



Category/Subject: Guidelines Regarding Job Orders and Business Services
Colorado Policy Guidance Letter#: WP-2012-01 (prior #12-11-WP)
Revise/Replace PGL#: 01-04-WP1
Date: December 5, 2012
Distribution: CDLE Management/Finance, State/Local Workforce Directors & Staff, Partners

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. Training and Employment Guidance Letter 31-11.

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. 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 02-05-L, Universal Access), 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 entered into Colorado’s job bank, Connecting Colorado, through an employer’s direct entry or web order, third party direct entry, or workforce staff direct entry.

This program guidance letter further defines a sub-category of job orders from state approved outside entities that are not directly entered and are transferred through automated processes, for example: Job Central job orders. This sub-category should meet minimum requirements as identified in section III B. 4 (page14). This should provide guidance about 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 agency recruiting for an employer, wishes to place a job order that would charge the applicant a fee for placement, the workforce center cannot take the order. The employer or agency must 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 can 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 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 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.
- 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 will be refused. **Examples** are commission-only sales, real estate agents, cab drivers, limousine drivers, insurance agents and newspaper delivery persons.
- e. When an employer does not provide Workers' Compensation, even though there is an employer-employee relationship, workforce centers are encouraged to refuse these job orders. Workforce Centers and staff who knowingly refer clients to jobs without workers compensation insurance could be liable in a civil suit if the worker is injured on the job and they obtained the job from a workforce center referral. Workers' Compensation verification can be obtained directly from the employer or at <http://www.coworkforce.com/dwc/faqs/employerfaqs.asp> by clicking on the Employers' Insurance Coverage Verification tab.

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. 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:
 - i. 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
 - ii. 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.
 - iii. Job orders that are received to build a list of applicants for future openings are not bona fide orders and should be refused.
- b. When a questionable situation arises, the workforce center must attempt to verify the legitimacy of the employer by asking the employer for an FEIN number. If the workforce center cannot verify that the opening of employer is bona fide, the job order must be refused.

4. Orders Pre-designating 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 must 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 pre-designation 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 pre-designation 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 can 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, disability, 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 government entity.
- c. The Rehabilitation Act of 1973 prohibits employers meeting certain standards from discriminating against qualified disabled applicants.
- d. The Civil Rights Act of 1964 and 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.
 - i. Training and Employment Guidance Letter No. 31-11 accessible at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9230 further details information about exclusion based on criminal records.
 - ii. Business Services Representatives will provide guidance and the appropriate notices to any hiring authority posting a job on Connecting Colorado. Notices may be provided electronically via email, sent through U.S. mail, or by guiding the employer to the appropriate URL provided in the next three sub sections.
 - Notice #1 (see attachment 1 or navigate to http://wdr.doleta.gov/directives/attach/TEGL/TEGL_31_11_att1.pdf) is provided at time of post and details compliance with federal civil rights laws and likely disparate impact of criminal records exclusion and provides information about obligations under the Fair Credit Reporting Act, which requires permission before asking for a background or criminal history report;
 - Notice #2 (see attachment 2 or navigate to http://wdr.doleta.gov/directives/attach/TEGL/TEGL_31_11_att2.pdf) will be provided to employers who exclude individuals based on arrest/conviction history and provides an employer an opportunity to remove or edit the post;
 - Notice #3 (see attachment 3 or navigate to http://wdr.doleta.gov/directives/attach/TEGL/TEGL_31_11_att3.pdf) is provided to job seekers who receive referrals with criminal records exclusions. This notice refers to jobs containing language excluding candidates based on criminal history detailing adverse impact on protected groups as set forth in the EEOC

guidance. The notice further informs job seekers and individuals with criminal history records are not prohibited from applying for posted positions.

iii. Screening and referral based on criminal record restrictions

- Workforce staff will refrain from screening and refusing to make referrals based on criminal history records and will provide notice #3 and job announcement when job seeker is referred to a job posting that takes criminal records into account.

- e. Religious Organization Exception: Under Title VII, religious organizations are permitted to give employment preference to members of their own religion. The exception applies only to those institutions whose “purpose and character are primarily religious.” Factors to consider that would indicate whether an entity is religious include: whether its articles of incorporation state a religious purpose; whether its day-to-day operations are religious (e.g., are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion?); whether it is not-for-profit; and whether it affiliated with, or supported by, a church or other religious organization.

This exception is not limited to religious activities of the organization. However, it only allows religious organizations to prefer to employ individuals who share their religion. The exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races. Additional guidance can be found at the following link:

http://eeoc.gov/policy/docs/qanda_religion.html

- f. An exception to the nondiscrimination laws is a situation involving a **Bona Fide Occupational Qualification** (BFOQ). Wagner-Peyser regulations defines 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. In the event a job order identifying a BFOQ is taken the rationale will be noted in the job order as a precaution. Examples of BFOQ’s would be a request for an actress to portray a female role in a play or movie, or 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 BFOQ’s may be written and serviced.

- g. Should an employer wish to list an opening containing discriminatory specifications and a BFOQ does not exist, the workforce center will attempt to persuade the employer to eliminate those discriminatory specifications. If the employer is willing to change the requirements, the order can be accepted. Otherwise, the order must be refused.

6. Affirmative Action Orders

- a. An affirmative action job order is one that seeks qualified applicants, particular 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:
 - i. 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
 - i. 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
 - ii. A court order resulting from a decision in which there was a finding of employment discrimination; or
 - iii. A conciliation agreement as authorized by Title VII of Civil Rights Act; or
 - iv. Provisions of Federal, State, or local fair employment practice law; or
 - v. An affirmative action plan adopted pursuant to the Equal Employment Opportunity Commission's guidelines on Affirmative Action (29 CFR part 1608).
- b. Workforce centers will 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 06-03-V (Veterans' File Search Activity) and PGL 10-05-V (Implementing Priority of Service for Veterans). 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 will 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 will 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.

- i. Marijuana possession or use violates federal law, and federal funds cannot be used to support violations of federal law. Therefore, the State of Colorado cannot use WIA, Wagner-Peyser or any other funds they receive from CDLE to post job orders or in any other way help employers to fill positions that promote or support the use, possession or distribution of marijuana.
- b. Workforce centers will 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 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 Workforce Development Programs is legally responsible for official notification to workforce centers regarding labor disputes resulting in work stoppage, 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 the State Monitor Advocate, Olga Ruiz, at CDLE's Workforce Development Programs (olga.ruiz@co.state.co.us or 303-318-8802) with information on any such disputes. This will help facilitate timely notification to all the regions should work stoppage occur.

9. Orders Specifying Membership or Non-membership in Labor Organizations

- a. Orders specifying 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 is not 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, Labor Union, or Third Party Post

- a. In general, job orders received from a temporary agency, labor unions, or third party vendors will 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 will also make certain that a job order from a temporary agency, labor union or third party vendor does not duplicate an order listed by an employer that the union or agency may be representing. To accomplish this, workforce centers will obtain the name of the employer being represented whenever possible and compare any listing from that employer with those received from the representative. Duplicates will be eliminated. The determination of which duplicate orders should be kept or deleted is the responsibility of the local workforce center.
- c. When an order is refused or closed the workforce center will document the rationale on the note screen.
- d. In the event a temporary agency, labor union, or third party vendor is unable to provide quality job posts following the guidelines outlined in this PGL the State Business Services Coordinator (SBSC) will be alerted. While regions do have the ability to close an account from temporary agencies, labor unions, and third party posters, workforce regions will provide

documentation describing all efforts to mitigate violations. Because temporary agencies, labor unions, and third party posters may represent multiple employers needing to meet federal job post requirements, enforced by the Office of Federal Contract Compliance Programs (OFCCP), it is imperative to provide guidance to these entities. Furthermore, because multiple companies can be impacted by the closure of these accounts and not all workforce regions may experience concerns, the SBSC will work with the entity to develop a process improvement plan. During the development of this plan the SBSC may enforce a 90 day resolution period. During this 90 day period jobs will not be taken by these agencies. When the agency is able to address any and all issues that led to the account being closed and addresses all areas of concern the account will be reactivated. During the 90 day resolution period Workforce centers will work directly with the employer to post jobs and verify if the employer's job is being posted through Job Central (for more guidance on Job Central Jobs see section C. subsection 4.).

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

- a. A filled-when-written (FWW) 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:
 - i. The opening is the result of job development for an individual applicant and the applicant is referred and hired before the order is written; or
 - ii. A hire is a result of a job fair or other mass hiring activity; or
 - iii. A hire results from a work experience, an on-the-job (OJT) training contract, or other subsidized employment opportunity; or
 - iv. The job order specifies that applicants must belong to a targeted group such as welfare recipients, dislocated workers, etc.; or
 - v. The opening is a 1-3 day casual labor position; or
 - vi. An applicant is hired for a job other than the job to which he was referred; or
 - vii. 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 will state that it is filled-when-written and indicate the reason why (ex: FWW-job fair placement)

12. Orders that Are Substandard for the Local Labor Market

- a. A job order is considered substandard when an employer is offering wages, hours, or working conditions that are below the standard in a local labor market for a particular type of work.

- b. Should a job order be considered substandard, the workforce center will provide the employer with appropriate labor market information and offer the employer opportunity to modify the job order. If the employer agrees to an appropriate modification, the order will be accepted. If not, the workforce center can accept and post the order, but is not required to enter the order into Connecting Colorado. Jobs that are not modified to meet local labor market standards can be placed into a job order book or be posted on a bulletin board.

13. Orders From Employers Refusing to Provide Salary Information

- a. Employers frequently refuse to provide salary information. When this happens, the pay field on their job order is defaulted to the current minimum wage, \$7.64/hr as of January 2012 for hourly workers and \$4.62 for tipped employees, which is misleading and discourages many applicants from applying for openings.
- b. Workforce centers will not refuse a job order or limit services to an employer solely on this 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. At a minimum workforce staff will attempt verify an employer meets current minimum wage requirements if the employer does not chose to disclose salary.

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 III.A of this program guidance letter (PGL), or if the employer refuses to cooperate with the workforce center's request 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 should notify partner agencies and CDLE's Workforce Development Programs Business Development Coordinator, currently Chris Carman at (303) 318-8825 or chris.carman@state.co.us when this happens, as well as document the rationale for the refusal, discontinuation, or limited service on the note screen in Connecting Colorado, when applicable.
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 center when such decisions have been made. (See PGL 02-33-P for ES Complaint System Reporting Requirements)
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 opening will be posted in note books 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 November 1, 2012, CDLE's Program Monitors 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:
 - a. It is legal and allowable under the law, regulations or policies governing the Wagner-Peyser programs;
 - b. It has complete and accurate data including location of the employer, how to contact the employer, O-Net code, hours of position, and duration of the job;
 - c. It is "On-line ready" (i.e. the most important elements of job description can be viewed and understood by the job seeker and no extraneous or confidential information is going out over the Internet) In the event a job order is placed by an employer, DO NOT modify the post unless there is something discriminatory in nature, and please confirm any changes with the employer;
 - d. It contains documentation that the "first auto file search" was completed. This initial auto file search should be reflected in the "first AFS" line of the job order display. This will ensure that the veterans' file search requirement on all job orders, except filled-when-written orders and multi-opening job orders, has been met.
 - e. It contains documentation of regular follow-up contacts with the employer. (The timing of follow-up contacts will be determined by local workforce regions job order policies or as identified by the employer.)
 - f. Web order follow-ups are encouraged, but at the discretion of the local region, guided by local policies as applicable;
 - g. Service notes are encouraged particularly if an employer's account is limited or closed. It is strongly encouraged that all closed accounts show a good faith effort to resolve concerns and explain the rationale for closing the employers account (i.e. discriminatory in nature or duplicate job order etc.).
 - h. Employer accounts and job orders should have the status updated to "Active" or "Inactive" within one business day unless otherwise documented (i.e. unable to reach etc.)
2. Workforce centers are responsible for setting local standards for quality of job orders and assuring that these standards are met. The State's minimum standards will be incorporated in the local standards. In addition, the workforce centers will determine procedures for internal monitoring of job order quality.
3. Web employers must be contacted prior to approval of the job orders in Connecting Colorado whenever possible. Staff must speak directly with the person listed as the contact person and verify that the employer meets all the requirements outlined in this PGL. If possible, the phone number listed on the employer record with an alternate source will be verified and documented within the record. If the employer is deemed in violation of any of the approved guidelines, the

record must be inactivated and a note will be entered explaining the rationale for closure (ex. Job Order number XXXXXX is being closed due to not Bona Fide, no employer employee relationship exists, etc.). If the employer is deemed to be legitimate, the record should be activated within 24 hours and a note will identify the date and person activating the record.

4. Jobs that automatically transfer to Connecting Colorado from state approved outside entities (for example: Job Central) will adhere to the minimum job post requirements. Workforce centers should have policy and procedure guidelines to determine how an employer becomes “Trusted.” A “Trusted” employer is one that has been determined to meet all the guidelines of an approved job order and be deemed to not need verification. Local policy will additionally outline processes “to un-trust” an employer in the event job orders become compromised. This policy will be reviewed in the event a “trusted” employer’s job is pulled for a monitoring sample and is determined to be in violation of the guidance within this PGL. The minimum job requirements are:
 - a. Job orders that do not guarantee minimum wage will not be posted when minimum wage is available. If a wage is not identified in the job order, it is encouraged that workforce centers attempt to verify the wage. If verification of minimum wage is not attainable, the job may still be posted.
 - b. Job orders that that identify a fee for placement will not be posted.
 - c. Job orders that do not identify an employer-employee relationship will not be posted.
 - d. Jobs that are not bona fide will not be posted.
 - e. Jobs that pre-designate applicants with the exception of a job requiring a BFOQ will not be posted.
 - f. Jobs that are discriminatory or are in violation of the law will not be posted.
 - g. Jobs that are attached to a labor dispute will not be posted.
 - h. Jobs that identify a requirement to be a member of or a non-member of a labor union will not be posted.

D. LOCAL JOB ORDER AND BUSINESS SERVICES POLICIES

1. Workforce centers will develop 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, including internal monitoring and setting guidelines for “trusting” an employer.
2. Written local policies must, at a minimum directly, reflect the requirements of this PGL, or they may be stricter than this PGL, if local circumstances warrant additional requirements. In addition, local policies will also contain additional procedural detail to assist staff with implementation.
3. CDLE’s Program Monitors will request a copy of local policies and procedures as a part of their annual compliance monitoring of the workforce centers. This monitoring will occur after July 1, 2012. In addition, Workforce centers are encouraged to request technical assistance as needed from their Program Monitors and ask for their review of any new or revised policies before local management and board signatures are obtained.

V. IMPLEMENTATION DATE:

Effective immediately.

VI. INQUIRIES:

Please direct all inquiries to your Regional Liaison at Workforce Development Programs.

Elise Lowe-Vaughn, Director
Workforce Programs, Policy, and Strategic Initiatives

ATTACHMENTS:

1. Notice #1 for Employers Regarding Nondiscrimination and Criminal Records Exclusions
2. Notice #2 for Employers Regarding Criminal Records Exclusions
3. Notice #3 for Job Seekers obtaining Job Postings with Criminal Records Exclusions