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Category: Wagner-Peyser
Subject#: Guidelines Regarding Job Orders and Employer Services
Source: Federal/State
Revise/Replace:
Contact: Employment and Training Programs Director
Distribution: Managers, Employment & Training Staff, Workforce Region Directors, Fiscal
Colorado One-Stop System Policy Guidance Letter#: 01-04-WP1
Date: January 31, 2001

I. REFERENCE(S):

Wagner-Peyser Act of 1933 as amended by Title III of the Workforce Investment Act (WIA) of 1998; Wagner-Peyser Regulations, 20 CFR Parts 651, 652, and 658.

II. PURPOSE:

To provide guidelines to workforce regions for accepting job orders; to define the conditions under which job orders or services to employers can be refused; and to address policies regarding quality control of job orders.

III. BACKGROUND:

For several years, Wagner-Peyser staff have received limited guidance and training in the area of taking job orders. As a result, many questions have arisen regarding when job orders should be taken or refused, what constitutes a bona fide job order, and what quality control standards should be set for writing job orders.

On September 20, 2000, the Colorado Department of Labor and Employment (CDLE) convened a workgroup of staff representatives from 14 of the 18 workforce regions and subregions to discuss potential job order policies. This day-long session covered a wide range of issues pursuant to job orders as well as client applications. Input from the workgroup, and a comprehensive review of the Wagner-Peyser law, Wagner-Peyser regulations, current and past CDLE directives, and the Colorado Employment Service Manual (last issued in April of

1990), served as the basis for this Program Guidance Letter (PGL).

IV: POLICY/ACTION:

A. TYPES OF JOB ORDERS AND APPROPRIATE ACTIONS

Although the principle of universal access applies to the provision of services to employers (see PGL 97-11-P4, Universal and Equal Access to Services), there are a number of circumstances in which a workforce center is required by law, regulation, or policy to refuse a job order. The following defines the types of job orders that might be received by a workforce center and what actions should be taken:

1. Orders Involving a Fee for Placement

- a. A fee for placement is a charge that consists of direct payment in exchange for the job opening being filled. If an employer, or an agency recruiting for an employer, wishes to place a job order that would charge the applicant a fee for placement, the workforce center should not take the order. The employer or agency should be informed why the order is being refused.
- b. The purchase of materials, equipment, and uniforms or payment for testing and licensing by an applicant are not considered fees for placement. If the employer requires that the applicant pay for such items, the job order may be taken as long as the required expenses are listed on the order.
- c. The Wagner-Peyser Act does not prohibit the referral of an applicant to a private employment agency as long as the applicant is not charged a fee.

2. Orders Where an Employer-Employee Relationship Does Not Exist

- a. An employer is defined by the Wagner-Peyser regulations, in part, as a person, firm, corporation, or other organization that has a location within the United States to employ workers, and that hires, pays, fires, supervises and otherwise controls the work of its employees.
- b. When an employer-employee relationship does not exist, an order can be refused. Typically an employer-employee relationship does not exist if the worker is an independent contractor, and/or if the employer does not pay Unemployment Insurance (UI) taxes or provide Workers' Compensation on behalf of the worker.
- c. An employer pays UI taxes on **domestic workers** only if the worker earns at least \$1000.00 in a calendar year. Workforce centers have the discretion to either accept or refuse job orders for domestic workers who do not have the potential to earn \$1000.00 in a year. To verify that an employer is registered to pay UI taxes, the workforce center should access the UI Tax employer database.
- d. The Colorado Employment Security Act states that an employer-employee relationship does not exist when a worker is paid straight commission. An employer must guarantee at least minimum wage to an employee in order for an employer-employee relationship to be established. Job orders for commission-only positions should be refused.

Examples would be commission-only sales, real estate agents, cab drivers, limousine drivers, and newspaper delivery persons.

e. When an employer does not provide Workers' Compensation, even though he has an employer-employee relationship, a job order may be refused or accepted. However, workforce centers are encouraged to refuse these orders because the center or an individual staff person could be liable in a civil suit if a worker is injured on a job not covered by Workers' Compensation that he obtained from a workforce center referral.

3. Orders That May Not Be Bona Fide

a. A bona fide job order means that a current and valid job opening exists prior to any referrals being made, and that the workforce center has reason to be confident that the employer is a legitimate employer.

b. Job orders that are received to build a list of applicants for future openings are not bona fide orders and should be refused.

c. Workforce centers should be alert to the possibility that a job opening or an employer may not be bona fide. Examples of questionable situations may be:

1) When an employer requires any unusual pre-employment action on the part of the applicant such as a deposit for some alleged service (e.g., transportation, dues, food, or lodging); or

2) When an unknown employer requests permission to interview applicants at an address that is not a normal place of business, such as a hotel room.

d. When a questionable situation arises, the workforce center should attempt to verify the legitimacy of the employer by checking UI Tax records or asking the employer for an FEIN number (since some bona fide employers do not pay UI taxes.) If the workforce center cannot verify that the opening or employer is bona fide, the job order may be refused.

4. Orders Predesignating Applicants To Be Referred

a. When an employer requests that certain workers be referred on any basis other than an occupational qualification, the job order should be refused. For example, an employer might identify a specific individual to be referred, and indicate that he is not willing to consider other applicants. Such requests for referrals are considered predesignation of applicants and make a job order unacceptable. However, an order may be taken if the employer requests that a specific person be referred and is also willing to consider other referrals.

b. An employer may request the referral of individuals who were previous employees before he is willing to consider the referral of other qualified applicants. In this instance, the order may be taken.

c. An exception to the rule on predesignation occurs when an employer lists an agricultural job order. In this instance, the employer may request a specific crew leader or worker, and the job order should be accepted.

5. Orders That Are Discriminatory

- a. The Civil Rights Act of 1964 prohibits discrimination in hiring, promotion, discharge, pay, fringe benefits, and other aspects of employment, on the basis of race, color, religion, sex, or national origin.
- b. The Age Discrimination In Employment Act of 1967 prohibits arbitrary age discrimination in employment against individuals 40 years of age or older by: 1) private employers having 20 or more employees and engaging in an industry affecting interstate commerce, or 2) any governmental entity.
- c. The Rehabilitation Act of 1973 prohibits employers meeting certain standards from discriminating against qualified disabled applicants.
- d. The Civil Rights Act and the Wagner-Peyser Act require that the labor exchange system ensure that discriminatory job orders are not accepted. In addition, the Civil Rights Act of 1964 prohibits the labor exchange system from providing any service to an employer when there are reasonable grounds (i.e. documented evidence) to believe that the employer is engaged in discriminatory practices.
- e. An exception to the nondiscrimination laws is a situation involving a **Bona Fide Occupational Qualification** (BFOQ). Wagner-Peyser regulations define a BFOQ to mean that an employment decision or request relating to age, sex, national origin, or religion is based on a finding that such a characteristic is necessary to the individual's ability to perform the job in question. Examples of BFOQs would be a request for an actress to portray a female role in a play or movie, or a male attendant to serve in a men's locker room. Certain jobs have bona fide age requirements based on agility (e.g. fire fighter or police officer), legal requirements (e.g. bartender), or insurance requirements (e.g. commercial drivers). Orders with acceptable BFOQs may be written and serviced.
- f. Should an employer wish to list an opening containing discriminatory specifications, and a BFOQ does not exist, the workforce center should attempt to persuade the employer to eliminate those discriminatory specifications. If the employer is willing to change his requirements, the order may be accepted. Otherwise, the order must be refused.

6. Affirmative Action Orders

- a. An affirmative action job order is one that seeks qualified applicants, particularly members of a specified group that, for non-occupationally valid purposes, have been discouraged from entering certain occupational fields. In addition, it is an order that results from:
 - 1) Executive Order No. 11246 and implementing instructions at 41 CFR Chapter 60, requiring certain government contractors to take affirmative action to hire and promote qualified minorities and women; or

- 2) Section 503 of the Rehabilitation Act of 1973 and implementing regulations at 41 CFR Part 60-471 requiring certain government contractors to take affirmative action to employ and advance in employment qualified disabled workers; or
- 3) Section 402 of the Vietnam-era Veterans Readjustment Assistance Act of 1974 and implementing regulations at 41 CFR part 60-250 requiring certain government contractors to take affirmative action to employ and advance in employment Vietnam-era and disabled veterans; or
- 4) A court order resulting from a decision in which there was a finding of employment discrimination; or
- 5) A conciliation agreement as authorized by Title VII of the Civil Rights Act; or
- 6) Provisions of Federal, State, or local fair employment practice law; or
- 7) An affirmative action plan adopted pursuant to the Equal Employment Opportunity Commission's guidelines on Affirmative Action (29 CFR part 1608).

b. Workforce centers should accept all legitimate affirmative action job orders and may assist the employer with special applicant searches and recruitment efforts. However, applicant file searches must follow the standard veterans preference requirements spelled out in PGL 00-04-V6 (Veterans' File Search Activity). For example, if an employer requests that a special search be done for minorities, minority veterans must be given preference for referral to the job.

c. An affirmative action order should be clearly marked as affirmative action and clearly reflect the employer's needs. An example of appropriate language to be included in the job description might be:

"Affirmative Action: All qualified applicants will be considered. Minorities and women encouraged to apply."

7. Orders That Are In Violation of Law

a. Job orders that contain job duties or terms or conditions of employment that are contrary to law should be refused. Examples of such orders would be those specifying pay below the legal minimum wage, requiring the worker to perform illegal activities, or specifying hours for a youth worker in violation of child labor laws.

b. Workforce centers should explain the legal basis for refusing the order to the employer and offer the opportunity for the order to be modified. If the employer agrees to an appropriate modification, the job order may be accepted. Otherwise, the order must be refused.

8. Orders Impacted By a Labor Dispute

- a. A labor dispute is any controversy concerning the terms or conditions of employment, or any controversy concerning the association or representation of individuals in negotiating, maintaining, changing, or seeking to arrange the terms or conditions of employment.
- b. When a labor dispute results in a work stoppage (such as a labor strike, walkout or lockout), workforce centers are restricted from accepting or servicing orders for positions that are vacant because the former occupant is on strike, is being locked out in the course of a labor dispute, or the filling of which is otherwise an issue in the labor dispute.
- c. Workforce centers may accept job orders from an employer involved in a labor dispute until such time as a work stoppage occurs, and may accept job orders during a work stoppage as long as the orders are for positions that are not impacted, either directly or indirectly, by the work stoppage.
- d. Should job orders for positions not impacted be taken from an employer involved in a work stoppage, workforce centers are responsible for notifying any applicants referred that the employer is involved in a labor dispute and that the position listed with the workforce center is not vacant as a result of the dispute. Workforce centers are encouraged to include this information in the job description of the job order.
- e. CDLE's Employment and Training Programs Unit is legally responsible for official notification to workforce centers regarding labor disputes resulting in work stoppages, and for official notification to workforce centers when labor disputes have been resolved. These notifications determine when the restrictions and requirements described in b, c, and d above must begin and when they should end.
- f. Workforce centers should be alert to labor disputes that are developing in their regions and are encouraged to contact their Program Support Representative or Marie Valenzuela at the Employment and Training Programs Unit (303-318-8811 or marie.valenzuela@co.state.us) with information on any such disputes. This will help facilitate timely notification of all the regions should a work stoppage occur.

9. Orders Specifying Membership or Non-membership in a Labor Organization

- a. Orders specifying membership or non-membership in a labor organization as a condition of being hired may be in violation of law if the employer is subject to the Labor-Management Relations Act of 1947.
- b. However, if the employer requires an employee to join a labor organization on or after the 30th day of employment, and this requirement is pursuant to the employer's agreement with the labor organization, the order would **not** be in violation of the Act. In the case of the building and construction industries, the requirement to join a labor organization may be on or after the 7th day of employment.

10. Orders From Temporary Agencies or Labor Unions

- a. In general, job orders received from a temporary agency or a labor union should be handled in the same manner as those from any other employer. However, workforce centers should be alert to whether job orders from these organizations have current and valid job openings and are not for the purpose of building lists of applicants for future openings.
- b. Workforce centers should also make certain that a job order from a temporary agency or labor union does not duplicate an order listed by an employer that the union or agency may be representing. To accomplish this, workforce centers should obtain the name of the employer being represented whenever possible and compare any listings from that employer with those received from the representative. Duplicates should be eliminated. The determination of which duplicate orders should be kept or deleted is the responsibility of the local workforce center.

11. Orders That Are “Filled-When-Written”

- a. A filled-when-written job order is one that has been filled prior to the time of input into the computer database and is not subject to the veterans' file search requirement.
- b. The use of a filled-when-written job order is appropriate when:
 - The opening is the result of job development for an individual applicant and the applicant is referred and hired before the order is written;
 - A hire is a result of a job fair or other mass hiring activity;
 - A hire results from a work experience, an on-the-job (OJT) training contract, or other subsidized employment opportunity;
 - The job order specifies that applicants must belong to a targeted group such as welfare recipients, dislocated workers, etc.;
 - The opening is a 1-3 day casual labor position;
 - Verification of a hire occurs after a job order has been closed;
 - An applicant is hired for a job other than the job to which he was referred; or
 - A job order needs to be rewritten due to an end-of-program-year data processing issue.
- c. A filled-when-written job order (FWW) does not require a job description. In place of the job description, the order should state that it is filled-when-written and indicate the reason why (ex: FWW – casual labor).

12. Casual Labor Orders

- a. A casual labor job order is one having a job opening with a duration of 1-3 days. The principle of universal access to services applies to employers listing casual labor jobs although the level of service offered can be determined by local workforce center policy. Some of the service options that may be considered are posting the order without entering it into the computer database, referring the employer to a partner agency that is better able to handle casual labor orders, or listing the order in the computer database and conducting a regular file search.

- b. Workforce centers should be careful to verify Workers' Compensation coverage on casual labor openings for other than domestic workers. Workforce centers can verify coverage by calling the CDLE Workers' Compensation Customer Service Unit at 303-318-8700.

13. Orders That Are Substandard for the Local Labor Market

- a. A job order should be considered substandard when an employer is offering wages, hours, or working conditions that are below the standard in a labor market for a particular type of work.
- b. Workforce centers should be aware of local labor market information such as average wage by occupation in order to establish local standards and policies regarding what job orders are to be considered substandard.
- c. Should a job order be considered substandard, the workforce center should provide the employer with appropriate labor market information and offer him the opportunity to modify his job order. If the employer agrees to an appropriate modification, the order should be accepted. If not, the workforce center should accept and post the order, but is not required to enter the order into the computer database.

14. Orders From Employers Refusing to Provide Salary Information

- a. Employers frequently refuse to provide salary information. As a result the pay field on their job order is defaulted to \$5.15/hr, which is misleading and discourages many applicants from applying for the opening.
- b. Workforce centers may not refuse a job order or limit service to an employer solely on the basis that salary information has not been provided. Workforce centers are encouraged to work with the employer to obtain a salary range, at a minimum, and the actual salary if possible.

B. REFUSING, DISCONTINUING, OR LIMITING SERVICES TO AN EMPLOYER

1. Workforce centers may refuse or discontinue services to an employer if the employer or his job orders meet any of the conditions for refusal specified in part IV.A of this program guidance letter (PGL), or if the employer refuses to cooperate with the workforce center's requests for job order verification. Workforce centers should set a local standard for terminating or refusing services based on lack of cooperation from the employer, and are encouraged to notify partner agencies and the statewide network of workforce centers when this happens.

2. Workforce centers **must** refuse or discontinue services to an employer when CDLE's Monitor Advocate has determined through the Employment Service Complaint System that an employer has violated the terms or conditions of a job order or provisions of employment related law. CDLE will notify the workforce centers when such decisions have been made. (See PGL 99-10-P5 for guidelines on the Employment Service Complaint System.)

3. Workforce centers should set a local standard for limiting services to an employer. These standards should include the circumstances under which the employer's openings will be posted in notebooks or on bulletin boards rather than entered into the computer database, and should define when multiple openings from an employer will be listed on a single job order. Workforce centers are encouraged to coordinate standards for limiting services to an employer with workforce centers sharing the same labor market area.

C. QUALITY STANDARDS FOR JOB ORDERS

1. On an annual basis beginning July 1, 2001, CDLE's Program Support Representatives will review a sample of job orders as part of their annual compliance monitoring of workforce centers. Each job order selected will be expected to meet the following minimum standards:

- It is legal and allowable under the law, regulations or policies governing the Wagner-Peyser program;
- It has complete and accurate data including location of the employer, how to contact the employer, O-Net code, hours, and duration of the job.
- It contains sufficient information for job matching including job title, required skills, secondary skills, pay information, and a description of duties.
- It is "Internet Ready" (i.e. the most important elements of the job description can be viewed and understood by the job seeker and no extraneous or confidential information is going out over the Internet);
- It contains documentation of the veterans file search required on all job orders except filled-when-written orders and multi-opening job orders. (The file search should include at a minimum the date of the file search; the local office and agent ID of the person doing the file search; the number of veterans selected; and the number of veterans contacted.);
- It contains documentation of regular follow-up contacts with the employer including referral verification contacts. (The timing of follow-up contacts should be determined by local workforce region policy and the needs of individual employers.); and
- It contains timely results of referrals. (Local workforce centers should determine a maximum length of time for verifying results of referrals with employers, before utilizing wage data records.)

2. Workforce centers are responsible for setting local standards for the quality of job orders and assuring that these standards are met. The State's minimum standards should be incorporated in the local standards. In addition, the workforce centers should determine procedures for internal monitoring of job order quality.

D. LOCAL JOB ORDER AND EMPLOYER SERVICES POLICIES

1. Workforce centers are responsible for developing written policies and procedures for accepting or refusing job orders, discontinuing or refusing services to employers, limiting services provided to employers, and assuring quality control of job orders.

2. These policies and procedures must incorporate the general guidance of this PGL and provide additional detail as needed or desired to assist staff in properly implementing the employer services elements of the Wagner-Peyser program.

3. CDLE's Program Support Representatives will request a copy of these policies and procedures as a part of their annual compliance monitoring of the workforce centers. This monitoring will occur after July 1, 2001. Workforce centers are encouraged to request technical assistance as needed from their Program Support Representative prior to that time.

V. IMPLEMENTATION DATE:

Upon receipt of this program guidance letter.

VI. INQUIRIES:

Please direct all inquiries to your Program Support Representative at Employment and Training Programs.

Robert D. Hale, Director
Division of Employment & Training