. Furthermore, Federal program funding triggers the reporting requirement; therefore, the Departments provide funding for any associated reporting mandate. Private training entities participate as a provider under a WIOA core program on a purely voluntary basis, and voluntarily assume the information collection.

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

The Departments reviewed this final rule under the terms of E.O. 13175 and DOL’s Tribal Consultation Policy and have determined that it would have

Tribal implications, because the proposed regulations would have substantial direct effects on: one or more Indian Tribes; the relationship between the Federal Government and Indian Tribes; or the distribution of power and responsibilities between the Federal Government and Indian Tribes. Therefore, DOL has prepared a Tribal summary impact statement. Because the Tribal implications of this final rule relate only to DOL Indian and Native American (INA) program grantees, DOL has printed the requisite Tribal summary impact statement in the DOL-specific effectiveness in serving employers final rule published elsewhere in this issue of the **Federal Register**, which proposes related changes for effectiveness in serving employers to DOL’s INA program regulations.

#### **List of Subjects**

*20 CFR Part 677*

Employment, Grant programs—labor.

*34 CFR Part 361*

Administrative practice and procedure, Grant programs—education, Grant programs—social programs, Reporting and recordkeeping requirements, Vocational rehabilitation.

*34 CFR Part 463*

Adult education, Grant programs—education.

For the reasons discussed in the preamble, the Employment and Training Administration amends 20 CFR part 677 as follows:

#### **PART 677—PERFORMANCE ACCOUNTABILITY UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT**

■ 1. The authority citation for part 677 continues to read as follows:

**Authority:** Secs. 116, 189, and 503 of Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014).

#### **Subpart A—State Indicators of Performance for Core Programs**

■ 2. Amend § 677.155 by revising paragraphs (a)(1)(vi) and (c)(6) to read as follows:

**§ 677.155 What are the primary indicators of performance under the Workforce Innovation and Opportunity Act?**

(a) \* \* \*

(1) \* \* \*

(vi) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth

quarters after exit. For the six core programs, this indicator is a statewide indicator reported by one core program on behalf of all six core programs in the State, as described in guidance.

\* \* \* \* \*

(c) \* \* \*

(6) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit. For the six core programs, this indicator is a statewide indicator reported by one core program on behalf of all six core programs in the State, as described in guidance.

**Subpart B—Sanctions for State Performance and the Provision of Technical Assistance**

■ 3. Amend § 677.190 by revising paragraph (c) to read as follows:

**§ 677.190 When are sanctions applied for failure to achieve adjusted levels of performance?**

\* \* \* \* \*

(c) Whether a State has failed to meet adjusted levels of performance will be determined using the following criteria:

(1) The overall State program score, which is expressed as the percent achieved, compares the actual results achieved by a core program on the primary indicators of performance, except for the effectiveness in serving employers indicator described in § 677.155(a)(1)(vi), to the adjusted levels of performance for that core program. The average of the percentages achieved of the adjusted level of performance for each of the primary indicators, except for the effectiveness in serving employers indicator described in § 677.155(a)(1)(vi), by a core program will constitute the overall State program score.

(2) However, until all indicators for the core program have at least 2 years of complete data, the overall State program score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data for that program.

(3) The overall State indicator score, which is expressed as the percent achieved, compares the actual results achieved on a primary indicator of performance by all core programs in a State to the adjusted levels of performance for that primary indicator.

(i) The average of the percentages achieved of the adjusted level of performance by all of the core programs on that indicator will constitute the

overall State indicator score, except for the effectiveness in serving employers indicator described in § 677.155(a)(1)(vi).

(ii) The overall State indicator score for effectiveness in serving employers, as reported by one core program on behalf of all six core programs in the State, as described in guidance, is a statewide indicator that reflects the performance for all core programs. It is calculated as the statewide percentage achieved of the statewide adjusted level of performance.

(4) However, until all indicators for the State have at least 2 years of complete data, the overall State indicator score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data in a State.

(5) The individual indicator score, which is expressed as the percent achieved, compares the actual results achieved by each core program on each of the individual primary indicators to the adjusted levels of performance for each of the program’s primary indicators of performance, except for the effectiveness in serving employers indicator described in § 677.155(a)(1)(vi).

\* \* \* \* \*

For the reasons stated in the preamble, the Department of Education amends 34 CFR parts 361 and 463 as follows:

**PART 361—STATE VOCATIONAL REHABILITATION SERVICES PROGRAM**

**Subpart E—Performance Accountability Under Title I of the Workforce Innovation and Opportunity Act**

■ 4. The authority citation for part 361, subpart E continues to read as follows:

**Authority:** Secs. 116, 189, and 503 of Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014).

■ 5. Amend § 361.155 by revising paragraphs (a)(1)(vi) and (c)(6) to read as follows:

**§ 361.155 What are the primary indicators of performance under the Workforce Innovation and Opportunity Act?**

(a) \* \* \*

(1) \* \* \*

(vi) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit. For the six core programs, this indicator is a statewide

indicator reported by one core program on behalf of all six core programs in the State, as described in guidance.

\* \* \* \* \*

(c) \* \* \*

(6) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit. For the six core programs, this indicator is a statewide indicator reported by one core program on behalf of all six core programs in the State, as described in guidance.

■ 6. Amend § 361.190 by revising paragraph (c) to read as follows:

**§ 361.190 When are sanctions applied for failure to achieve adjusted levels of performance?**

\* \* \* \* \*

(c) Whether a State has failed to meet adjusted levels of performance will be determined using the following criteria:

(1) The overall State program score, which is expressed as the percent achieved, compares the actual results achieved by a core program on the primary indicators of performance, except for the effectiveness in serving employers indicator described in § 361.155(a)(1)(vi), to the adjusted levels of performance for that core program. The average of the percentages achieved of the adjusted level of performance for each of the primary indicators, except for the effectiveness in serving employers indicator described in § 361.155(a)(1)(vi), by a core program will constitute the overall State program score.

(2) However, until all indicators for the core program have at least 2 years of complete data, the overall State program score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data for that program.

(3) The overall State indicator score, which is expressed as the percent achieved, compares the actual results achieved on a primary indicator of performance by all core programs in a State to the adjusted levels of performance for that primary indicator.

(i) The average of the percentages achieved of the adjusted level of performance by all of the core programs on that indicator will constitute the overall State indicator score, except for the effectiveness in serving employers indicator described in § 361.155(a)(1)(vi).

(ii) The overall State indicator score for effectiveness in serving employers, as reported by one core program on

behalf of all six core programs in the State, as described in guidance, is a statewide indicator that reflects the performance for all core programs. It is calculated as the statewide percentage achieved of the statewide adjusted level of performance.

(4) However, until all indicators for the State have at least 2 years of complete data, the overall State indicator score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data in a State.

(5) The individual indicator score, which is expressed as the percent achieved, compares the actual results achieved by each core program on each of the individual primary indicators to the adjusted levels of performance for each of the program's primary indicators of performance, except for the effectiveness in serving employers indicator described in § 463.155(a)(1)(vi).

\* \* \* \* \*

**PART 463—ADULT EDUCATION AND FAMILY LITERACY ACT**

**Subpart I—Performance Accountability Under Title I of the Workforce Innovation and Opportunity Act**

■ 7. The authority citation for part 463, subpart I continues to read as follows:

**Authority:** Secs. 116, 189, and 503 of Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014).

■ 8. Amend § 463.155 by revising paragraphs (a)(1)(vi) and (c)(6) to read as follows:

**§ 463.155 What are the primary indicators of performance under the Workforce Innovation and Opportunity Act?**

- (a) \* \* \*
- (1) \* \* \*

(vi) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth

quarters after exit. For the six core programs, this indicator is a statewide indicator reported by one core program on behalf of all six core programs in the State, as described in guidance.

\* \* \* \* \*

(c) \* \* \*

(6) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit. For the six core programs, this indicator is a statewide indicator reported by one core program on behalf of all six core programs in the State, as described in guidance.

■ 9. Amend § 463.190 by revising paragraph (c) to read as follows:

**§ 463.190 When are sanctions applied for failure to achieve adjusted levels of performance?**

\* \* \* \* \*

(c) Whether a State has failed to meet adjusted levels of performance will be determined using the following criteria:

(1) The overall State program score, which is expressed as the percent achieved, compares the actual results achieved by a core program on the primary indicators of performance, except for the effectiveness in serving employers indicator described in § 463.155(a)(1)(vi), to the adjusted levels of performance for that core program. The average of the percentages achieved of the adjusted level of performance for each of the primary indicators, except for the effectiveness in serving employers indicator described in § 463.155(a)(1)(vi), by a core program will constitute the overall State program score.

(2) However, until all indicators for the core program have at least 2 years of complete data, the overall State program score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data for that program.

(3) The overall State indicator score, which is expressed as the percent achieved, compares the actual results achieved on a primary indicator of performance by all core programs in a State to the adjusted levels of performance for that primary indicator.

(i) The average of the percentages achieved of the adjusted level of performance by all of the core programs on that indicator will constitute the overall State indicator score, except for the effectiveness in serving employers indicator described in § 463.155(a)(1)(vi).

(ii) The overall State indicator score for effectiveness in serving employers, as reported by one core program on behalf of all six core programs in the State, as described in guidance, is a statewide indicator that reflects the performance for all core programs. It is calculated as the statewide percentage achieved of the statewide adjusted level of performance.

(4) However, until all indicators for the State have at least 2 years of complete data, the overall State indicator score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data in a State.

(5) The individual indicator score, which is expressed as the percent achieved, compares the actual results achieved by each core program on each of the individual primary indicators to the adjusted levels of performance for each of the program's primary indicators of performance, except for the effectiveness in serving employers indicator described in § 463.155(a)(1)(vi).

\* \* \* \* \*

**Julie Su,**  
*Acting Secretary of Labor.*  
**Miguel A. Cardona,**  
*Secretary of Education.*