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The U.S. Employment Service: Service Delivery and Merit Staffing

Introduction

Since the establishment of the Employment Service (ES) in 1933, there has been congressional and executive branch interest and activity around the staffing requirements in the delivery of ES services. In particular, there has been a long-standing dialogue on the best way to ensure uniformity of service delivery and standards of efficiency across states in the ES—through public sector workers hired on the basis of merit (*merit staff*) or through non-state or non-public sector workers. In 2020, the Department of Labor (DOL) changed its longstanding regulations on ES staffing; in 2022, DOL proposes to partially reverse those changes. In 2022, the House passed a reauthorization of the Workforce Innovation and Opportunity Act (H.R. 7309) that includes merit staffing requirements in the ES.

This In Focus summarizes the major statutory and regulatory developments related to the use of merit staff in ES offices since the enactment of the Wagner-Peyser Act, the law that created the ES.

The Employment Service

In response to exceptionally high unemployment during the Great Depression, the Franklin D. Roosevelt Administration and Congress proposed and enacted numerous New Deal programs to address unemployment and to improve the efficiency of the U.S. labor market. The decentralized and uneven nature of labor exchange services in the United States in the early 1930s led to proposals for the federal government to take a more active approach in matching unemployed workers with employment opportunities.

Building on prior experience with labor exchange services, the Wagner-Peyser Act (29 U.S.C. §49 et seq.) was enacted in 1933 to establish a more uniform federal-state system of public employment service offices from the existing mix of state and local offices. The act created the ES within DOL to promote the establishment and maintenance of the federal-state public employment service.

The Wagner-Peyser Act and federal regulations require that each state, in order to receive related federal appropriations, must operate a labor exchange system that has, at a minimum, the capacity to

- assist job seekers in finding employment,
- assist employers in filling jobs,
- facilitate the match between jobseekers and employers,
- participate in a system for clearing labor between the states, and
- meet the work-test requirements of the state unemployment compensation system.

The ES is federally funded, primarily by appropriations from the Federal Unemployment Tax Act (FUTA). The ES is the central component of most states' workforce development systems, as services are universally accessible to all jobseekers and employers. Reflecting this central role, the Workforce Innovation and Opportunity Act (WIOA; 29 U.S.C. §3101 et seq.), enacted in 2014, requires ES offices to be integrated by being physically located with One-Stop centers and prohibits standalone ES offices. In addition, because ES staff conduct the work test for the receipt of unemployment benefits, ES is also a critical component of the Unemployment Insurance (UI) system.

Current ES Staffing Requirements

The Wagner-Peyser Act does not use the term *merit staff* in the ES; using merit staff in the ES began shortly after the act passed in 1933 and continued until 2020. Initial discussions in the 1930s around setting staffing standards in the ES were informed by concerns about favoritism and partiality in the provision of employment services, especially given patronage systems then operating in several states and localities.

Current staffing requirements for the ES are based on a combination of law and regulations. Under DOL regulations finalized in 2020, labor exchange services authorized through the ES may be provided through a variety of staffing models. States may choose to provide ES services by state merit-staff employees; they are not required to do so.

Merit Staff Definition

While no specific merit standards are described in the Wagner-Peyser Act, such requirements are typically adopted to ensure (1) hiring is based on competence rather than patronage, (2) execution of services is impartial and nonpartisan, and (3) administration of services is not affected by favoritism. The Intergovernmental Personnel Act of 1970 (IPA; 42 U.S.C. §4701 et seq.) authorized the Office of Personnel Management (OPM) to prescribe personnel standards consistent with merit principles for the administration of certain federal programs, including those funded by the Wagner-Peyser Act. In implementing the IPA, OPM noted that the quality of public services can be improved by developing personnel systems consistent with

- employee recruitment based on knowledge, skills, and abilities;
- equitable and adequate compensation;
- employee training to ensure high performance;
- employee retention based on adequacy of performance;
- assurance of non-discrimination; and

- employee protection against coercion for partisan political purposes.

Evolution of Merit Staffing Requirements

Table 1 summarizes the major regulatory provisions in ES staffing requirements from 1933 (enactment of the Wagner-Peyser Act) through 2019, those provided in the 2020 Final Rule, and those in the 2022 proposed rule.

Table 1. Major Regulatory Provisions Pertaining to Employment Service Staffing Requirements

Provision	1933-2019	2020	2022 (proposed)
State Merit Staff Required	Yes	No	Yes
Demonstration States—Non-Merit/Local Merit Staff	Yes	Yes	No
Summary of Rationale	Uniform system of service delivery, non-discrimination, and protection against political influence	Flexibility and closer alignment with WIOA staffing models	Standardization, cross-training, and closer alignment with the UI system

Source: CRS analysis of 2020 Final Rule, 2022 Notice of Proposed Rulemaking, and David E. Balducci and Christopher J. O’Leary, *The Employment Service-Unemployment Insurance Partnership: Origin, Evolution, and Revitalization*, W.E. Upjohn Institute for Employment Research, Upjohn Institute Working Paper 17-269, Kalamazoo, MI, April 2017, <https://doi.org/10.17848/wp17-269>.

From Enactment through 2019

Through a series of statutory and regulatory actions, state merit staff were generally required for labor exchanges funded through the ES from 1933 through 2019. Of note,

- DOL policy since the time of enactment in 1933 through 2019 generally required merit staffing in the ES. DOL’s policy was based upon DOL’s authority to assist ES offices by “developing and prescribing *minimum standards of efficiency* ... and *promoting uniformity* in [ES] administrative and statistical procedure”; and
- in the 1990s, DOL granted three demonstration states an indefinite waiver from the merit-staffing requirements of the ES. Colorado, Massachusetts, and Michigan were authorized to run demonstration projects with alternative service delivery (i.e., a non-state ES agency) for ES labor exchange services. Subsequent litigation in the Michigan case led the U.S. District Court for the Western District of Michigan to rule that DOL’s construction of the Wagner-Peyser Act to require merit staffing was a “reasonable and permissible interpretation” of the act.

In 2006, DOL issued a Notice of Proposed Rulemaking (NPRM) that would have allowed states to use non-merit

staff in the delivery of ES services by reconsidering its previous rulemaking requiring state merit staff to deliver ES services. The 2006 NPRM was withdrawn in 2009.

Final Rule in 2020

Effective January 1, 2020, DOL issued a Final Rule (2020 Final Rule) that eliminated the merit staffing requirement for the ES and allows all states to use non-merit staff in the delivery of ES services. DOL argued that the Wagner-Peyser Act “does not contain a statutory requirement to impose a merit-staffing requirement on States.” Instead, the 2020 Final Rule noted that while DOL historically required state merit staff for administration of ES services, this was a “policy choice” rather than a statutory requirement.

In the 2020 Final Rule, DOL changed its longstanding policy of requiring state merit staff to deliver ES services to allow states to

- align ES service delivery with WIOA, which does not require any particular staffing model;
- develop “innovative and creative” approaches to deliver ES services and activities; and
- “free resources” to assist employers and jobseekers more effectively.

Proposed Rulemaking in 2022

In April 2022, DOL issued a Notice of Proposed Rulemaking (2022 NPRM) that would require states to use state merit staff in the delivery of ES services. While the 2020 Final Rule argued for closer alignment between the ES and WIOA, which does not require the use of merit staff, the 2022 NPRM stresses the importance of aligning the ES more closely with the UI system, which generally requires the use of merit staff to deliver services. DOL provides two main rationales for requiring state merit staff to deliver all ES services:

- *Stronger alignment between the ES and UI systems.* State merit staff ensure “surge capacity” in times of stress on the UI system, as occurred particularly in the spike in 2020 in pandemic-related unemployment claims. (The adjudication of UI claims must be performed by state merit staff and only ES state merit staff who have been cross-trained may assist in UI claims processing and adjudication).
- *Accountability and uniformity.* Uniform merit staff standards would help “ensure that ES services are delivered by qualified, non-partisan personnel who are directly accountable to the State.”

The 2022 NPRM would thus require the demonstration states that currently use local merit staff to provide ES services to reconfigure service delivery to state merit staff only. While the 2020 Final Rule argued for closer alignment between the ES and WIOA, which does not require the use of merit staff, the 2022 NPRM stresses the importance of aligning the ES more closely with the UI system, which generally does require the use of merit staff to deliver services.

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