

To: Indiana’s Workforce System

From: Indiana Department of Workforce Development (DWD)

Date: June 26, 2024

Subject: DWD Policy 2023-20
Discontinuation of Wagner-Peyser Employment Services to Employers

Purpose

To provide guidance on the discontinuation of Wagner-Peyser employment services to employers that use WorkOne/American Job Center (WorkOne/AJC) resources funded in whole or in part by the state’s Wagner-Peyser (WP) Employment Services (ES) grant and the conditions under which those services will be discontinued. This includes discontinuation of services to employers that file a clearance order in connection to an H-2A program.

References

- 20 CFR 651.10
- 20 CFR 658.417
- 20 CFR 658 Subpart F
- Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898 (April 29, 2024)
- TEN 27-23 Announcing the Publication of the Final Rule, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*

Definitions

See **Attachment A**.

Content

Employers¹ must comply with all applicable employment-related laws as well as the full terms and conditions of clearance orders in order to employ workers through the ES system. Under certain circumstances, the Indiana Department of Workforce Development (DWD) has the authority to discontinue employment services to employers to ensure that the rights of workers, including H-2A workers, are protected.²

¹ As defined in 20 CFR 651.10. **NOTE:** For purposes of this policy and 20 CFR part 658 subpart F only, where the term “employer” is used, it refers to employers, agents, farm labor contractors, joint employers, and successors in interest to any employer, agent, farm labor contractor, or joint employer. See **Attachment A** for definitions of these terms.

² Per 20 CFR 658 Subpart F.

Discontinuation of employment services³ is an administrative process that requires formal notice to employers along with instructions on how to correct an issue (if applicable) and how to appeal a decision made by DWD.

Within the context of H-2A, DWD will notify the U.S. Department of Labor (DOL) regarding the discontinuation of services that may impact an employer's domestic clearance orders.

Basis for the Discontinuation of Employment Services to Employers⁴

DWD will initiate procedures for discontinuation of services to employers who:

1. Submit and refuse to correct or withdraw job orders containing terms and conditions that are contrary to employment-related laws;
2. Submit job orders and refuse to provide assurances, or refuse to withdraw job orders that do not contain assurances, required pursuant to the Agricultural Recruitment System for U.S. Workers;⁵
3. Are found through field checks or otherwise to have either misrepresented the terms or conditions of employment specified on job orders or failed to comply fully with assurances made on job orders;
4. Are 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 DWD by that enforcement agency, which includes those who are currently debarred from participating in the H-2A or H-2B foreign labor certification programs;⁶
5. Are found to have violated ES regulations;⁷
6. Refuse to accept qualified workers referred through the clearance system for criteria clearance orders;⁸
7. Refuse to cooperate in field checks conducted;⁹ or
8. Repeatedly cause the initiation of the procedures for discontinuation of services under the items (1) through (7) listed above.

Notification of the Intention to Discontinue the Provision of Employment Services to Employers¹⁰

DWD must notify employers in writing of its intent to discontinue employment services and state the reason for the discontinuation. Notifications will inform employers that discontinuation of services will occur within twenty (20) working days from the date of the notification unless the employer takes certain actions as specified in the notification.¹¹

³ See **Attachment A** for the definition of *Discontinuation of Services*.

⁴ 20 CFR 658.501(a).

⁵ At 20 CFR 653, subpart F.

⁶ Pursuant to 20 CFR 655.73 or 655.182 or 29 CFR 501.20 or 503.24.

⁷ Pursuant to 20 CFR 658.411 or 658.419.

⁸ Filed pursuant to 20 CFR 655, subpart B.

⁹ Pursuant to 20 CFR 653.503.

¹⁰ 20 CFR 658.502(a)(1)-(7).

¹¹ Actions are detailed at 20 CFR 658.502(a) for circumstances 1-7.

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

Discontinuation of Services to Employers¹²

DWD will issue, via certified mail, a final determination within twenty (20) working days of receiving the employer's response or from the date of when the notification was received by the employer if the employer fails to respond. If it is determined that the employer's response was not satisfactory,¹³ DWD will issue a notification that will:

- Specify the reason(s) for the determination;
- State that the discontinuation of services will be effective twenty (20) working days from the date of the notification;
- Inform the employer they may request reinstatement or a hearing;¹⁴ and
- State that a request for a hearing stays the discontinuation pending the outcome of the hearing.

Immediate Discontinuation of Services

DWD may discontinue services immediately if, in the judgment of the State Administrator, exhaustion of the administrative procedures would cause substantial harm to workers. In such instances, DWD will notify the employer in writing of the following:

- The facts supporting the applicable basis for discontinuation;¹⁵
- The reasons that exhaustion of the administrative procedures would cause substantial harm;
- Services are discontinued as of the date of the notice;
- The employer may request reinstatement or a hearing;¹⁶ and
- A request for a hearing relating to immediate discontinuation would not stay the discontinuation pending the outcome of the hearing.

Employers that experience discontinuation of services may not use any ES activities described in 20 CFR parts 652 and 653,¹⁷ all active job orders in the clearance system will be removed, and DWD will not process any future job orders while the services as discontinued.

NOTE: DWD will continue to provide the full range of ES and other appropriate services to workers whose employers' services have been discontinued.

Reinstatement of Services to Employers¹⁸

Employers have two options to pursue reinstatement of services:

¹² 20 CFR 658.503.

¹³ In accordance with 20 CFR 658.502.

¹⁴ Pursuant to 20 CFR 658.504.

¹⁵ Under 20 CFR 658.501(a).

¹⁶ Pursuant to 20 CFR 658.504.

¹⁷ Loss of access to ES applies in all locations throughout the country where such services may be available.

¹⁸ 20 CFR 658.504.

- Submit a written request for a hearing within twenty (20) working days of the date of receiving DWD's final determination; or
- Submit a written request to DWD at any time following the discontinuation.

Reinstatement Requests

Employers requesting reinstatement will be notified by DWD within twenty (20) working days whether the request has been granted or denied. If the request for reinstatement is denied, DWD's notification will include the reasons for the denial and inform the employer they may request a hearing within twenty (20) working days.

Services may be reinstated to an employer after discontinuation if:

- (i) The employer provides 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
- (ii) The employer provides adequate evidence that they have responded appropriately to any findings of an enforcement agency, State Workforce Agency (DWD), or ETA, including restitution to the complainant and the payment of any fines, which were the basis of the discontinuation of services.

Hearing Requests

Employers must submit a written request for a hearing within twenty (20) working days of the date of receiving DWD's final determination. Hearings will be conducted in accordance with 20 CFR 658.417.

Action

Local boards must ensure that all staff, especially those delivering Business Services, are aware of the contents of this policy. It should also be noted that the discontinuation of services process applies to all employers. If staff witness a violation that could lead to a discontinuation of Wagner-Peyser employment services, staff are to contact the State Administrator to initiate an investigation to ensure that the rights of all Indiana workers are protected.

Attachments

Attachment A – Definitions

Effective Date

Immediately.

Ending Date

Upon rescission.

Additional Information

Questions regarding the content of this publication should be directed to policy@dwd.in.gov.

Attachment A Definitions¹⁹

Agent means a legal entity or person, such as an association of employers, or an attorney for an association, that is authorized to act on behalf of the employer for purposes of recruitment of workers through the clearance system and is not itself an employer or joint employer, as defined in this section, with respect to a specific job order.

Criteria clearance order means a clearance order that is attached to an application for foreign temporary agricultural workers.²⁰

Discontinuation of services means that an employer, agent, farm labor contractor, joint employer, or successor in interest cannot participate in or receive any Wagner-Peyser Act employment service provided by the ES to employers.²¹

Employer means a person, firm, corporation, or other association or organization which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a worker at a place within the United States and which has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises, and otherwise controls the work of such employees. An association of employers is considered an employer if it has all of the indicia of an employer set forth in this definition. Such an association, however, is considered as a joint employer with the employer member if either share in exercising one or more of the definitional indicia.²²

Employment-related laws mean those laws and implementing rules, regulations, and standards that relate to the employment relationship, such as those enforced by the Department's WHD, OSHA, or by other Federal, State, or local agencies.

Employment Service (ES) regulations mean the Federal regulations at parts 651, 652, 653, 654, 658 of this chapter, and 29 CFR part 75.²³

Farm labor contractor means any person or entity, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal farmworker (MSFW).

Field checks mean unannounced appearances by ES staff and/or other State or Federal staff at agricultural worksites to which ES placements have been made through the intrastate or interstate clearance system to ensure that conditions are as stated on the clearance order and that the employer is not violating an employment-related law.²⁴

¹⁹ As defined at 89 FR. 33898 unless otherwise indicated.

²⁰ Pursuant to 20 CFR part 655, subpart B.

²¹ Pursuant to 20 CFR parts 652 and 653.

²² As defined at 20 CFR 651.10.

²³ As defined at 20 CFR 651.10.

²⁴ As defined at 20 CFR 651.10.

Joint employer means where two or more employers each have sufficient definitional indicia of being an employer of a worker as defined in this section, they are, at all times, joint employers of that worker. An employer that submits a job order to the ES clearance system as a joint employer is a joint employer of any worker placed and employed on the job order during the period of employment anticipated, amended, or otherwise extended in accordance with the order.

Non-criteria clearance order means a clearance order that is not attached to an application for foreign temporary agricultural workers.²⁵

Successor in interest—The following factors, including those as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or farm labor contractor is a successor in interest; however, these factors are not exhaustive, and no one factor is dispositive, but all of the circumstances will be considered as a whole:

- 1) Substantial continuity of the same business operations;
- 2) Use of the same facilities;
- 3) Continuity of the work force;
- 4) Similarity of jobs and working conditions;
- 5) Similarity of supervisory personnel;
- 6) Whether the former management or owner retains a direct or indirect interest in the new enterprise;
- 7) Similarity in machinery, equipment, and production methods;
- 8) Similarity of products and services;
- 9) The ability of the predecessor to provide relief; and
- 10) For purposes of discontinuation of services, the involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

NOTE: a successor in interest to an employer, agent, or farm labor contractor may be held liable for the duties and obligations of that employer, agent, or farm labor contractor for purposes of recruitment of workers through the ES clearance system or enforcement of ES regulations, regardless of whether such successor in interest has succeeded to all the rights and liabilities of the predecessor entity.

²⁵ Pursuant to 20 CFR part 655, subpart B.