

Washington State Wagner-Peyser Employment Service Policy

Policy Number: 4060, Revision 1

Policy Title: Discontinuation of Wagner-Peyser Services to Employers

Effective Date: June 28, 2022

1. **Purpose:**

To communicate the Employment Security Department's (ESD) authority to discontinue Wagner-Peyser employment services to employers that use WorkSource one-stop resources funded in whole or in part by the state's Wagner-Peyser Employment Services grant and the conditions under which those services will be discontinued. This includes discontinuation of services to employers that use the federal Foreign Labor Certification (FLC) program for temporary agricultural workers (H-2A).

2. **Background:**

ESD has the authority to discontinue services to employers under the Wagner-Peyser Act per the Final Rule at 20 CFR 658 Subpart F for the Workforce Innovation and Opportunity Act (WIOA) of 2014 ([P.L. 113-128](#)). This process is intended to ensure that the rights of workers, including H-2A workers, are protected and that government resources are not leveraged in support of illegal or prohibited activities.

Discontinuation of services is an administrative process that requires formal notice to employers along with instructions on how to correct a finding (if applicable) and how to appeal a decision made by ESD. Regulations tied to this process require that employers be given an opportunity to respond before ESD takes action, except under special circumstances defined in this policy. For employers for whom ESD discontinues services, ESD will no longer provide Wagner-Peyser employment services, which include the posting of job announcements, and receipt of job applicant referrals through WorkSourceWA.com, as well as the use of local WorkSource one-stop centers for Wagner-Peyser funded business services such as resume and applicant screening, interviews, and hiring events. Within the context of H-2A, such action may prompt the U.S. Department of Labor (DOL) to deny an employer access to the domestic clearance order process that is part of the Agricultural Recruitment System and a requirement of the H-2A temporary foreign agricultural labor certification program.

3. **Policy:**

a. Basis for discontinuation of services

ESD will initiate discontinuation of services procedures under the following circumstances:

- i. An employer submits and refuses to alter or withdraw job orders or clearance orders

containing specifications that are contrary to employment-related laws.

For H-2A jobs, the process to be followed by ESD is outlined in the H-2A regulations under 20 CFR [655.141](#) wherein ESD and DOL's Office of Foreign Labor Certification (OFLC) review H-2A contracts for compliance. This process is also well detailed in [DOL's Employer Guide to Participation in the H-2A Temporary Agricultural Program](#). In cases where ESD and OFLC disagree on whether or not job orders are in compliance, ESD will discuss the disagreement with OFLC. If ESD and OFLC are unable to reach agreement on the language in question, ESD reserves the right to initiate discontinuation of services procedures if ESD determines that the language that is contrary to employment law remains in the job order. Affected employers will have the right to respond and appeal (described in sections b, c and d of this policy) if they disagree with ESD's decision.

- ii. An employer submits a job order or clearance order and refuses to provide assurances that the jobs offered are in compliance with employment-related laws, or to withdraw such job orders or clearance orders.

For H-2A jobs, these assurances are described in Agricultural Recruitment System for U.S. Workers regulations at 20 CFR [653 Subpart F](#). These assurances include, but are not limited to, guaranteeing workers at least 75 percent of the hours stated on the job order; free housing for qualifying workers that meet state and federal standards; and access to workers by ESD outreach staff in the conduct of outreach activities. The process to be followed by ESD is outlined in the H-2A regulations under 20 CFR [655.141](#), where ESD and OFLC review H-2A job orders for compliance. This process is also well detailed in [DOL's Employer Guide to Participation in the H-2A Temporary Agricultural Program](#). In cases where ESD and OFLC disagree on whether or not the job orders are in compliance, ESD will discuss the disagreement with OFLC. If ESD and OFLC are unable to reach agreement on the language in question, ESD reserves the right to initiate discontinuation of services procedures if ESD determines that the language in the job order lacks adequate assurances that the jobs offered are in compliance with employment-related laws. Affected employers will have the right to respond and appeal (described in sections b, c and d of this policy) if they disagree with ESD's decision.

- iii. An employer is found through field checks, site visits or otherwise to have either misrepresented the terms or conditions of employment specified on job orders or clearance orders or failed to comply fully with assurances made on job orders or clearance orders. For the H-2A program, where findings are found through a field check under 20 CFR [653.503](#), the employer will have the opportunity to correct the finding to the satisfaction of ESD within 5 days unless the situation involves an issue that requires an immediate referral to an enforcement agency such as allegations of sexual harassment or discrimination. Findings that are not resolved within 5 days will be forwarded on to the appropriate enforcement agencies for further action and ESD will initiate discontinuation of services procedures.
- iv. An employer is found by a final determination by an appropriate enforcement agency to have violated any employment-related laws and notification of this final determination has been provided to ESD. This includes being on the debarment lists of either the Office of Foreign Labor Certification (OFLC) or Wage and Hour Division (WHD) within the U.S. Department of Labor.

- v. An employer is found to have violated Employment Services regulations pursuant to 20 CFR [658.411](#), which describe the actions to be taken on complaints. ESD will follow these regulatory requirements when in receipt of an alleged violation or complaint. If ESD determines that the employer has violated Employment Services regulations, ESD will initiate discontinuation of services procedures.
- vi. An H-2A employer refuses to accept qualified workers referred by ESD staff on an H-2A job order.
- vii. An H-2A employer refuses to cooperate with ESD staff's efforts in conducting a field check on an H-2A job order or clearance order where at least one WorkSource referral has been hired.
- viii. An employer repeatedly causes ESD to initiate the procedures for discontinuation of services pursuant to sections 3(a)(i-vii) of this policy.

As to any of the eight above reasons for initiating discontinuation of services, ESD may discontinue services immediately if it determines that exhaustion of the administrative procedures would cause or have the potential to cause substantial harm to a significant number of workers. Such harm may include, but is not limited to, exposure to unhealthy or unsafe work conditions at the worksite, on the farm, or at worker housing where the violation is occurring. In such instances, ESD will provide notice to an employer and follow procedures described in 20 CFR [658.503](#) and 20 CFR [658.504](#), which allow an employer the opportunity to appeal such a decision. Absent such a determination, ESD must give notice of its intent to discontinue services as provided below.

b. Notification to employers

ESD must notify employers in writing of its intent to discontinue employment services and state the reason. Notifications must inform employers that discontinuation of services will occur after 20 working days from the date of the letter unless they take certain actions as specified in 20 CFR [658.502](#)(a). The actions that employers may take are determined by the basis upon which ESD decided to discontinue services. See [attachment A](#) for a template of the letter, [attachment B](#) for a template of the notice and [attachment C](#) for the declaration of compliance template.

For the H-2A program: At the same time, ESD will notify DOL's Office of Foreign Labor Certification's Chicago National Processing Center of alleged noncompliance and consideration of ineligibility.

c. Discontinuation of services

If employers do not provide satisfactory responses in accordance with 20 CFR [658.502](#)(a) within 20 working days from the date of the letter or do not timely request hearings, ESD will immediately discontinue services to those employers.

Action to be taken by ESD will include no longer allowing the posting of job announcements or allowing the use of local WorkSource office and staff resources as well as halting the referral of job seekers. ESD will also notify Local Workforce Development Boards so that WorkSource (one-stop) system partners are aware of any action taken by ESD. Within the context of H-2A,

such action may prompt DOL, upon notice from ESD, to deny an employer access to the clearance orders through the Agricultural Recruitment System that are required for the H-2A foreign labor certification program.

If services are discontinued to an employer subject to Federal Contractor Job Listing Requirements, ESD must immediately notify the DOL regional office.

d. Requesting a Hearing or Appeal

i. Failure to request a hearing

If employers do not provide timely, satisfactory responses in accordance with 20 CFR [658.503](#)(a) or timely request a hearing, ESD must immediately discontinue services to the employer.

ii. Referral of matter to an administrative law judge at the Office of Administrative Hearings

If ESD receives a timely written request for an administrative hearing, ESD will refer the matter to an administrative law judge (ALJ) at the Office of Administrative Hearings. ESD will also notify the respective parties in writing that (1) they will be notified of the date, time, and place of the hearing; (2) they may be represented at the hearing by an attorney or other representative; (3) they may bring witnesses and/or documentary evidence to the hearing; (4) they may cross-examine opposing witnesses at the hearing; (5) the decision will be based on the evidence presented at the hearing; (6) the ALJ may reschedule the hearing at the request of a party or its representative; and (7) with the consent of ESD's representative and the ALJ, the party requesting the hearing may withdraw the request for hearing in writing before the hearing.

iii. Decision of an administrative law judge at the Office of Administrative Hearings

After considering the entire record, the ALJ will prepare a written decision with findings of fact and conclusions of law per 20 CFR [658.418](#)(b). The ALJ will send a copy of the decision to the complainant (if any), the respondent, entities serving in amicus capacity (if any), ESD, the DOL Regional Administrator, and the DOL Solicitor General. The ALJ's decision will be accompanied by a written notice informing the parties—not including the DOL Regional Administrator, DOL Solicitor General, or entities serving in an amicus capacity—that they may appeal the ALJ's decision by filing an appeal in writing with the DOL Regional Administrator within 20 working days of the certified date of receipt of the decision per 20 CFR [658.418](#)(c). The ALJ's notice will include the DOL Regional Administrator's address.

e. Reinstatement of services

i. Services may be reinstated to an employer after discontinuation if:

A. ESD is ordered to do so by a federal ALJ or DOL Regional Administrator; or

B. ESD is satisfied that the employer has provided adequate evidence that any policies, procedures, or conditions responsible for the previous discontinuation of services have been corrected and that the same or similar circumstances are not likely to

occur in the future; and that the employer has provided adequate evidence that the employer has responded adequately to any findings of an enforcement agency, ESD, or DOL's Employment and Training Administration, including restitution to the complainant and the payment of any fines, which were a basis of the discontinuation of services.

- ii. If an employer requests reinstatement of services, ESD must notify the employer requesting reinstatement within 20 working days whether or not the request has been granted. If ESD denies the request for reinstatement, the basis for the denial must be specified and the employer must be notified of the right to request a hearing within 20 working days.
- iii. If the employer makes a timely request for a hearing, ESD will refer the matter to the Office of Administrative Hearings for an administrative hearing before an ALJ. ESD must reinstate services to an employer if ordered to do so by a state hearing official, the DOL Regional Administrator, or federal ALJ as a result of a hearing regarding the employer's request for reinstatement of services.

4. Definitions:

Amicus capacity: Someone who is not a party to a case and may or may not have been solicited by a party and who assists a court by offering information, expertise, or insight that has a bearing on the issues in the case; and is typically presented in the form of a brief.

Employment-Related Laws: Laws that relate to the employment relationship, such as those enforced by the Wage and Hour Division of US DOL, OSHA, or by other Federal, State, or local agencies.

Field Check: Random, unannounced appearances by ESD personnel at agricultural work sites to which WorkSource job placements have been made to ensure that conditions are as stated on the job order and that employers are not violating employment-related laws.

Finding: A determination made by ESD or an enforcement agency based on observations, information received, or other conditions that lead them to believe that conditions are not as stated in the job order or that an employer is violating an employment law as noted in 20 CFR 653.503.

5. References:

- [Public Law 113-128, Workforce Innovation and Opportunity Act of 2014](#)
- 20 CFR 658 Subpart E – [Complaint System](#)
- 20 CFR 658 Subpart F – [Discontinuation of Services to Employers](#)
- 20 CFR 655 - [Processing of Applications for Temporary Employment Certification](#)
- 20 CFR 655 [Subpart B - Labor Certification Process for Temporary Agricultural Employment in the United States \(H-2A Workers\)](#)
- 20 CFR 658.411 - [Action on Complaints](#)
- 20 CFR 653.503 - [Agricultural Recruitment System for U.S. Workers \(ARS\) Field Checks](#)
- 20 CFR 653.501 - [Requirements for Processing Clearance Orders](#)
- 20 CFR 658.418(b) – [Decision of the State hearing official](#)
- [Washington State Office of Administrative Hearings](#)
- [RCW 50.75.020 – Office of agricultural and seasonal workforce services – creation – duties](#)
- [WorkSourceWA.com Terms of Use Agreement](#)

- [WorkSourceWA.com Job Posting Guidelines](#)
- [WorkSourceWA.com Privacy Policy](#)

6. Supersedes:

Wagner-Peyser Employment Service Policy 4060 - Discontinuation of Wagner-Peyser Employment Services to H2A Employers

7. Website:

[Workforce Professionals Center](#)

8. Action:

Local Workforce Development Boards and their contractors, as well as Employment Security Regional Directors, must distribute this policy broadly throughout the system to ensure that WorkSource System staff are familiar with its content and requirements.

9. Attachments:

[Attachment A](#) – Intent to Initiate Discontinuation of Services process letter template

[Attachment B](#) – Notice of Intent to Initiate Discontinuation of Services template

[Attachment C](#) – Declaration of Compliance template

Direct Policy Inquiries To:

*Employment System Administration and Policy
Employment System Policy and Integrity Division
Employment Security Department
SystemPolicy@esd.wa.gov*

Direct Non-H-2A Procedural Inquiries To:

*Wagner-Peyser Program Operator
Employment Connections Division
Employment Security Department
P.O. Box 9046
Olympia, WA 98507-9046
ESDGPWagnerPeyser-MSFW@esd.wa.gov*

Direct H-2A Procedural Inquiries To:

*Agricultural and Seasonal Workforce Services – Director
Employment System Policy and Integrity Division
Employment Security Department
P.O. Box 9046
Olympia WA 98507-9046
ESDGPMonitorAdvocate@esd.wa.gov*