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July 24, 2019

Adele Gagliardi, Administrator  
Office of Policy Development and Research  
U.S. Department of Labor  
200 Constitution Avenue  
Washington, DC 20210  
**Submitted electronically to <http://www.regulations.gov>**

**Re: Proposed Rule: Wagner-Peyser Act Staffing Flexibility, RIN 1205-AB87**

Dear Ms. Gagliardi:

The American Federation of State, County & Municipal Employees (AFSCME) is pleased to respond to the Department of Labor (DOL) request for comments on the proposed Wagner-Peyser Act Staffing Flexibility rule that would remove the merit staffing requirement of the Employment Service (ES).

AFSCME members provide the vital services that make America happen. With 1.3 million members in communities across the nation, serving in hundreds of different occupations—from nurses to corrections officers, child care providers to sanitation workers—AFSCME advocates for fairness in the workplace, excellence in public services, and freedom and opportunity for all working families. Nationwide, AFSCME members are the connection to Unemployment Insurance (UI) for jobless workers: As merit-based ES employees, they provide unbiased employment services to jobseekers and employers, and conduct work test duties so that claimants can begin or continue receiving UI benefits.

The DOL notice would remove the longstanding, and legally required, merit-based staffing rule for the ES and would permit private entities to receive Wagner-Peyser Act<sup>1</sup> (“Wagner-Peyser-Act” or “the Act”) funding. Housed at more than 2,000 American Job Centers (public employment offices) and other administrative offices in all 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands, thousands of merit-based ES staff could lose their jobs due to the proposed rule change. The loss of a large cadre of unbiased state government staff would threaten the integrity of services for jobseekers and employers across the country. We strongly urge you to reject this change.

<sup>1</sup> The Wagner-Peyser Act of 1933, as amended by the Workforce Investment Act of 1998 and the Workforce Innovation and Opportunity Act of 2014, U.S. Department of Labor Employment & Training Administration, <https://www.doleta.gov/programs/wagner-peyser-statute.cfm>.

**American Federation of State, County and Municipal Employees, AFL-CIO**

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As explained below, the proposal would allow states to use state and local employees, contractors, other personnel, or a combination thereof in the administration of the ES program. These rule changes could result in the privatization of multiple ES activities, including job-search assistance, job-referral and placement assistance for jobseekers, reemployment services for unemployment insurance (UI) claimants, and recruitment services for employers with job openings. It also removes affirmative action protections for ES staff serving migrant and seasonal farmworkers.

The notice's analysis does not warrant reversing DOL's long-held position requiring the delivery of ES services by merit-based state employees. The history of the Wagner-Peyser Act, Congress's actions since its New Deal-era passage, and the inherently governmental nature of the Act's functions reveal the intention of the Act's authors to require merit staff as a foundation of the ES system. The lack of an independent assessment showing the effectiveness of alternative, non-merit staffing of ES programs—juxtaposed against overwhelming evidence of the success of merit staffing models—point to the importance of a merit personnel system in providing employment services and maintaining accountability for UI systems. The notice also uses broad, questionable methodology in its cost-benefit analysis. Moreover, the proposal attempts to reverse decades of progress in remedying discrimination in hiring by removing affirmative action protections for ES staff serving migrant and seasonal farmworkers. For all of these reasons, DOL should withdraw the proposed regulations.

DOL has long taken the position that the Wagner-Peyser Act legally requires the delivery of ES services by merit-based state employees and has not justified a reversal of that position. Though the Wagner-Peyser Act does not explicitly state that ES staff in states must be merit-based, the Act gives DOL the authority to develop and prescribe minimum standards of efficiency for public employment services and to promote uniformity in their administrative procedures.<sup>2</sup> The Act establishes “a national system of public employment service offices,” a principal component of which are employees of state government hired and promoted on the basis of merit under a civil service system. For that reason, it has always been DOL's position, as it argued in *State of Michigan v. Alexis M. Herman* (1998),<sup>3</sup> that the Act requires merit-based staffing. In its argument, DOL stated that Congress intended merit staffing to be a key component of a public employment service at the outset and described how Congress has reaffirmed this principle over time.

In this notice, DOL attempts to rewrite history, arguing that “the Department has interpreted Section 3(a) as permitting the Department to require [merit-based staffing] through regulations,” (84 FR 29433 at 29436).<sup>4</sup> The first director of the ES, W. Frank

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<sup>2</sup> *Ibid.* See Sections 3(a) and 5(b)(1) of the Act.

<sup>3</sup> The district court did not have to decide if the Act required merit staffing, relying on DOL's interpretation of the act as “reasonable.” (W.D. MI, Southern Div.) File No. 5:98-CV-16.

<sup>4</sup> “Wagner-Peyser Act Staffing Flexibility,” 84 C.F.R. 29433 at 29436, <https://www.federalregister.gov/documents/2019/06/24/2019-12111/wagner-peyser-act-staffing-flexibility>.

Persons, concluded that, to avert patronage and favoritism in hiring, state ES programs were legally required to adopt merit personnel systems for appointments and promotions.<sup>5</sup> Further, as states adopted companion laws to conform with the Wagner-Peyser Act in the 1930s, DOL withheld certification of nine states until those states provided assurances that they would merit staff any state-administered public employment office.<sup>6</sup>

Over the years, Congress has reaffirmed the Wagner-Peyser Act's requirement of merit staffing. The Intergovernmental Personnel Act of 1970 first ratified merit systems in the ES when it named the Wagner-Peyser Act as one of two Acts administered by DOL which transferred merit authority to the Civil Service Commission (succeeded by the Office of Personnel Management).<sup>7</sup> Implementing regulations affirmed the applicability of "a statutory requirement for the establishment and maintenance of personnel standards on a merit basis" in Wagner-Peyser Act-funded programs.<sup>8</sup> In 2006, when DOL attempted to change its legal interpretation of the Act, Congress blocked the proposal in subsequent annual appropriations laws. The Department withdrew the proposed rule in the early years of the Obama administration. This pattern of Congressional action to halt efforts to privatize ES reveals Congress's insistence on maintaining ES merit staffing requirements since the program's inception.

In this NPRM, DOL argues that the imposition of merit staff is a policy choice, as acknowledged by prior Workforce Investment Act (WIA) and Workforce Innovation and Opportunity Act (WIOA) rulemakings. However, in the WIA interim final rule, DOL stated that the merit staffing requirements "reflect the department's interpretation of the Wagner-Peyser Act," citing the Michigan case where the DOL argued that the Act required merit staffing (64 FR 18662, 18691). The final WIA rule did not change that position (65 FR 49294, 49385). While the WIOA NPRM called it a policy, ("[t]he Department has followed this policy since the earliest days of ES" (80 FR 20690, 20805)), neither the NPRM nor the final rule stated or implied that the policy was not legally required by the statute or that DOL was free to choose a different interpretation of the Act. A 2013 DOL guidance<sup>9</sup> affirmed this:

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<sup>5</sup> David E. Balducchi and Alison J. Pasternak, "Federal-State Relations in Labor Exchange Policy," W.E. Upjohn Institute for Employment Research, 2004, <file:///C:/Users/mgable/Downloads/up04dblepich2bg.pdf>.

<sup>6</sup> David E. Balducchi and Christopher J. O'Leary, "The Employment Service-Unemployment Insurance Partnership: Origin, Evolution, and Revitalization," W.E. Upjohn Institute for Employment Research, 2018, [file:///C:/Users/mgable/Downloads/up18swuir0ch3B%20\(1\).pdf](file:///C:/Users/mgable/Downloads/up18swuir0ch3B%20(1).pdf).

<sup>7</sup> SL 60001.675 Intergovernmental Personnel Act of 1970 at Pub. L. 91-648-, title II, §208, Jan. 5, 1971, 84 Stat. 1915.

<sup>8</sup> Standards for a Merit System of Personnel Administration 5 C.F.R. Appendix A to Subpart F of Part 900.

<sup>9</sup> Jane Oates, Assistant Secretary, "Advisory: Training and Employment Guidance Letter No. 11-12," U.S. Department of Labor Employment and Training Administration, addressed to State Workforce Agencies, State Workforce Administrators, State Workforce Liaisons, State And Local Workforce Investment Board Directors, Comprehensive And Affiliate American Job Center Directors, and American Job Centers, January 3, 2013, [https://wdr.doleta.gov/directives/attach/TEGL/TEGL\\_11-12\\_Acc.pdf](https://wdr.doleta.gov/directives/attach/TEGL/TEGL_11-12_Acc.pdf).

*States should be aware that this guidance does not change the requirement that state merit staff employees deliver labor exchange services provided under the Wagner-Peyser Act.<sup>10</sup> Under the longstanding practice of the Department of Labor, Employment Services that are not performed by state merit staff cannot be charged to the Wagner-Peyser Act grant. Therefore, core and intensive services funded under the Wagner-Peyser Act must be performed by state merit staff.<sup>11</sup>*

The origins of the Wagner-Peyser Act and the inherently governmental nature of its functions also require merit staffing of the ES. In the midst of the Great Depression, Congress passed the 1933 Wagner-Peyser Act in response to massive unemployment. The Act set up local public employment offices—the Employment Service—to connect jobseekers to employment, initially in public works programs established by the New Deal. Before passage of the Wagner-Peyser Act, widespread corruption, political patronage, and inequities had plagued private employment offices nationwide. In passing the Act, Congress envisioned a state merit system to prevent favoritism and promote equality in the delivery of employment services. Ultimately, the 1939 Social Security Amendments established merit standards for UI and required unemployment compensation payment only through the public employment offices.

The UI and ES financing structure and the UI work test<sup>12</sup> closely coordinated between the programs bind them together—merit staffing is a cornerstone of this connection. Title III of the Social Security Act authorized the payment of Federal Unemployment Tax Act funds to administer UI benefits through public employment offices. This integration of the financing and administration of UI and public employment offices led to housing the two activities under the same state agency and extending merit staffing requirements to ES functions. Operationally, ES staff administer the work test to ensure that claimants are able to work, available for work and actively seeking work. These are federally required conditions of state UI eligibility. This gatekeeper function makes the role of ES staff “inherently governmental.” Today, merit-staffed ES employees in American Job Centers gather information from UI applicants and claimants, and convey work test results to the UI program for the determination of continuing eligibility or disqualification from benefits. Removing the merit staff requirement from the ES would jeopardize its future as an impartial program connecting jobseekers to UI benefits and job referrals—and could lead to a return to the widespread system abuses that led to the Wagner-Peyser Act’s passage.

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<sup>10</sup> See 20 CFR 652.215 for applicable regulatory text.

<sup>11</sup> Three states have received an exemption from the Employment Service merit staffing requirements under the

Wagner-Peyser Act. Those three states are Colorado, Massachusetts, and Michigan.

<sup>12</sup> Ibid 1. See Sec. 7(a)(3)(F) of the Wagner-Peyser Act.

Selecting highly qualified, politically unbiased state government employees for the provision of employment services and performance of the UI work test remains central to reducing unemployment. For UI claimants, a referral to a job is as valuable as a cash benefit. By allowing private entities to provide those services, this proposal could introduce a profit motive that might interfere with the job referral process. For example, contractors evaluated and paid based on the total number of job placements might have little incentive to consider whether they are referring candidates of diverse nationalities and races or simply referring the most employable workers. The public ES has always been the “people’s employment service” and outsourcing the labor exchange function carries risks for the longstanding ES commitment to serving disadvantaged and low-income workers who typically require greater levels of service but have historically been underserved.

Ending merit staffing would also affect the ability of the ES to perform other duties not directly related to the UI system. All Disabled Veterans’ Outreach Program staff and Local Veterans’ Employment Representatives are merit-based state employees in the ES. Finalizing this rule could lead to a withering ES, leaving only Veterans Employment Agents to staff a weakened veterans employment infrastructure. Merit-based ES employees also perform Trade Adjustment Assistance (TAA) case management services for workers displaced as a result of trade. As a continued benefit after exhausting UI benefits, TAA is an integral part of putting trade-affected displaced workers back to work. It is critical to maintain TAA caseworkers as state merit system employees. Employing non-merit personnel does not guarantee the high-quality services already demonstrated by experienced merit-based staff in TAA services and other ES functions.

Privatization has not worked in demonstration states with alternative staffing models. The proposal cites pilot projects in Massachusetts, Michigan, and Colorado to support the claim of the effectiveness of ES privatization. However, findings from a 2004 study<sup>13</sup> contradict this assertion: Compared with three states with merit-based staffing (North Carolina, Oregon, and Washington), contracting out ES functions to private entities resulted in their underperformance in referrals, placements, job openings, and registrations. The study concluded that the merit-based comparison states (“traditional public labor exchanges”) were highly cost-effective. Their benefits exceeded costs by as much as two to three times, while benefits were considerably smaller in the pilot-project states.<sup>14</sup> These demonstrations have continued without further evaluation. Moreover, a 2012 study of Nevada’s Reemployment Eligibility and

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<sup>13</sup> Louis Jacobson, Ian Petta, Amy Shimshak, and Regina Yudd, “Evaluation of Labor Exchange Services in a One-Stop Delivery System Environment,” WESTAT, prepared for U.S. Department of Labor Employment and Training, Occasional Paper 2004-09, February 2004, [https://wdr.doleta.gov/research/FullText\\_Documents/Evaluation%20of%20Labor%20Exchange%20in%20One-Stop%20Delivery%20System%20-%20Final%20Report.pdf](https://wdr.doleta.gov/research/FullText_Documents/Evaluation%20of%20Labor%20Exchange%20in%20One-Stop%20Delivery%20System%20-%20Final%20Report.pdf). The Bush administration released the paper to the public in 2008.

<sup>14</sup> Ibid.

Assessment program (previously titled the Reemployment and Eligibility Assessment program) revealed that requiring merit-based staff to conduct all program components improved outcomes—connecting claimants to jobs more quickly and, as a result, lowering total benefit payouts.<sup>15</sup>

Referring to the demonstration states, the proposal cites potential wage savings in administrative costs as the primary rationale for the rule change. However, the only existing evaluation of the pilot project states shows that privatization is less cost-effective than employing merit-based personnel.<sup>16</sup> Moreover, it is inappropriate for this administration—while claiming to promote good jobs—to justify the rule change based on wage and benefit cuts for the people who are providing ES services.

If, contrary to DOL's long-held position, the Wagner-Peyser Act did not require merit staffing, prior experiences with privatization show that it would be bad policy to end it. The notice's analysis leaves out any discussion of program effectiveness, accountability, and how it can achieve both without merit personnel while performing legally mandated functions. The Wagner-Peyser Act describes four functions of the ES: facilitating matches between jobseekers and employers, providing labor market information to jobseekers and employers, making appropriate referrals to related employment and training programs, and meeting the work test requirements of state UI systems.<sup>17</sup> This proposal fails to address how, with private contractors, the ES will continue to perform these job brokering, labor market information and adjustment, and work test functions while meeting the Act's accountability, fiscal control, and operational responsibilities.<sup>18</sup> For example, the proposal doesn't describe whether Local Workforce Development Boards will make contracting decisions and, if so, will prohibit them from bidding on the work. This leaves states open to potential conflicts of interest.

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<sup>15</sup> Marios Michaelides, Eileen Poe-Yamagata, Jacob Benus, and Dharmendra Tirumalasetti, "Impact of the Reemployment And Eligibility Assessment (REA) Initiative In Nevada," January 2012, [https://wdr.doleta.gov/research/FullText\\_Documents/ETAOP\\_2012\\_08\\_REA\\_Nevada\\_Follow\\_up\\_Report.pdf](https://wdr.doleta.gov/research/FullText_Documents/ETAOP_2012_08_REA_Nevada_Follow_up_Report.pdf). The study showed a decrease in weeks of duration that was greater than in any other state. The state accomplished this by requiring merit ES staff to conduct the entire work test. In other states, non-merit Workforce Innovation Opportunity Act (previously Workforce Investment Act) staff administer some of these services. For additional evidence of REA's success, see Stephen A. Wandner, "Solving the Reemployment Puzzle: From Research to Policy," W.E. Upjohn Institute for Employment Research, Kalamazoo, MI, 2010, [https://research.upjohn.org/up\\_press/205/](https://research.upjohn.org/up_press/205/).

<sup>16</sup> *Ibid.* 13.

<sup>17</sup> Christopher J. O'Leary and Randall W. Eberts, "The Wagner-Peyser Act and U.S. Employment Service: Seventy-Five Years of Matching Job Seekers and Employers," W.E. Upjohn Institute for Employment Research, 2008, <https://research.upjohn.org/cgi/viewcontent.cgi?article=1032&context=reports>.

<sup>18</sup> *Ibid.* 1. The Wagner-Peyser Act requires, under Section 9, each state to establish fiscal control and fund accounting procedures with mandates for biannual audits, federal review, and clawback provisions. Section 10 of the Act requires states to put fiscal control measure in place. Section 15E mandates operational responsibilities for collecting data on employment opportunities and conditions at the national, state and local levels.

The experiences of other states reveal that introducing the option of private profit in the ES would allow the loss of accountability prescribed in the Act—permitting inequities and patronage to return to the public employment offices. Failed privatization schemes in Indiana and Texas blocked benefits for thousands of people and resulted in huge cost overruns. In Indiana, one year after a private contractor took over the administration of food stamps, the error rate doubled to over 13%: “Though the \$1.37-billion project proved disastrous for many of the state’s poor, elderly and disabled, it was a financial bonanza for a handful of firms with ties to [former Governor] Daniels and his political allies, which landed state contracts worth millions.”<sup>19</sup> The state of Texas has also overseen multiple privatization failures over the past 20 years: an \$11 million social services contract with Accenture ballooned to \$68 million and ended three years late; a 2006 venture with Accenture to administer multiple social service programs ended with over a backlog of thousands of clients and high error rates—yet the state still paid \$244 million to Accenture; in 2001 and 2002, Hewlett-Packard overbilled the state by \$51 million for its role in administering Medicaid benefits; and, in 2014, Xerox botched its management of Medicaid dental payments.<sup>20</sup>

As DOL remains focused on reducing the error rate in the administration of unemployment benefits, it should also consider how outsourcing may affect accuracy in the administration of employment systems. Government should represent the uninformed, unrepresented UI claimant. Without high-caliber, merit-based ES employees, states cannot guarantee that they will deliver the services and perform the UI work test activities required by the Wagner-Peyser Act.

DOL also uses broad, questionable methodology to determine an estimated annual wage savings of \$29 million. Though all 50 states, the District of Columbia, Puerto Rico, Guam, and Virgin Islands receive Wagner-Peyser Act funding, the methodology includes only eight states in its analysis. In these eight states, which include the demonstration states (Colorado, Michigan, and Massachusetts), DOL’s analysis estimates much higher public-sector wages and compensation compared with the private sector. However, a recent Economic Policy Institute analysis revealed that state and local government employees earn less than similar private-sector workers; the wage and compensation gap is larger in right-to-work states.<sup>21</sup> DOL’s analysis also doesn’t compare similar workers in both sectors. For example, it compares low-paid, non-unionized private-sector workers (e.g., food service workers) to administrative

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<sup>19</sup> Matea Gold, Melanie Mason, and Tom Hamburger, “Indiana’s bumpy road to privatization,” *Los Angeles Times*, June 24, 2011, <https://www.latimes.com/archives/la-xpm-2011-jun-24-la-na-indiana-privatize-20110624-story.html>.

<sup>20</sup> Aman Batheia, “In State Contracting, Failure is an Option,” *The Texas Tribune*, February 1, 2015, <https://www.texastribune.org/2015/02/01/cost-overruns-and-bungles-state-contracting/>. “Updating and Outsourcing Enrollment in Public Benefits: The Texas Experience, Center for Public Policy Priorities, November 2006, [http://library.cppp.org/files/3/CPPP\\_PrivReport\\_\(FS\).pdf](http://library.cppp.org/files/3/CPPP_PrivReport_(FS).pdf).

<sup>21</sup> Jeffrey Keefe, “Public-sector workers are paid less than their private-sector counterparts—and the penalty is larger in right-to-work states,” *Economic Policy Institute*, January 14, 2016, <https://www.epi.org/publication/public-sector-workers-are-paid-less-than-their-private-sector-counterparts-and-its-much-worse-in-right-to-work-states/>.

support government employees. Moreover, the methodology relies on Occupational Employment Statistics (OES) data that, according to the Bureau of Labor Statistics, are inappropriate for this comparison:

*Can OES data be used to compare private and government pay for similar work? Occupational wages in the different ownership groups (the private sector, and state, local, and federal governments) are influenced by many factors that the OES measures cannot take into account. Thus, while one can obtain OES data that compare estimates of mean and median wages paid in a wide range of detailed occupations across ownership groups, those comparisons do not explain why they might be different. . . . OES data are not designed for use in comparing federal and private sector pay because the OES data do not contain information about pay according to the level of work performed.<sup>22</sup>*

The proposal makes other questionable underlying assumptions. First, it assumes that the administrative costs of contracting out services “would be small.”<sup>23</sup> However, recent research disputes this claim. The Government Finance Officers Association uses a standard assumption of between 10 to 20 percent of a contractor’s bid for contract monitoring and administration costs.<sup>24</sup> A separate Rutgers study found monitoring and compliance expenditures in excess of 20 percent of project costs in New Jersey.<sup>25</sup> In addition, in comparing salaries of public- and private-sector workers, the Department’s analysis arbitrarily doubles public wage rates to account for fringe benefits and overhead without providing details of what “fringe benefits” and “overhead” include. Without more information on fringe benefits and overhead, it would be impossible to evaluate wage and compensation costs.

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<sup>22</sup> “Frequently Asked Questions,” Occupational Employment Statistics, Bureau of Labor Statistics, accessed July 17, 2019, [https://www.bls.gov/oes/oes\\_ques.htm](https://www.bls.gov/oes/oes_ques.htm).

<sup>23</sup> Ibid 4. See footnote 16.

<sup>24</sup> R. Gregory Michel, “Cost Analysis and Activity-Based Costing for Government,” Government Finance Officers Association, 2004.

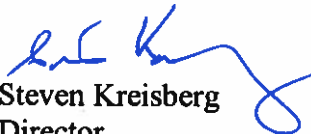
<sup>25</sup> Janice Fine, Patrice Mareschal, David Hersh, and Kirk Leach, “Overlooking Oversight: A Lack of Oversight in the Garden State is Placing New Jersey Residents and Assets at Risk,” Rutgers University, Department of Labor Studies and Employment Relations, March 2014, [https://smlr.rutgers.edu/sites/default/files/images/news/Overlooking%20Oversight%20Janice%20Fine\\_Patrice%20Mareschal\\_Rutgers%20Study\\_3-24-14.pdf](https://smlr.rutgers.edu/sites/default/files/images/news/Overlooking%20Oversight%20Janice%20Fine_Patrice%20Mareschal_Rutgers%20Study_3-24-14.pdf).



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AFSCME appreciates the opportunity to comment in response to DOL's notice. Given the potential harmful, far-reaching effects of ending the longstanding legal requirement of merit-based staffing in the ES, the lack of evidence of the effectiveness of privatization, and the proposal's removal of affirmative action protections for specific ES staff, we urge you to withdraw this proposed regulation.

Sincerely,

  
Steven Kreisberg  
Director  
Research and Collective  
Bargaining Services

SK/mg:tem