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ADVISORY: **TRAINING AND EMPLOYMENT GUIDANCE LETTER NO.** 26-09

TO: STATE WORKFORCE AGENCIES
STATE WORKFORCE ADMINISTRATORS
STATE WORKFORCE LIAISONS
STATE AND LOCAL WORKFORCE BOARD CHAIRS AND DIRECTORS
STATE LABOR COMMISSIONERS

FROM: JANE OATES
Assistant Secretary

SUBJECT: Workforce Investment Act (WIA) Waiver Policy and Waiver Decisions for PY 2009 and 2010.

1. **Purpose.**
   - To explain current waiver policy and clarify conditions that ETA placed on certain waivers.
   - To provide guidance on the elements of a waiver request and the submission and approval process.
   - To provide information on waiver accountability, including monitoring.

2. **References.**
   - The Workforce Investment Act of 1998; WIA Section 189(i)(4);
   - WIA Section 192;
   - WIA regulations at 20 CFR 661.420-430;
   - Training and Employment Guidance Letter (TEGL) No. 14-08, "Guidance for Implementation of the Workforce Investment Act and Wagner-Peyser Act Funding in the American Recovery and Reinvestment Act of 2009 and State Planning Requirements for Program Year 2009";
   - TEGL No. 21-09, "Instructions for Submitting Workforce Investment Act and Wagner-Peyser Act State Plans and Waiver Requests for Program Year 2010";
   - TEGL No. 17-09, "Quarterly Submission of Workforce Investment Act Standardized Record Data (WIASRD)";
   - TEGL No. 14-00, Change 3, "Workforce Investment Act (WIA) Annual Report Narrative";
   - Training and Employment Notice (TEN) No. 24-09, "Joint Letter from the Employment and Training Administration (ETA) and the U.S. Department of Health and Human Services Administration for Children and Families (ACF) regarding youth subsidized

employment opportunities under the Temporary Assistance for Needy Families (TANF) Emergency Contingency Fund"; and

- WIA Strategic State Plan Guidance and Instructions (OMB No. 1205-0398).

3. **Background.** In its guidance TEGL No.14-08, *Guidance for Implementation of the Workforce Investment Act and Wagner-Peyser Act Funding in the American Recovery and Reinvestment Act of 2009 and State Planning Requirements for Program Year 2009,* the Employment and Training Administration (ETA) required states to submit modified State Plans for Title I of WIA and the Wagner-Peyser Act to address how states planned to utilize funding under the American Recovery and Reinvestment Act (Recovery Act) to meet the increased demand for workforce development services in Program Year (PY) 2009. The TEGL also required states to submit full waiver requests for both regular formula and Recovery Act funds for any waivers sought for PY 2009. ETA received over 450 waiver requests as part of this requirement. ETA carefully reviewed all waivers to assess whether the waivers supported the strategic goals of the requesting state, whether states had in place policies to support the waivers' implementation, the degree to which waivers supported the state's economic recovery, and whether programmatic outcomes were achieved as a result of the waiver. This policy review resulted in changes to ETA's position on granting certain waivers, adjustments to the approval conditions of other waivers, and no changes for other waivers. The results of these decisions are provided in Section 6 of this TEGL.

   TEGL No. 21-09 provides states the opportunity to extend their waivers and WIA/Wagner-Peyser Act State Plans for an additional year. This TEGL provides guidance and suggestions on submitting waiver requests throughout PY 2010, and describes the steps ETA is taking to ensure that states' waiver implementation is within the bounds of the waiver approval letters and within WIA statute and regulations.

4. **Waiver Authority**. Section 189(i)(4) of WIA authorizes the Secretary to waive certain statutory and regulatory provisions of the WIA and of the Wagner-Peyser Act (W-P). This general statutory and regulatory waiver authority provides increased flexibility to states and local areas, and it provides an opportunity for states and local areas to organize services in ways that best meet the needs of the state, regional, and local economies and overcome legal or regulatory barriers that may impede innovation. Waivers provide flexibility in exchange for improved programmatic outcomes and must be consistent with WIA's key reform principles.

   Please note that WIA prohibits waivers for certain WIA and Wagner-Peyser Act provisions including wage and labor standards, allocation of funds to local areas, eligibility of participants and providers, the establishment and functions of local areas and local workforce investment boards, and procedures for review and approval of plans, as described at WIA Section 189(i)(4)(A).

   WIA Section 192 provides the Department of Labor the authority to approve Work-Flex plans. With an approved Work-Flex plan, Governors are granted the authority to approve requests for waivers of certain statutory and regulatory provisions of the WIA and the Wagner-Peyser Act submitted by their local areas and certain provisions of the Older Americans Act applicable to state agencies that administer the Senior Community Service Employment Program (SCSEP). The Secretary may grant Work-Flex authority for a period of not more than five years. Waiver authority under Work-Flex is subject to the same

prohibitions as those identified in the previous paragraph, except for provider eligibility. Waiving provider eligibility is allowed under Work-Flex.

5. **Waiver Policy Emphases.** Waiver approval decisions made in PY 2009 place significant focus on the economic climate and its impact on workers, and focus on utilizing the resources available to the workforce investment system to maximize training and employment outcomes of the workforce, particularly the unemployed. Waiver policy during the nation's challenging economic climate maintains flexibility while providing greater attention to ensuring that WIA services are directed to appropriate populations. Furthermore, waiver policy requires a judicious use of waivers; state requests and utilization of waivers must be directly linked to the state's workforce strategy, and the waivers should be one of a number of tactics to facilitate the state's implementation of its strategy. ETA will only grant waivers where the state demonstrates a connection to a given workforce strategy.

   ETA waiver approval decisions emphasize the following tenets: 1) The workforce system should prioritize serving the unemployed and populations targeted by WIA; 2) State and local area interests should be balanced; 3) Youth funds must be preserved for youth and reach the hardest-to-serve; and 4) States and local areas must be accountable for employment-related outcomes, and long-standing performance reporting mechanisms should be maintained. These tenets are more fully described below.

   A. ***The workforce system should prioritize serving the unemployed and populations targeted by WIA***. Many of the waiver requests for PY 2009 sought to expand the permissible uses of WIA formula and Recovery Act formula funds. Waiver policy prior to PY 2009 provided wide latitude to permit local areas to use local Adult, Dislocated Worker, and Youth funding streams to conduct allowable statewide activities, including incumbent worker training (IWT), and also permitted states to use Rapid Response funds for such activities. Current waiver policy for these funds still provides some flexibility, but it is more limited in order to preserve their use for the populations targeted by WIA, who are currently seeking traditional workforce services in record numbers. Serving unemployed workers and other low-skilled, low-income populations must be the workforce system's focus, and resources should not be diverted to other uses at the expense of those most in need. At the same time, some flexibility in the use of the formula and Rapid Response funds is warranted, when the funds can be used to avert worker dislocations. IWT is an effective approach for providing workers with needed skills to be more effective in the workplace and to improve employers' ability to adapt to economic changes and changing skill needs in the marketplace. As such, ETA will approve waivers to allow local areas to use a certain portion of local Adult and Dislocated Worker funds to conduct IWT as part of a layoff aversion strategy, and also permit states to use Rapid Response funds for such activities. See Attachment A for the specific policy decision.

   ETA will approve waivers that effectively focus resources at proven training and employment strategies for unemployed and underserved populations. For instance, to expand the use of on-the-job training (OJT) and increase participation of small businesses, ETA approved a waiver of the 50 percent limit on reimbursement to employers for OJT to permit local areas to use a sliding scale to increase the reimbursement based on the size of the business. In its PY 2009 approval of this waiver, ETA expanded the sliding scale to include businesses with up to 250 employees.

B. ***State and local area interests should be balanced.*** A key principle of WIA is a strong role for local workforce investment boards and local business leadership, and WIA regulations require that waivers be approved consistent with this key principle (20 CFR 661.400(b)(5)). In implementing this principle, decision-making devolves to local workforce investment areas and local areas have the authority to implement strategies and expend resources that respond to the needs of their workforce and business customers. At the same time, both states and local areas are provided flexibility to implement innovative systems with significant authority reserved for the Governor and chief elected officials. Maintaining a balance between state and local area interests is crucial to an effectively functioning workforce system. The complementary roles should not be disrupted in a way that may result in an inequitable distribution of resources across areas or that truncate the decision-making authority of either the state or local areas.

For all waiver requests, ETA will consider how the waiver may affect the balance of statutorily-prescribed roles within a state. Waivers that disrupt this balance will not be approved. For example, prior to PY 2009 ETA approved a waiver that permitted states to recapture unobligated and unexpended funds from local areas earlier and more often than the statute allowed, and to redistribute the funds as the state deemed appropriate. This waiver was not approved for any state in PY 2009 in order to preserve local area authority to allocate resources and to give local areas sufficient time to expend their funds.

C. ***Youth funds must be preserved for youth and reach the hardest-to-serve.*** Youth are among the most vulnerable populations during the nation's economic downturn, with an employment rate of just 51.4 percent as of July 2009, according to the Bureau of Labor Statistics (BLS). This is the lowest July rate ever recorded for youth since data tracking began in 1948. Due to the employment challenges facing youth, waivers approved for PY 2009 focus on improving and expanding service delivery to youth to provide them with improved access to training and other services that connect them to work and educational experiences that lead to promising career paths. As an example, ETA is offering flexibility to facilitate the workforce system working with the TANF system on summer youth employment activities in order to facilitate serving the hardest-to-serve youth (see Section 8B for further details). Conversely, ETA did not, and will not, approve waivers that diminish the ability of the system to deliver vital services to youth in need or that divert resources away from youth. Requests to forgo certain required youth program elements or that seek to use Youth formula funds for populations other than youth are contrary to ETA's focus in this area.

D. ***States and local areas must be accountable, and long-standing performance reporting mechanisms should be maintained.*** For waivers related to performance accountability, waiver decisions for PY 2009 and going forward seek to maintain long-standing waivers regarding operational and management processes that, if denied, would disrupt the continued effective functioning of the system in a time of exceptionally high demand for workforce services. This includes a waiver to permit implementation of, and reporting only for, the common performance measures in place of the statutory WIA measures. Under this waiver, states are expected to report on certificates and credentials attained, as well as conduct customer satisfaction surveys. ETA does not, however, support waivers that would exempt states and local areas from accountability. Accountability is a key WIA principle and, therefore, will not be waived. Evaluating the outcomes of Federal investments is important for ensuring wise use of funds and assessing the effectiveness of WIA/W-P programs. As

such, waivers that seek to exempt certain populations from performance measures or exempt local areas from data collection and reporting will not be approved. States that serve larger numbers of certain populations that they believe might negatively impact their performance may seek to renegotiate performance targets with ETA based on such impacts.

6. **Waiver Decisions for PY 2009.** Attachment A summarizes PY 2009 waiver requests and the corresponding current policy decisions. ETA will consider all complete waiver requests, as described in Section 8, and expects states to provide supporting justifications. States may also request waivers that are not listed in Attachment A.

7. **Clarifications for Certain Waiver Conditions**. Many waivers for PY 2009 were approved with conditions which were conveyed in each state's waiver disposition letter. ETA has received questions about certain conditions of the waivers. Clarifications are provided below. These conditions will also apply to PY 2010 waivers.

   A. ***Use of Local Funds for Incumbent Worker Training***
   This waiver allows the use of a portion of local WIA funds to permit local areas to conduct allowable statewide activities as defined under WIA section 134(a)(3), specifically IWT. Under the waiver and depending on what the state requested and was approved to do, states may permit their local areas to use up to 20 percent of Dislocated Worker funds, or up to 10 percent of Adult funds, or up to 10 percent of Adult and 10 percent of Dislocated Worker funds, to train incumbent workers as part of a documented layoff aversion strategy. Use of Adult WIA funds for this purpose must be restricted to serving low-income adults. All training delivered under this waiver is restricted to skill attainment activities. Local areas must continue to conduct the required local employment and training activities identified at WIA section 134(d), and states are required to report performance information for any individual served under this waiver in the Workforce Investment Act Standardized Record Data (WIASRD) submission and include these individuals in program performance outcomes.

   i.) Layoff Aversion Strategy: States must ensure that local areas implementing this waiver use IWT to avert layoffs. State policies related to this waiver should include a description of how the potential for layoff aversion will be determined, such as:
   - the likelihood of future layoffs without the training;
   - the business circumstances surrounding the probable layoff, and how the training will prevent the layoff or reduce the magnitude of a large layoff; and/or
   - the specific skills to be provided to the workers that will help avert the layoff.

   States must also establish, or require local areas to establish, criteria for determining the appropriate provision of IWT under the waiver, such as:
   - how employers will be identified, i.e. knowledge gained by contact with the local workforce investment boards (WIBs) or One Stop Business Services representatives, Chambers of Commerce or Economic Development Councils, local media, or another indicator of a company that is at risk of layoff, particularly due to lack of a company's ability to compete because of its employee skill-base;
   - any targeted industries and economic sectors; and/or
   - other criteria the state will establish to guide local areas in the use of IWT, and in its own monitoring of the use of IWT.

ii.) Eligibility: Under 20 CFR 665.220, states may establish policies and definitions to determine which workers, or groups of workers, are eligible for incumbent worker services for purposes of statewide activities. The regulations further define an incumbent worker as "an individual who is employed, but...does not necessarily have to meet the eligibility requirements for intensive and training services for employed adults and dislocated workers at 20 CFR 663.220(b) and 663.310." Since this waiver permits local areas to use local funds for the statewide activity of IWT, the state should establish definitions and policies to determine eligibility of incumbent workers served under this waiver, or require that local areas establish their own eligibility definitions and policies prior to providing IWT.

For states approved to use Adult funds to conduct IWT, ETA's waiver approval letter restricted the funds' use to low-income adults. For the purpose of determining eligibility for IWT participants under this waiver, states are not required to follow the statutory definition of low-income described at WIA Section 101. States may choose to establish, or require the local area to establish, a definition of low-income using the self-sufficiency criteria referenced at 20 CFR 663.230. While the regulations state that such criteria "must provide that self-sufficiency means employment that pays at least the lower living standard income level (LLSIL)", this is the minimum. For purposes of providing IWT using Adult funds, states may choose to set self-sufficiency at a higher level, as determined by local costs of living. Several states and local areas have developed "self-sufficiency calculators" based on factors such as the number and age of household members and local living costs for housing, childcare, food, transportation, and health care. Any definition of low-income for the purposes of using Adult funds for IWT can include some or all of these factors. When a state or local area is providing IWT under the waiver to a group of workers at a single employer, eligibility for IWT does not need to be documented at the individual level, as allowed by 20 CFR 665.220 when states use statewide discretionary funds to deliver IWT. State policy can establish eligibility criteria for individuals or groups of workers using self-sufficiency criteria as defined by the state or local area. Group level determinations may only apply to a single company and should ensure that pre-training wages of trainee groups are less than the self-sufficiency level. States and local areas are responsible for ensuring that Adult funds are used for their intended purpose; IWT delivered under this waiver with Adult funds must be targeted at serving lower-income individuals.

iii.) Skill Attainment: All IWT delivered under this waiver is restricted to skill attainment activities. The training must result in development of skills that directly benefit the workers receiving the training by making them more qualified in their field of employment, and/or provide new skills for new product lines or processes. Therefore, when providing IWT, states and local areas must consider how, besides averting layoff, the skills attained contribute either to the maintenance of employment or increase in employment security for workers. States and local areas should consider whether: 1) the skills attained through the training could help to qualify participants for a job with changing skill requirements or for higher paying jobs with their existing employer or other companies in the area; 2) the skills attained enable participants to perform work that is at a higher level than their current positions; and 3) the training leads to certifications or other industry-recognized credentials, or provides a significant step towards achieving such credentials that increase the workers' overall employability. State or local policies should ensure that IWT directly benefits workers beyond layoff aversion.

iv.) Performance Reporting: In its waiver approval letters, ETA required states to report performance outcomes for any individual served under this waiver in the WIASRD. The previous WIASRD data elements and layout made reporting such data ambiguous when IWT is delivered with waivered funds. Therefore, ETA has recently revised the WIASRD layout, and states should follow the following procedures, as indicated in TEGL No. 17-09, *"Quarterly Submission of Workforce Investment Act Standardized Record Data (WIASRD)":* **In field 309, *Incumbent Worker*, Record 2 if the participant received services financially assisted primarily by local formula funds, via waiver.** States should report according to these specifications as soon as possible, but no later than the first quarter of PY 2010, under an approved waiver for PY 2010. States are required, in the *WIA Annual Report*, to describe how they collected and reported WIASRD elements for any individual served under this waiver during PY 2009. To the extent possible, states must also describe outcomes for individuals served under this waiver during PY 2009 in the *WIA Annual Report.*

B. ***Use of Rapid Response Funds for Incumbent Worker Training***

This waiver allows states to use of a portion of funds reserved for Rapid Response to conduct allowable statewide activities as defined under WIA section 134(a)(3), specifically IWT. Under this waiver, a state is permitted to use up to 20 percent of rapid response funds for IWT only as part of a layoff aversion strategy. All training delivered under this waiver is restricted to skill attainment activities. The state is required to report performance outcomes in the WIASRD for any incumbent workers served under this waiver.

i.) Layoff Aversion Strategy: States must ensure that this waiver uses IWT to prevent layoffs. State policies related to this waiver should include a description of how the potential for layoff aversion will be determined, such as:

- the likelihood of future layoffs without the training;
- the business circumstances surrounding the probable layoff, and how the training will prevent it; and/or
- the specific skills to be provided to the workers that will help prevent the layoff or reduce the magnitude of a large layoff.

States must also establish criteria for determining the provision of IWT under the waiver, such as:

- how employers will be identified, i.e. knowledge gained by contact with State and Local WIBs, Chambers of Commerce or Economic Development Councils, media, or another indicator of a company that is at risk of layoff, particularly due to lack of a company's ability to compete because of its employee skill-base; and/or
- any targeted industries and economic sectors.

ii.) Eligibility: Under 20 CFR 665.220, states may establish policies and definitions to determine which workers, or groups of workers, are eligible for incumbent worker services for purposes of statewide activities. It further defines an incumbent worker as "an individual who is employed, but...does not necessarily have to meet the eligibility requirements for intensive and training services for employed adults and dislocated workers at 20 CFR 663.220(b) and 663.310." Since this waiver permits use of Rapid

Response funds for the defined statewide activity of IWT, the state should establish definitions and policies to determine eligibility of incumbent workers served under this waiver.

iii.) Skill Attainment: All IWT delivered under this waiver is restricted to skill attainment activities. The training must result in skills that directly benefit the workers receiving the training by making them more qualified in their field of employment and/or provide new skills for new product lines or processes. Therefore, when providing IWT, states and local areas must consider how, besides averting layoff, the skills attained contribute either to the maintenance of employment or increase in employment security for workers. States should consider whether the skills attained through the training could help to qualify participants for a job with changing skill requirements or for higher paying jobs with their existing employer or other companies in the area; whether the skills attained enable participants to perform work that is at a higher level than their current positions; and whether it offers certification or other industry-recognized credential or provides a significant step towards achieving such credentials that increases the workers' overall employability. State policies should describe how it will ensure that IWT will directly benefit workers beyond layoff aversion.

iv.) Performance Reporting: States are required to report performance outcomes for any individual served under this waiver in the WIASRD. The previous WIASRD data elements and layout made reporting such data ambiguous when IWT is delivered with waivered funds. Therefore, ETA has recently revised the WIASRD layout, and states should follow the following procedures, as indicated in TEGL No. 17-09: **In field 309, *Incumbent Worker,* Record 3 if the participant received services financially assisted primarily by Rapid Response funds, via waiver**. States should report according to these specifications as soon as possible, but no later than the first quarter of PY 2010, under an approved waiver for PY 2010. States are required, in the *WIA Annual Report*, to describe how they collected and reported WIASRD elements for any individual served under this waiver during PY 2009. To the extent possible, states must also describe outcomes for individuals served under this waiver during PY 2009 in the *WIA Annual Report.*

C. *Adult -Dislocated Worker funds transfer*

This waiver of WIA Section 133(b)(4) permits local areas to increase the allowable transfer amount between Adult and Dislocated Worker funding streams allocated to a local area. Under the waiver, transfer authority is limited to 50 percent. The current waiver authority applies to funding for all program years, and transfers may not exceed the 50 percent limit, except for funds transferred under an approved waiver permitting a higher limit if the transfer occurred during the effective period of the prior waiver authority. As stated in TEGL No. 14-08, Section 19, this waiver does not apply to funds made available through the Recovery Act. However, the State is permitted to transfer up to 30 percent of ARRA funds between the Adult and Dislocated Worker programs as discussed in TEGL No. 14-08, change 1.

D. *Contracted Class-size Training*

This waiver of WIA section 134(d)(4)(G) allows local areas within a state to contract for class-size training with WIA funds instead of using Individual Training Accounts (ITAs). This waiver only applies to funding for program years prior to and including PY 2009. Recovery Act provisions do allow states to use Recovery Act funds for class-size contracts,

as discussed in TEGL 14-08, Section 6. In addition, the Fiscal Year (FY) 2010 Appropriations Act allows FY 2010 funds to be used to provide training through class-size contracts. The FY 2010 Appropriations Act states "a local board may award a contract to an institution of higher education or other eligible training provider if the local board determines that it would facilitate the training of multiple individuals in high-demand occupations, if such contract does not limit customer choice." Funds for FY 2010 will first become available to states when ETA allots FY 2010 funds for PY 2010, in approximately April 2010. Therefore, a waiver to conduct class-size training is only required if using PY 2009 or prior year funding; Recovery Act funds and PY 2010 funds allow for class-size training without a waiver.

8. **Summer Youth Employment Activities Waivers.** ETA issued a number of waivers for PY09 in support of summer youth employment activities funded by Recovery Act funds. ETA is aware that many states intend to mount summer youth employment activities during the summer months of 2010. This section seeks to clarify the use of waivers for such activities. ETA will issue separate guidance if a supplemental appropriation for summer youth employment activities is enacted.

   A. *Options for funding Summer Youth Employment Activities and Determining the Need for a Waiver.* States are using a variety of funding sources to mount PY 2010 summer youth employment activities. The summary below provides clarifications of the various flexibilities available by funding source.

   i.) *Summer youth employment activities funded solely with Recovery Act Temporary Assistance to Needy Families (TANF) Emergency Contingency Funds.* Some states are providing subsidized employment to youth with funds available under the TANF Emergency Contingency fund in summer 2010, as encouraged by ETA and the Department of Health and Human Services (HHS) (see Training and Employment Notice No. 24-09). The use of TANF funds must be consistent with the TANF statute and regulations, as well as state rules and regulations. When a state or local area is not using WIA funds, WIA statue and regulations do not apply. WIA statute and waiver authority does not apply to TANF funds.

   ii.) *Summer youth employment activities funded solely with WIA Recovery Act Youth funds.* The flexibility and requirements described in TEGL No. 14-08, Section 16 apply, without the need for a performance or program design flexibility waiver in the summer. Part B of this Section addresses these funds.

   iii.) *Summer youth employment activities funded with TANF Emergency Contingency Funds and WIA Recovery Act Youth funds.* States providing subsidized employment opportunities for youth with TANF Emergency Contingency funds and Recovery Act funds will not likely need waivers. WIA statute and waiver authority does not apply to TANF funds. For youth served with WIA Recovery Act funds, the flexibility and requirements described in TEGL No. 14-08, Section 16 apply, without the need for a performance or program design flexibility waiver in the summer. Part B of this Section addresses these funds.

iv.) *Summer youth employment activities funded with TANF Emergency Contingency Funds and regular WIA youth formula funds.* States may request the two waivers described in part C of this Section as needed.

v.) *Summer youth employment activities funded with TANF Emergency Contingency Funds, Recovery Act WIA youth funds, and regular WIA youth formula funds.* States must carefully track which participants are served with which funds and utilize only the flexibilities that are available for that funding source, as described in the above items.

B. *Recovery Act Summer Youth Employment Program Waivers*

In TEGL No. 14-08 Section 19.A, ETA discussed three waivers to support the implementation of summer youth employment activities with Recovery Act funds. It is unlikely any of these waivers will be approved for Recovery Act funds for the summer of 2010. First, in 2009, ETA approved waivers to expand existing competitively procured contracts or to conduct a limited expedited competition for the purpose of quickly implementing summer youth employment activities for the summer of 2009. ETA will not approve this waiver for Recovery Act funds for summer 2010, since states have had adequate time to plan for and competitively procure summer youth employment activities for summer 2010 with Recovery Act funds. ETA will issue separate guidance if a supplemental appropriation for summer youth employment activities is enacted.

Second, ETA approved waivers of the youth performance measures for older out-of-school youth when those youth were provided work experience only with Recovery Act funds beyond the summer months. This waiver expired March 31, 2010. A waiver is not necessary to only use the work readiness performance indicator in the summer months of 2010; this flexibility was already provided for the entire summer period under TEGL No. 14-08 Section 16. ETA anticipates that those states that intend to use any remaining Recovery Act Youth funds to implement summer youth employment activities in 2010 will fully expend those funds within the summer months, and will not have Recovery Act funds to conduct work experience for older out-of-school youth beyond the end of summer (September 30, 2010). Therefore, ETA does not anticipate that states will request to waive youth performance measures beyond the summer months.

Third, ETA approved waivers to apply the aspects of program design flexibility described in Section 16.A of TEGL No. 14-08 to older out of school youth who participated in work experience beyond the summer months. Like the youth performance measure waiver, this waiver expired March 31, 2010. A waiver is not necessary to provide program design flexibility in the summer months of 2010; this flexibility was already provided for the entire summer period under TEGL No. 14-08 Section 16. Because it is very unlikely states will have Recovery Act funds to conduct work experience activities beyond the summer months, ETA does not anticipate that states will request waivers to apply program design flexibility beyond the summer.

In the rare circumstance that a state does have sufficient Recovery Act funds to conduct work experience beyond summer 2010, the state may submit a waiver request for either the youth performance measures or program design flexibility for older out-of-school youth engaged in work experience beyond the summer months. The waiver request must

include the required elements for waivers listed in the WIA regulations at 20 CFR 661.420(c), including a justification for the waiver, an estimate of the state's unexpended Recovery Act funds, an explanation of why the funds are unexpended, and a description of how the state will address continued service plans for participants served under the waiver, such as transition to the WIA Adult program or further education and training services.

C. *Using WIA Formula Funds and TANF Funds for Summer Youth Employment Activities*

Some states are providing subsidized employment to youth with funds available under the Recovery Act's TANF Emergency Contingency fund in summer 2010, as encouraged by ETA and HHS (see Training and Employment Notice No. 24-09). ETA and HHS encouraged the public workforce system to partner with TANF agencies in their efforts to promote subsidized employment opportunities for the creation and expansion of subsidized summer employment for low-income youth allowable under ARRA TANF Emergency Contingency funding. The notice also encouraged co-enrollment of youth in TANF and appropriate WIA programs so individuals can benefit from WIA services such as supportive services, occupational skills training, and other relevant services.

The use of TANF funds must be consistent with the TANF statute and regulations, as well as state rules and regulations. WIA waiver authority does not apply to TANF funds. However, ETA is aware that some states are co-enrolling youth in TANF and the WIA formula youth program, as ETA encouraged. The large-scale use of such a strategy may dramatically increase the number of youth enrolled in the WIA youth program. Therefore, ETA is willing to consider state requests for the following two types of waivers where TANF and WIA youth co-enrollment occurs for summer youth employment activities which would be effective from May 1, 2010 through September 30, 2010:

1) flexibility to use the work readiness indicator as the only performance measure for such co-enrolled youth, and
2) ability to apply the program design flexibility for summer youth articulated in TEGL 14-08 Section 16.A for such co-enrolled youth, specifically to provide follow-up services as deemed appropriate for such youth participants and to provide an assessment and Individual Service Strategy (ISS) as deemed appropriate for such youth.

When submitting a waiver plan to request these waivers, states must address the requirements described in the WIA regulations at 20 CFR 661.420(c) and provide a justification for the waiver. In addition, requests should include the following information:

- An estimate of the *number* of youth that will be co-enrolled in the WIA youth program and in TANF summer youth employment activities during PY 2010;
- An estimate of the *percent* of PY 2010 WIA youth program enrollees that will be co-enrolled TANF summer youth employment participants only, and not participate in the WIA youth program beyond summer;
- Description of how the state plans to use WIA Youth funds to support co-enrolled summer youth participants;

- A description of continued service plans for co-enrolled participants served under the waiver, such as transition to the WIA Adult program or further education and training under WIA funded youth services.

9. **Waiver and Work-Flex Request Elements and Process**. ETA's waiver authority provides states with flexibility to design and implement workforce strategies that meet unique state needs. When requesting and implementing a waiver, the state must clearly identify how the waiver helps it achieve the overarching workforce strategies discussed in its Strategic State Plan. States should also consider how multiple waivers may be used together for maximum effect. In formulating a waiver package, ETA encourages states to consult Federal Project Officers (FPO) within each ETA Regional Office. Regional Offices are available to:

   - give guidance on current flexibility available under the law and regulations;
   - help identify useful and complementary waivers; and
   - provide technical assistance in drafting waiver requests.

   Generally, ETA intends to approve waivers in alignment with the decisions provided in *Waiver Policy Emphases,* Section 5 of this TEGL. However, ETA will consider all requests, and the unique circumstances in a particular state may result in the approval of a waiver request that ETA has disapproved in another state. Similarly, states may resubmit formerly denied waiver requests if circumstances within the state have changed significantly since the last submission. In addition, ETA encourages states to identify innovative practices and service delivery strategies, and to request waivers that may be new to the workforce system as necessary to implement that innovation. States may also request that certain waivers be applied to National Emergency Grant (NEG) funds, either in its application for an NEG or during the effective period of an approved NEG.

   A. *Elements of a Waiver Request.* In accordance with WIA Section 189(i)(4)(B), all waiver requests must include certain required elements. In addition, in its review of certain requests, ETA may need additional information on a case-by-case basis in order to inform its decision-making. Below are the statutorily required elements for all requests as well as a brief description.

   i.) *Identify the statutory or regulatory requirements that are requested to be waived and the goals that the State or local area in the State, as appropriate, intends to achieve as a result of the waiver.* In practice this means the State should indicate which area of WIA or the regulations it would like to have waived.

   ii.) *Describe the actions that the State or local area, as appropriate, has undertaken to remove State or local statutory or regulatory barriers.*

   iii.) *Describe the goals of the waiver and the expected programmatic outcomes if the request is granted.* The state should specify how the waiver will help it achieve an identified strategic goal or set of goals that it has outlined in its State Plan. If possible and appropriate to the type of waiver requested, the state should provide quantifiable projections for programmatic outcomes that will result from the waiver.

iv.) *Describe the individuals impacted by the waiver.* The state should describe which populations will benefit from the waiver or otherwise be affected by it. Beneficiaries may include workforce systems and processes as well as workers and employers.

v.) *Describe the process used to monitor the progress in implementing such a waiver, and the process by which notice and an opportunity to comment on such request has been provided to the local board.* The state should describe policies it has established or will establish to support waiver implementation; it should identify steps for implementing the waiver; and it should discuss how it will monitor implementation including programmatic review, financial oversight, and accountability. In addition, the state should provide a description of its proactive solicitation of public comments. At minimum, the state should post the proposed waiver request to the state's official website for comment or in a newspaper of general circulation. Ideally, states will develop a targeted outreach strategy to collect input and comment from all affected stakeholders. The state should submit any comments or concerns collected in this manner along with the waiver request. The state should also address how local boards affected by the waiver were notified of the request.

B. Elements of a Work-Flex Request. States requesting designation as a Work-Flex State must submit a Work-Flex plan, in accordance with WIA Section 192, which includes descriptions of:

i.) The process by which local areas in the state may submit and obtain approval by the state of applications for waivers of requirements applicable under Title I of WIA, including provisions for public review and comment on local area waiver applications.

ii.) The statutory and regulatory requirements of Title I that are likely to be waived by the state under the plan.

iii.) The requirements applicable under Sections 8-10 of the Wagner-Peyser Act that are proposed to be waived, if any.

iv.) The statutory and regulatory requirements of the Older Americans Act of 1965 applicable to state agencies on aging with respect to administration of the Senior Community Service Employment Program (SCSEP) that are proposed to be waived, if any.

v.) The outcomes to be achieved by the waiver authority including, where appropriate, revisions to adjusted levels of performance included in the State or Local Plan under Title I of WIA.

vi.) Special measures (in addition to current procedures) to be taken to ensure appropriate accountability for Federal funds in connection with the waivers.

vii.) Prior to submitting a Work-Flex plan, the state must provide all interested parties and the general public adequate notice and a reasonable opportunity for comment on the waivers proposed to be implemented. The plan should describe the process used for ensuring meaningful public comment, including a description of the Governor's and the state Workforce Investment Board's involvement in drafting, reviewing and commenting

on the plan. The Work-Flex request should describe actions taken to collaborate in the development of the State Work-Flex plan with local elected officials, local workforce investment boards and youth councils, the business community (including small businesses), labor organizations, educators, vocational rehabilitation agencies, and other interested parties, such as service providers, welfare agencies, community-based organizations, transportations providers, and other stakeholders.

C. ***Process for Submitting Extension of Waiver Requests or New Waiver Requests.*** To **extend** currently approved waivers for PY 2010, states do not need to submit anything to ETA. ETA will grant an extension of an additional year for existing waivers that have been approved, except in the following circumstances: 1) ETA has advised the state in prior correspondence that it did not anticipate approving an extension beyond June 30, 2010; or 2) ETA advises the state that there are significant performance issues related to the use of the waiver or that the waiver as implemented is not in compliance with the terms prescribed in the approval letter. States may submit a request for a new waiver at any time during the program year. As described in TEGL 21-09, ETA advised states that wished to submit **new** waiver requests that they want to be in effect for all of PY 2010 should do so by May 14, 2010. Please see TEGL No. 21-09 for further details on the waiver request process for PY 2010.

For requests submitted at any other time of year, the request process is similar to that outlined in TEGL No. 21-09. States can email their request to WIA.PLAN@dol.gov, with a copy to the appropriate Regional Administrator. States can also submit a hard copy waiver request with an original signature to Janet Sten, the Federal Coordinator for Plan Review and Approval, and one copy to the appropriate ETA Regional Administrator. The address for the Federal Coordinator is as follows:

Division of Workforce System Support
Employment and Training Administration
U.S. Department of Labor
200 Constitution Ave., NW, Room S-4231
Washington, DC 20210
ATTN: Janet Sten

10. **Waiver Monitoring and Accountability.** ETA intends to enhance its oversight and monitoring of waivers to determine what impact waivers have on performance outcomes, gain insight into how states are using waivers, and to ensure that the integrity of the waiver guidelines as stated in the waiver decision letters is maintained. At the national level, oversight activities will include an analysis of performance data, review of information provided by states in the *WIA Annual Report*, and an evaluation of waiver impacts. In accordance with requirements established in TEGL 14-00, Change 3, each state should be tracking waiver implementation, and describe how waivers are being used and their effect on performance as part of the *WIA Annual Report*. As part of the ongoing monitoring efforts performed by regional offices, ETA will regularly review state waiver implementation. In its waiver monitoring efforts, ETA seeks to:

- ensure that the state has implemented waivers in accordance with the parameters established in the waiver request and the applicable ETA approval letter;

- make certain that appropriate safeguards and controls have been implemented to maintain the integrity of the funds in accordance with limitations imposed in the waiver decision letter;
- examine how waivers changed the activities of state and local areas;
- evaluate how waivers in practice are supporting the overall strategic framework and outcomes established by states; and
- provide any technical assistance as needed and as appropriate.

11. **Useful Resources.** Information about waivers is available at http://www.doleta.gov/waivers. A summary report of all PY 2009 approved waivers and states for which they are approved is available at http://www.doleta.gov/waivers/pdf/WIA_summary_waiver_report_12210.pdf.

12. **Inquiries.** States should address their inquiries to their ETA Regional Office.

13. **Attachment.** Attachment A: Waiver Decisions for PY 2009

Attachment A: Waiver Decisions for PY 2009

Waiver Name	Waiver Description	PY09 Policy Decision
Funds Flexibility		
Adult-Dislocated Worker Transfer	Waiver of WIA Section 133(b)(4) to increase the funds transfer limit between the Adult and Dislocated Worker programs	ETA approved this waiver, but with more limited parameters. The transfer authority may now be increased to 50%.
Customized Training-Employer Contribution	Waiver of WIA Section 101(8)(C) of the requirement for a 50% employer contribution for customized training to permit local areas to use a sliding scale to reduce the contribution based on the size of the business	ETA approved this waiver.
On-the-Job Training-Employer Reimbursement	Waiver of WIA Section 101(31)(B) of the 50% limit on reimbursement to employers for OJT to permit local areas to use a sliding scale to increase the reimbursement based on the size of the business	ETA approved this waiver.
Local Funds for Incumbent Worker Training as a Statewide Activity	Waiver of WIA Section 134(a) to permit local areas to use a portion of local Adult, Dislocated Worker, and Youth funds for statewide activities, specifically IWT	ETA approved this waiver, but with more limited parameters. ▪ Local Adult and Dislocated Worker funds may only be used for IWT as part of layoff aversion and are limited to: o 20% of local Dislocated Worker funds for IWT OR o 10% of Dislocated Worker funds and 10% or Adult funds for IWT OR o 10% of Adult funds for IWT ▪ Youth funds may not be used for IWT. ▪ Local funds may not be used for any other statewide activities.
Rapid Response Funds for Incumbent Worker Training and Other Statewide Activities	Waiver of WIA Section 134(a)(1)(A) to permit states to use a portion of rapid response funds for IWT and other statewide activities	ETA approved this waiver, but with more limited parameters. ▪ Waiver granted for purpose of using 20% of rapid response funds for IWT as part of lay-off aversion only. ▪ ETA will still consider waiver requests to use rapid response funds for other statewide activities for the purpose of innovative training and service delivery approaches that enhance services to dislocated workers.

Waiver Name	Waiver Description	PY09 Policy Decision
Recapture and Reallocation	Waiver of WIA Sections 128(c)(2) and 133(c)(2), and 20 CFR 667.160, to permit states to recapture local funds midway through the year, recapture of unexpended funds instead of unobligated funds, and reallocation based on local area expenditure rates. If requested, the waiver allowed for reallocation based on a variety of factors.	ETA did not grant this waiver for any state in PY 2009.
Performance		
Alternative Seasonal Performance Measure	Waiver of WIA section 136(b)(2)(A)(i)(II) and 20 CFR 666.140 to permit an alternate measure of employment retention for areas of the state where the majority of employment is seasonal	ETA approved this waiver on a case by case basis in PY 2009.
Common Measures	Waiver of WIA Section 136(b) to permit implementation of, and reporting only for, the common measures in lieu of the current WIA statutory measures	ETA approved this waiver.
Incentive Grants to Local Areas	Waiver of WIA Section 134(a)(2)(B)(iii) and 20 CFR 665.200(e) to exempt the state from providing local incentive grants	ETA approved this waiver on a case by case basis in PY 2009.
Reports as a Statewide Region	Waiver of WIA Section 136(c) and 136(d) to permit the state to report only statewide data	ETA did not grant this waiver for any state in PY 2009.
WIASRD Elements for Incumbent Worker Training	Waiver of regulations at 20 CFR 666 and 667.300(a) to allow states to discontinue collection of 7 WIASRD data elements for incumbent workers	ETA approved this waiver.
Local Performance Exemption for Entrepreneurship Training	Waiver of regulations at 20 CFR 666.300 to exclude entrepreneurship training from local performance measures	ETA did not grant this waiver for any state in PY 2009.
OJT Credential Performance	Waiver of regulations at 20 CFR 666.100 to exempt state from including credential attainment outcomes for participants enrolled in OJT in the credential performance measure calculations. All participants served and outcomes should be reported in the WIASRD.	ETA approved this waiver.
Performance Sanctions Applied to a Consortium	Waiver of WIA Section 136(h) and 20 CFR 666.420 to permit sanctions for poor performance to be applied to a consortium of multiple local areas, rather than to the individual local areas	ETA approved this waiver.
Performance Negotiations as a Consortium	Waiver of regulations at 20 CFR 666.300 and 666.310 to permit a consortium of multiple local areas to negotiate performance goals with the State as one entity	ETA approved this waiver.
Youth		
Youth Individual Training Accounts	Waiver of regulations at 20 CFR 664.510 of the prohibition on the use of ITAs for youth	ETA approved this waiver.

Waiver Name	Waiver Description	PY09 Policy Decision
Competitive Procurement for Youth Program Elements	Waiver of WIA Section 123 of the requirement for competitive procurement of service providers for some or all youth program elements	ETA approved this waiver, but with more limited parameters. ▪ ETA will allow One-Stop Operators to directly provide the following 3 elements: supportive services, follow-up, and work experience. ETA did not grant this waiver for other elements except in very limited circumstances in PY 2009.
Alternative School for Out-of-School Youth	Waiver of WIA Section 129(c)(4)(A) to allow certain alternative school enrollees to count toward the 30% out-of-school youth expenditure requirement	ETA considered this waiver on a case by case basis, but did not approve for any state in PY 2009.
Youth Program Elements	Waiver of WIA Section 129(c)(2) to allow local areas to choose which of the 10 youth program elements to make available to youth participants	ETA did not grant this waiver for any state in PY 2009.
Youth Follow-up Services	Waiver of regulations at 20 CFR 664.450(b) of the requirement that all youth participants receive follow-up services for a minimum duration of 12 months	ETA did not grant this waiver for any state in PY 2009.
Youth Eligibility	Waiver of WIA Section 101(13) to grant eligibility to children of parents who are WIA Adult participants	ETA will not grant this waiver as it lies outside the waiver authority.
Governance		
State Board Acting as Local Board	Waiver of regulations at 20 CFR 661.300(f) to allow the State Board to carry out the roles and responsibilities of the Local Board	ETA approved this waiver on a case-by-case basis in PY 2009.
State WIB Membership Requirements	Waiver of WIA Section 111(b) to streamline the membership of the State Workforce Board	ETA approved this waiver on a case-by-case basis in PY 2009.
Other		
ETPL Initial Eligibility	Waiver of regulations at 20 CFR 663.530 of the time limit on the period of initial eligibility for training providers	ETA approved this waiver.
ETPL for Providers Adding Programs	Waiver of the ETPL process for eligible providers adding programs	ETA will not grant this waiver as it lies outside the waiver authority.
Public Service Employment	Waiver of WIA Section 195(10) and 20 CFR 667.264(a)(2) of the prohibition on the use of funds for public service employment	ETA did not grant this waiver for any state in PY 2009.
Contracting for Training Outside of ITA's	Waiver of WIA Section 134(d)(4)(G) to allow local areas to contract for training outside the ITA process	ETA approved one state for this waiver for FY 09 funds on a case-by-case basis. The FY 2010 DOL Appropriations Act allows local areas to contract with providers for class-size training in high-demand occupations, if it does not limit customer choice. A waiver is therefore not necessary for FY 2010 WIA funds.

Waiver Name	Waiver Description	PY09 Policy Decision
One-Stop Intake	Waiver of regulations at 20 CFR 662.240(b)(10) to allow WIA and W-P funded staff to perform intake for other programs	ETA approved this waiver on a case-by-case basis in PY 2009.
Work-Flex	Waiver at WIA Section 192 to provide State authority to waive certain elements of WIA for local areas, based on submitted plan	ETA approved this waiver on a case-by-case basis in PY 2009.
Business Capitalization	Waiver of WIA Section 181(e) to permit the use of a limited amount of WIA funds to capitalize a small business in concert with entrepreneurial or small business training	ETA did not grant this waiver for any state in PY 2009.
Needs Related Payments for Dislocated Workers	Waiver of regulations at 20 CFR 663.820 of the requirement that dislocated workers must be enrolled in training by end of 13th week after lay-off to receive needs-related payments	ETA will not grant this waiver as it lies outside the waiver authority.
Sequence of Service	Waiver to streamline sequence of service	Waiver not needed; refer to TEGL 14-08, section 13.